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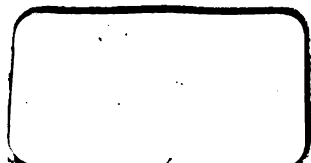
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HISTORY AND DIGEST

OF THE

INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY,

TOGETHER WITH

APPENDICES CONTAINING THE TREATIES RELATING TO SUCH
ARBITRATIONS, AND HISTORICAL AND LEGAL NOTES ON
OTHER INTERNATIONAL ARBITRATIONS ANCIENT AND
MODERN, AND ON THE DOMESTIC COMMISSIONS
OF THE UNITED STATES FOR THE ADJUST-
MENT OF INTERNATIONAL CLAIMS.

BY

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CHAPTER LI.

PROCEDURE.

1. RULES OF COMMISSIONS.

The journals of the mixed commissions under **Early Commissions.** Articles VI. and VII. of the Jay Treaty contain various orders adopted from time to time for the disposition of business, and we have seen in the history of the commission under Article VII. the text of a comprehensive notice in regard to evidence; but the records do not disclose any system of rules adopted at the outset by either of those bodies for the regulation of procedure. Elaborate regulations were, however, adopted by the commissions appointed by the United States to distribute the indemnities under the treaties of 1803 and 1831 with France, and 1819 with Spain. The mixed commission under the convention between the United States and Great Britain of June 30, 1822, to ascertain the indemnity due for the carrying away of slaves, enacted orders from time to time, but no system of rules. The mixed commission under the convention between the United States and Mexico of 1839 was able to agree upon only a few regulations of minor importance.

The foundation of the more elaborate regulations adopted by some of the later mixed **Commission under the act of March 3, 1849.** commissions was laid by the board appointed under the act of Congress of March 3, 1849, to distribute the indemnity which the United States had by the treaty of Guadalupe Hidalgo promised to pay to those of its citizens who held claims against Mexico. By the minutes of this board it appears that on Wednesday, April 18, 1849, Mr. Evans submitted a series of rules and orders for the consideration of his colleagues. The rules followed those of the boards under the treaties of 1803, 1819, and 1831, but the orders were adapted to the special conditions under which the new board

sat. The rules and orders were adopted on Saturday, April 21, 1849, and Mr. Evans then submitted certain rules in relation to the manner and form in which testimony should be received. These rules were adopted on the following Monday. By these successive acts the board established comprehensive and systematic regulations, which were as follows:

"Rules and Orders of the Commissioners appointed under the act of 3 March 1849, entitled 'An Act to carry into effect certain stipulations of the treaty between the United States of America and the Republic of Mexico, of the 2nd of February 1848.

"Ordered, That all persons having claims upon the Republic of Mexico, which are provided for by the treaty between the United States and the said Republic, concluded on the second day of February 1848, except the claims named in the fifth article of the unratified convention between the two Governments of November 20, 1843, to wit: 'All claims of citizens of the United States against the Government of the Mexican Republic, which were considered by the Commissioners and referred to the Umpire appointed under the Convention of 11th April 1839, and which were not decided by him'—do file memorials of the same with the Secretary of this Board.

"Every memorial so filed must be addressed to the Commissioners, and must set forth minutely and particularly the facts and circumstances whence the right to prefer such claim is derived to the claimant, and it must be verified by his oath or affirmation.

"And in order that the claimants may be apprized of what is considered necessary to be averred in every such memorial, before the same will be received and acted on, it is further—

"Ordered, That in every such memorial it shall be set forth:

"1. For and in behalf of whom the claim is preferred.

"2. Whether the claimant is now a citizen of the United States, and if so, whether he is a native or naturalized citizen, and where is now his domicile; and if he claims in his own right, then whether he was a citizen when the claim had its origin, and where was then his domicile; and if he claims in the right of another, then whether such other was a citizen when the claim had its origin, and where was then and where is now his domicile; and if, in either case, the domicile of the claimant at the time the claim had its origin was in any foreign country, then whether such claimant was then a subject of the government of such country, or had taken any oath of allegiance thereto.

"3. Whether the entire amount of the claim does now, and did at the time when it had its origin, belong solely and absolutely to the claimant; and if any other person is or has been interested therein, or in any part thereof, then who is such other person, and what is or was the nature and extent of his interest; and how, when, and by what means and for what considerations the transfer of rights or interests, if any such was made, took place between the parties.

"4. Whether the claimant, or any other who may at any time have been entitled to the amount claimed, or any part thereof, hath ever received

any, and if any what amount of money, or other equivalent or indemnification, for the whole or any part of the loss or injury upon which the claim is founded, and if so, when and from whom the same was received.

"5. Whether the claim was presented to the Commissioners appointed by the Governments of the United States and Mexico under the Convention of 11th of April 1839; and if so, how the same was disposed of by said Commissioners; and if said claim had its origin prior to said 11th of April 1839, and was not so presented, then what were the reasons or causes why the same was not so presented.

"And that time may be allowed to the claimants to prepare and file the memorials above mentioned,

"*Resolved*, That this Board will be in session on the first Monday of November next, and will then proceed to decide whether the memorials which shall then have been filed with the Secretary are in conformity with the foregoing orders, and proper to be received for examination.

"And in respect to the claims excepted in the first of the foregoing rules and orders, it is

"*Resolved*, That, in the opinion of this Board, the claims of American citizens referred to in the 5th article of the unratified convention between the Governments of the United States and Mexico, of 20th November 1843, which article is made a part of the 15th article of the treaty of 2d February 1848, to wit, the claims 'which were considered by the Commissioners and referred to the Umpire, under the Convention of 11th April 1839, and which were not decided by him,' may now be presented to this Board for final decision, upon the memorials, proofs, and documents submitted to said Joint Commissioners, and by said Commissioners to the Umpire, and upon such new arguments as may be filed with the Secretary, in writing, addressed to the Commissioners.

"And that the claimants may be apprized of what is necessary in order to bring the same before this Board, for its consideration and decision, it is—

"*Ordered*, That all persons having claims of this description do file a memorial with the Secretary of this Board, addressed to the Commissioners, briefly describing the claim, and the right of the claimant to receive indemnity for the injury complained of. In all cases where the original memorial addressed to the Commissioners, under the Convention of 1839, does not aver the claimant, and any other person under whom the claim is derived, to be, and at the time when the claim had its origin to have been, a citizen of the United States, then the said memorial shall conform to the requirements of the second of the articles of the foregoing rules relating to that subject, and shall be verified by oath or affirmation.

"*Ordered*, That when the Board shall close its present session, it will adjourn to meet in this city on the first Monday in June next, and will then proceed to consider the claims referred to in the fifth article of said unratified convention of 2d November 1843, which may have been presented in conformity to the foregoing order, and all such cases are hereby set down for hearing at that time; and if any claimant desire a longer time in which to file a memorial or present arguments, he must file a written motion to that effect, setting forth reasons for the same on or before said day.

“Ordered, That all motions and arguments addressed to the Board be made in writing and filed with the Secretary, who shall note thereon the time when they are received; but brief verbal explanations may be made by the claimants or their agents immediately after the opening of each day’s session.

“Ordered, That the following Rules and Orders, relating to Testimony and Proofs to be advanced in support of claims which may be presented for adjudication, be and the same are hereby established.

“1. All testimony must be in writing, and upon oath or affirmation, duly administered according to the laws of the place where the same is taken, by a magistrate competent by such laws to take depositions, having no interest in the claim to which the testimony relates, and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant or deponent, if known to such magistrate, or other person authorized to take such testimony, must be certified by him, and if not known, must be certified on the same paper upon oath by some other person known to such magistrate having no interest in such claim, and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition must be reduced to writing by the person taking the same, or by some person in his presence having no interest, and not being the agent or attorney of any person having an interest in the claim, and must be carefully read to the deponent by the magistrate before being signed by him, and this must be certified.

“2. Depositions taken in any city, port, or place without the limits of the United States, may be taken before any consul or other public civil officer of the United States resident in such city, port, or place, having no interest, and not being agent or attorney of any person having an interest in the claim to which the testimony so taken relates. In all other cases, whether in the United States or any foreign place, the right of the person taking the same to administer oaths by the laws of the place must be proved.

“3. Every affiant or deponent must be required to state in his deposition his age, place of birth, residence, and occupation, and where was his residence and what was his occupation at the time the events took place in regard to which he deposes; and must also state if he have any, and if any, what interest in the claim to support which his testimony is taken; and if he have any contingent interest in the same, to what extent, and upon the happening of what event he will be entitled to receive any part of the sum which may be awarded by the Commissioners. He must also be required to state whether he be the agent or attorney of the claimant, or of any person having an interest in the claim.

“4. Original papers exhibited in proof must be verified as originals by the oath of a witness, whose credibility must be certified as required in the first of these rules; but when the fact is within the exclusive knowledge of the claimant, it may be verified by his own oath or affirmation. Papers in the handwriting of any person who has deceased, or whose residence is unknown to the claimant, may be verified by proof of such handwriting, and of the death of the party, or his removal to places unknown.

“5. All testimony taken in any foreign language, and all papers and documents in any foreign language which may be exhibited in proof, must be accompanied by a translation of the same into the English language.

"6. When the claim arises from the seizure or loss of any ship or vessel, or the cargo of any ship or vessel, a certified copy of the enrollment or registry of such ship or vessel must be produced, together with the original clearance, manifests, and all other papers and documents required by the laws of the United States, which she possessed on her last voyage from the United States, when the same are in the possession of the claimant, or can be obtained by him; and when not, certified copies of the same must be produced, together with his oath or affirmation that the originals are not in his possession, and cannot be obtained by him.

"7. In all cases where property of any description for the seizure or loss of which a claim has been presented was, at the time of such seizure or loss, insured, the original policy of insurance, or a certified copy thereof, must be produced.

"8. If the claimant be a naturalized citizen of the United States, a copy of the record of his naturalization, duly certified, must be produced.

"And to the end that the attention of claimants may be distinctly called to what is necessary to be done in order to obtain books, records, or documents which may be deemed necessary to the just decision of any claim presented to the Board, and which are in the possession or power of the Mexican Republic, the last clause of the fifteenth article of the said treaty of February 2, 1848, and the last clause of the third section of the said act of Congress of March 3, 1849, are herewith published."

The mixed commission which met in London
under the convention of 1853 had few rules,
and very simple ones. Its rules were adopted
October 15, 1853, and were as follows:

"1. The secretary, or clerk, shall keep a docket, and enter thereon a list of all claims as soon as they shall be filed, specifying briefly the grounds and nature of such claim.

"He shall also keep duplicate records of the proceedings had before the commissioners, and of the docket of claims filed with them, so that one copy of each shall be supplied to each government.

"2. Cases shall be considered in order for the action of the commissioners whenever they shall be presented to them for their decision, or, if parties or agents for the governments appear, whenever they shall agree that the same shall be taken up for hearing.

"3. All claims must be presented within six months from the fifteenth of September last, unless reasons be assigned for the delay satisfactory to the commissioners, and where cases, by leave of the commissioners, are presented after such time, they will be required to be in order for hearing as soon after presenting the same as may be.

"4. Cases presented within the first six months, where agents for the claimants appear, and which have not been previously disposed of, will be required to be in order for hearing and decision at any time after the said six months the commission may direct.

"5. Claims presented to the commissioners by the agents of either government will be regarded as presented by their respective governments, in accordance with the provisions of the convention."

New Granadian Commission. But when the mixed commission met in Washington under the convention between

the United States and New Granada of September 10, 1857, it adopted as the basis of its procedure the rules of the board of commissioners under the act of March 3, 1849, modifying them, where necessary, and amplifying them, as follows:

" Rules and Regulations of the Commissioners appointed under the Convention between the United States of America and the Republic of New Granada, of the 10th of September 1857.

" Ordered, That all persons having claims upon the Republic of New Granada, which are provided for by the convention between the United States and the said Republic, concluded on the 10th day of September 1857, do file memorials of the same with the Secretary of this Board, in the city of Washington.

" Every memorial so filed must be addressed to the Commissioners, and must set forth minutely and particularly the facts and circumstances whence the right to prefer such claim is derived to the claimant, and it must be verified by his oath or affirmation.

" And in order that the claimants may be apprized of what is considered necessary to be averred in every such memorial, before the same will be received and acted upon, it is further—

" Ordered, That in every such memorial shall be set forth—

" 1. The amount of the claim; the time when and place where it arose; the kind or kinds and amount of property lost or injured; the facts and circumstances attending the loss or injury, out of which the claim arises; the principles and causes which lie at the foundation of the claim.

" 2. For and in behalf of whom the claim is preferred.

" 3. Whether the claimant is now a citizen of the United States, and if so, whether he is a native or naturalized citizen, and where is now his domicile; and if he claims in his own right, then whether he was a citizen when the claim had its origin, and where was then his domicile; and if he claims in the right of another, then whether such other was a citizen when the claim had its origin, and where was then and where is now his domicile; and if, in either case, the domicile of the claimant at the time the claim had its origin was in any foreign country, then whether such claimant was then a subject of the government of such country, or had taken any oath of allegiance thereto.

" 4. Whether the entire amount of the claim does now, and did at the time when it had its origin, belong solely and absolutely to the claimant; and if any other person is or has been interested therein, or in any part thereof, then who is such other person, and what is or was the nature and extent of his interest, and how, when, and by what means and for what considerations the transfer of rights or interests, if any such was made, took place between the parties.

" 5. Whether the claimant, or any other who may at any time have been entitled to the amount claimed, or any part thereof, hath ever received any, and if any, what sum of money, or other equivalent or indemnifica-

tion, for the whole or any part of the loss or injury upon which the claim is founded, and if so, when and from whom the same was received.

"6. Whether the claim was presented prior to the 1st day of September, 1859, either to the Department of State at Washington, or to the Minister of the United States at Bogota, and with which and at what time.

"And that time may be allowed to the claimants to prepare and file the memorials above mentioned—

"*Resolved*, That this Board will be in session on the first Monday of September next, and will then proceed to decide whether the memorials which shall then have been filed with the Secretary are in conformity to the foregoing orders, and proper to be received for examination.

"*Ordered*, That when the Board shall close its present session, it will adjourn to meet in this city, on the first Monday in September next, and will then proceed to consider the claims which may have been presented in conformity to the foregoing order, and all such cases are hereby set down for hearing at that time; and if any claimant desire a longer time in which to file a memorial or present arguments, he must file a written motion to that effect, setting forth the reasons for the same on or before said day.

"*Ordered*, That all motions and arguments addressed to the Board be made in writing and filed with the Secretary, who shall note thereon the time when they are received; but brief verbal explanations may be made by the claimants or their agents immediately after the opening of each day's session, and the Commissioners may, in special cases, hear oral arguments at length, upon briefs being filed, setting forth the points of law and fact and the authorities relied upon.

"*Ordered*, That the following rules and orders, relating to Testimony and Proofs hereafter taken to be advanced in support of claims which may be presented for adjudication, be and the same are hereby established. All other proofs will be passed upon as offered:

"1. The proofs in support of the claims shall be filed with the memorials, and no proofs will be received subsequently, except such as are strictly to rebut proofs which shall have been presented on the part of New Granada.

"2. All testimony must be in writing, and upon oath or affirmation, duly administered according to the laws of the place where the same is taken, by a magistrate competent by such laws to take depositions, having no interest in the claim to which the testimony relates, and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant, or deponent, if known to such magistrate, or other person authorized to take such testimony, must be certified by him, and if not known, must be certified on the same paper upon oath, by some other person, known to such magistrate having no interest in such claim, and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition must be reduced to writing by the person taking the same, or by some person in his presence having no interest, and not being the agent or attorney of any person having an interest in the claim, and must be carefully read to the deponent by the magistrate before being signed by him, and this must be certified.

"3. Depositions taken in any city, port, or place, without the limits of the United States, may be taken before any consul or other public civil officer of the United States resident in such city, port or place, having no interest, and not being agent or attorney of any person having an interest in the claim to which the testimony so taken relates. In all other cases, whether in the United States or in any foreign place, the right of the person taking the same to administer oaths by the laws of the place must be proved.

"4. Every affiant or deponent must be required to state in his deposition his age, place of birth, residence and occupation, and where was his residence and what was his occupation at the time the events took place in regard to which he deposes; and must also state if he have any, and if any, what interest in the claim to support which his testimony is taken; and if he have any contingent interest in the same, to what extent, and upon the happening of what event he will be entitled to receive any part of the sum which may be awarded by the Commissioners. He must also be required to state whether he be the agent or attorney of the claimant, or of any person having an interest in the claim.

"5. Original papers exhibited in proof must be verified as originals by the oath of a witness, whose credibility must be certified as required in the second of these rules; but when the fact is within the exclusive knowledge of the claimant, it may be verified by his own oath or affirmation. Papers in the handwriting of any person who has deceased, or whose residence is unknown to the claimant, may be verified by proof of such handwriting, and of the death of the party, or his removal to places unknown.

"6. All testimony taken in any foreign language, and all papers and documents in any foreign language, which may be exhibited in proof, must be accompanied by a translation of the same into the English language.

"7. When the claim arises from the seizure or loss of any ship or vessel, or the cargo of any ship or vessel, a certified copy of the enrolment or register of such ship or vessel must be produced, together with the original clearance, manifests, and all other papers and documents required by the laws of the United States which she possessed on her last voyage from the United States, when the same are in the possession of the claimant, or can be obtained by him; and when not, certified copies of the same must be produced, together with his oath or affirmation that the originals are not in his possession, and can not be obtained by him.

"8. In all cases where property of any description for the seizure or loss of which a claim has been presented, was at the time of such seizure or loss insured, the original policy of insurance, or a certified copy thereof, must be produced.

"9. If the claimant be a naturalized citizen of the United States, a copy of the record of his naturalization, duly certified, must be produced.

"10. Documentary proof shall be authenticated by proper certificates or by the oath of a witness.

"11. When a claimant shall have filed his proofs in chief the proof on the part of the Government of New Granada shall be filed within the term

of ninety days. But upon good cause shown, on either side, the period prescribed may be extended in particular cases.

"12. The name of the counsel or agent for each claimant shall, with his address, be signed to the memorial and entered upon the record, so that all necessary notices may be served upon such counsel or agent, respecting case."

The mixed commission under the convention between the United States and Costa Rica of July 2, 1860, adopted the rules of the New Granadian commission, with some modifications, as follows:

Costa Rican Commission.

"Rules and Regulations of the Commissioners appointed under the Convention between the United States of America and the Republic of Costa Rica, of the 2d July 1860.

"Ordered, That all persons having claims upon the Republic of Costa Rica, which are provided for by the convention between the United States and the said Republic, concluded on the 2d day of July 1860, do file memorials of the same with the Secretary of this Board, in the City of Washington.

"Every memorial so filed must be addressed to the Commissioners, and must set forth minutely and particularly the facts and circumstances whence the right to prefer such claim is derived to the claimant, and it must be verified by his oath or affirmation.

"And in order that the claimants may be apprized of what is considered necessary to be averred in every such memorial, before the same will be received and acted on, it is further—

"Ordered, That in every such memorial shall be set forth—

"1. The amount of the claim; the time when and place where it arose; the kind or kinds and amount of property lost or injured; the nature and extent of injury to persons, limb or life; the facts and circumstances attending the loss or injury out of which the claim arises; the principles and causes which lie at the foundation of the claim.

"2. For and in behalf of whom the claim is preferred.

"3. Whether the claimant is now a citizen of the United States, and if so, whether he is a native or naturalized citizen, and where is now his domicile; and if he claims in his own right, then whether he was a citizen when the claim had its origin, and where was then his domicile; and if he claims in the right of another, then whether such other was a citizen when the claim had its origin, and where was then and where is now his domicile; and if, in either case, the domicile of the claimant at the time the claim had its origin was in any foreign country, then whether such a claimant was then a subject of the government of such country, or had taken any oath of allegiance thereto.

"4. Whether the entire amount of the claim does now, and did at the time when it had its origin, belong solely and absolutely to the claimant; and if any other person is or has been interested therein, or in any part thereof, then who is such other person, and what is or was the nature and extent of his interest; and how, when, and by what means and for what

considerations the transfer of rights or interests, if any such was made, took place between the parties.

"5. Whether the claimant, or any other who may at any time have been entitled to the amount claimed, or any part thereof, hath ever received any, and if any, what sum of money, or other equivalent or indemnification, for the whole or any part of the loss or injury upon which the claim is founded, and if so, when and from whom the same was received.

"6. Whether the claim was presented prior to the 2d day of July 1860, either to the Department of State at Washington, or to the Diplomatic Agents of said United States at San Jose de Costa Rica, and with which and at what time.

"And that time may be allowed to the claimants to prepare and file the memorials above-mentioned,

"*Resolved*, That this Board will be in session on the 12th day of March next, and will then proceed to decide whether the memorials which shall then have been filed with the Secretary, are in conformity to the foregoing orders, and proper to be received for examination.

"*Ordered*, That when the Board shall close its present session, it will adjourn to meet in this city, on the 12th day of March next, and will then proceed to consider the claims which may have been presented in conformity to the foregoing order, and all such cases are hereby set down for hearing at that time; and if any claimant desire a longer time in which to file a memorial or present arguments, he must file a written motion to that effect, setting forth the reasons for the same on or before said day.

"*Ordered*, That all motions and arguments addressed to the Board be made in writing and filed with the Secretary, who shall note thereon the time when they are received; but brief verbal explanations may be made by the claimants or their agents immediately after the opening of each day's session, and the Commissioners may, in special cases, hear oral arguments at length, upon briefs being filed, setting forth the points of law and fact and the authorities relied on.

"*Ordered*, That the following rules and orders, relating to testimony and proofs, hereafter taken, to be advanced for or against claims which may be presented for adjudication, be, and the same are hereby established. All other proofs will be passed upon as offered:

"1. The proofs in support of the claims shall be filed with the memorials, and no proofs will be received subsequently, except such as are strictly to rebut proofs, which shall have been presented on the part of Costa Rica.

"2. All testimony must be in writing, and upon oath or affirmation, duly administered according to the laws of the place where the same is taken, by a magistrate competent by such laws to take depositions, having no interest in the claim to which the testimony relates, and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case.

"3. Depositions for claimants taken in any city, port, or place, without the limits of the United States, may be taken before any consul or other public civil officer of the United States, resident in such city, port, or place, having no interest, and not being agent or attorney of any person having an interest in the claim to which the testimony so taken relates. Depositions on the part of the Government of Costa Rica may be taken

according to the laws of the place where taken, which shall be certified and authenticated in the customary form, or they may be taken before any consul or other public civil officer of the United States, residing at the place where such depositions are taken. In all other cases, whether in the United States, or in any foreign place, the right of the person taking the same, to administer oaths by the laws of the place must be proved.

"4. Every affiant or deponent must be required to state in his deposition his age, place of birth, residence and occupation, and where was his residence and what was his occupation at the time the events took place in regard to which he deposes; and must also state if he have any, and if any, what interest in the claim to support which his testimony is taken; and if he have any contingent interest in the same, to what extent, and upon the happening of what event he will be entitled to receive any part of the sum which may be awarded by the Commissioners. He must also be required to state whether he be the agent or attorney of the claimant, or of any person having an interest in the claim.

"5. Original papers exhibited in proof must be verified as originals by the oath of a witness, whose credibility must be certified as required in the second of these rules; but when the fact is within the exclusive knowledge of the claimant, it may be verified by his own oath or affirmation. Papers in the handwriting of any person who has deceased, or whose residence is unknown to the claimant, may be verified by proof of such handwriting, and of the death of the party, or his removal to places unknown.

"6. All testimony taken in any foreign language, and all papers and documents in any foreign language, which may be exhibited in proof, must be accompanied by a translation of the same into the English language.

"7. When the claim arises from the seizure or loss of any ship or vessel, or the cargo of any ship or vessel, a certified copy of the enrollment or registry of such ship or vessel must be produced, together with the original clearance, manifests, and all other papers and documents required by the laws of the United States, which she possessed on her last voyage from the United States, when the same are in the possession of the claimant, or can be obtained by him; and when not, certified copies of the same must be produced, together with his oath or affirmation that the originals are not in his possession, and can not be obtained by him.

"8. In all cases where property of any description for the seizure or loss of which a claim has been presented, was at the time of such seizure or loss insured, the original policy of insurance, or a certified copy thereof, must be produced.

"9. If the claimant be a naturalized citizen of the United States, a copy of the record of his naturalization, duly certified, must be produced.

"10. Documentary proof shall be authenticated by proper certificates or by the oath of a witness.

"11. When a claimant shall have filed his proofs in chief, the proof on the part of the Government of Costa Rica shall be filed within the term of ninety days. But upon good cause shown, on either side, the period prescribed may be extended in particular cases.

"12. The name of the counsel or agent for each claimant shall, with his address, be signed to the memorial and entered upon the record, so that all necessary notices may be served upon such counsel or agent, respecting case.

"CHAS. W. DAVIS, *Secretary*.

"OFFICE OF JOINT COMMISSION OF THE
UNITED STATES AND COSTA RICA,
"Washington, February 8, 1862."

The mixed commission under the convention between the United States and Mexico of July 4, 1868, adopted August 10, 1869, the following rules:

Mexican Commission
of 1868.

"*Rules and Regulations of the Commissioners under the convention between the United States of America and the United States of Mexico of July 4, 1868.*

"All claims filed with the commission by the respective governments shall be entered in duplicate dockets, one kept by each of the two secretaries, in his respective language, in the order in which they are referred.

"Separate dockets shall be kept for the claims respectively of citizens of the United States, and for those of citizens of the Mexican Republic.

"Duplicate records shall be kept in like manner of all the proceedings of the commissioners.

"2. All claims provided for by the convention shall be presented through the respective governments on or before the 31st day of March 1870, unless at a later day, for special cause shown to the satisfaction of the commissioners.

"3. All persons having claims shall file memorials of the same with the respective secretaries.

"Every memorial shall be signed and verified by the claimant, or, in his absence from the District of Columbia, by his attorney in fact, such absence being averred by such attorney, and it shall be subscribed by his solicitor or counsel.

"It shall set forth particularly the origin, nature and amount of the claim, with other circumstances as follows:

"(a) The amount of the claim; the time when and place where it arose; the kind or kinds and amount of property lost or injured; the facts and circumstances attending the loss or injury out of which the claim arises; and all the facts upon which the claim is founded.

"(b) For and on behalf of whom the claim is preferred.

"(c) Whether the claimant is now a citizen of the United States or of the Mexican Republic, as the case may require; and if so, whether he is a native or a naturalized citizen, and where is now his domicile; and if he claims in his own right, then whether he was a citizen when the claim had its origin, and where was then his domicile; and if he claims in right of another, then whether such other was a citizen when the claim had its origin, and where was then, and where is now, his domicile; and if in either case the domicile of the claimant, at the time the claim had its origin, was in any foreign country, then whether such claimant was then a subject of the government of such country, or had taken any oath of allegiance thereto.

"(d) Whether the entire amount of the claim does now, and did at the time when it had its origin, belong solely and absolutely to the claimant; and if any other person is or has been interested therein, or in any part thereof, then who is such other person, and what is or was the nature and extent of his interest; and how, when, and by what means and for what considerations the transfer of rights or interests, if any such was made, took place between the parties.

"(e) Whether the claimant, or any other who may at any time have been entitled to the amount claimed, or any part thereof, had ever received any, and if any, what sum of money, or other equivalent or indemnification, for the whole or any part of the loss or injury upon which the claim is founded; and if so, when and from whom the same was received.

"(f) Whether the claim was presented prior to the 1st of February 1869 to the Department of State of either government, or to the minister of the United States at Mexico, or that of the Mexican Republic at Washington, and to which and at what time.

"4. All motions and arguments addressed to the commissioners shall be made in writing and filed with the secretaries, who shall note thereon the time when they are received.

"Brief verbal explanations may be made after the opening of each day's session, by or in behalf of the agents of the respective governments.

"5. All testimony and proofs hereafter taken, other than papers and documents, referred by either government, whether taken in support of or in opposition to pending claims, will be taken and filed subject to the following regulations:

"(a) Proofs in support of claims shall be filed with the memorial: no proofs will be received subsequently, except such as may be responsive to proofs presented on the part of either government, unless for special cause shown, and supported by affidavit or affirmation, according to the law of the respective countries.

"(b) All testimony must be in writing, and upon oath or affirmation duly administered according to the laws of the place where the same is taken, by a magistrate competent by such laws to take depositions, having no interest in the claim to which the testimony relates, and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant or deponent, if known to such magistrate or other person authorized to take such testimony, must be certified by him, and if not known, must be certified on the same paper upon oath, by some other person known to such magistrate, having no interest in such claim, and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition must be reduced to writing by the person taking the same, or by some person in his presence having no interest, and not being the agent or attorney of any person having an interest in the claim, and must be carefully read to the deponent by the magistrate before being signed by him, and must be signed by him in the presence of the officer, and this must be certified.

"(c) Depositions taken in any city, port, or place, neither within the limits of the United States nor within those of the Mexican Republic, may be taken before any diplomatic or consular officer of either government, residing in such city, port, or place, he having no interest and not

being agent or attorney of any person having an interest in the claim to which the testimony so taken relates. In all other cases, whether in the United States or in the Mexican Republic, or any other foreign place, the right of the person taking the same to administer oaths by the laws of the place must be proved.

"(d) Every affiant or deponent is required to state in his deposition his age, place of birth, residence, and occupation, and where was his residence and what was his occupation at the time the events took place, in regard to which he deposes; and must also state if he have any, and if any, what interest in the claim to support which his testimony is taken, and if he have any contingent interest in the same to what extent, and upon the happening of what event he will be entitled to receive any part of the sum which may be awarded by the commissioners. He must also be required to state whether he be the agent or attorney of the claimant, or of any person having an interest in the claim.

"(e) Original papers or other documents exhibited in proof must be certified as required in the second of these rules; but when the fact is within the exclusive knowledge of the claimant, it may be verified by his own oath or affirmation. Papers in the handwriting of any person deceased or whose residence is unknown to the claimant, may be verified by proof of such handwriting, and of the death of the party, or his removal to places unknown.

"(f) When the claim arises from seizure or loss of any vessel, or cargo of any ship or vessel, a certified copy of the enrollment or registry of such ship or vessel must be produced, together with the original clearance, manifest, and all other papers and documents required by the laws of the United States or of the Mexican Republic, as the case may be, which she possessed on her last voyage, when the same are in the possession of the claimant, or can be obtained by him; and when not, certified copies of the same must be produced, together with the oath or affirmation, according to the law of the respective countries, that the originals are not in his possession, and can not be obtained by him.

"(g) In all cases where property of any description, for the seizure or loss of which a claim has been presented, was at the time of such seizure or loss, insured, the original policy of insurance, or a certified copy thereof must be produced.

"(h) If the claimant be a naturalized citizen of the United States or of the Mexican Republic, as the case may be, a copy of the record of his naturalization, duly certified, must be produced.

"6. Of all memorials, twenty printed copies in quarto form in English, and twenty in Spanish, shall be filed with the respective secretaries.

"Citizens of the United States may file their documents and proofs in English, and citizens of the Mexican Republic may file theirs in Spanish, and in both cases in manuscript, subject to the further order of the commissioners in this respect.

"7. When a claimant shall have filed his proofs in chief, and argument in support thereof, the adverse proofs and argument on the part of the United States, or of the Mexican Republic, shall be filed within the term of four months; but upon good cause shown on either side this period may be extended in particular cases.

"Ordered, That when the commission shall close its present session, it will adjourn to meet in this city on the first Monday of December next, and will then proceed to consider whether the memorials which shall then have been filed with the secretaries are in due form and proper to be received for examination; and all such papers are hereby set down for hearing at that time; and if any claimant desire a longer time in which to file a memorial, or present arguments, he must file a written motion to that effect, setting forth the reasons for the same, on or before said day.

"By order of the commissioners:

"GEORGE G. GAITHER,

"J. CARLOS MEXIA,

"Secretaries."

It will be observed that the foregoing rules were in the main a copy of the rules adopted by the New Granadian commission, which were substantially the same as the rules of the board under the act of March 3, 1849. The latter rules were, with some modifications, published by the Department of State of the United States in 1865 for the information and guidance of citizens of the United States having claims against foreign governments. The rules adopted by the United States and Mexican commission departed, however, in two particulars from the precedents just mentioned. These departures were discussed by Mr. Ashton, counsel for the United States, in a paper submitted to that commission December 13, 1869, as follows:

"1. The first and more important change occurs in the provision touching the authority to take depositions before consuls, which in the present rules is in the following language:

"Depositions taken in any city, port, or place *neither within the limits of the United States, nor within those of the Mexican Republic*, may be taken before any diplomatic or consular officer of either government, residing in such city, port or place, he having no interest and not being agent or attorney of any person having an interest in the claim to which the testimony so taken related."

"It will be perceived that unless consuls in Mexico are authorized by the effect of the preceding rule to take depositions, this provision would prevent the consular officers of the United States in Mexico from taking depositions in support of claims of American citizens, and consular officers of Mexico in this country from taking similar depositions in support of claims of citizens of Mexico against the United States.

"But by the rules of the previous commissions and those promulgated by the Department of State, depositions taken anywhere without the limits of the United States, are authorized to be taken before a consul or other public civil officer of the United States.

"The following is the provision common to these three sets of rules to which I have referred:

"Depositions taken in any city, port, or place without the limits of the United States, may be taken before any consul or other public civil officer of the United States resident in such city, port, or place, having no interest and not being agent or attorney of any person having an interest in the claim to which the testimony so taken relates.' So that for the words in the old rules 'without the limits of the United States' are substituted in the present rules the words 'neither within the limits of the United States nor within those of the Mexican Republic.'

"I am not apprised of the reason which induced this change, nor was my attention called to it until after the publication of the present rules.

"It will be for the commission to say whether the rules in this particular should not be amended so as to conform to the precedents on which they are based.

"For myself I do not perceive any objection to entertaining proofs taken before American diplomatic and consular officers in Mexico, or those taken on behalf of citizens of Mexico before diplomatic or consular officers of that Republic in this country.

"If the rules are so amended I presume the following provision would be in substantial conformity with the corresponding rules of other commissions.

"Depositions in support of claims of citizens of the United States taken in any city, port, or place without the limits of the United States, may be taken before any diplomatic or consular or other public civil officer of the United States resident in such city, port or place having no interest and not being agent or attorney of any person having an interest in the claim to which the testimony so taken relates; and depositions in support of the claims of citizens of the Mexican Republic, taken in any city, port, or place without the limits of the Republic of Mexico may be taken before any diplomatic, consular or other public civil officer of the Mexican Republic, resident in such port or place, having no interest and not being agent or attorney of any person having an interest in the claim to which the testimony so taken relates.'

"I discover also that sub-rule (e), Rule 5, as it may be called, is in a somewhat different form from the corresponding rule of the other commissions, and it has given rise to much, though I think unnecessary, misunderstanding and criticism.

"This rule is—'Original papers or other documents exhibited in proof must be certified as required in the second of these rules; but when the fact is within the exclusive knowledge of the claimant it may be verified by his own oath or affirmation.'

"The rules under the convention with the United States of Colombia provide as follows:

"'Original papers exhibited in proof must be verified as originals by the oath of a witness whose credibility must be certified as required in the second of those rules.'

"The rules of the commission under the Mexican treaty of 1848, and those of the State Department are in the same words.

"There is no necessity, in my opinion, for any change in the rule on the subject of the proof of original papers offered in evidence, and the present rule might with advantage be made to conform to the precedents as follows:

“Original papers exhibited in proof must be verified as originals by the oath of a witness whose credibility must be certified as required in Rule 5, subdivision (b).”

“And I would respectfully suggest whether in framing this amendment there should not be inserted an exception, based on the treaty, in favor of original papers preferred or presented to the commission by either government; that is to say, whether the rule should not read, ‘Original papers exhibited in proof, except papers referred by either government, must be verified,’ etc. This qualification, it is true, is contained in a previous provision of the rules which excepts ‘papers and documents referred by either government’ from the operation of the rules altogether, as I understand. But I think the exception should also be contained in the particular provision to which I have referred. I submit this suggestion also to the better judgment of this honorable commission.

“I desire also to suggest an additional rule substantially in the words of the act of Congress, passed on January the 8th, 1860, which authorizes certified copies of all papers on file in any consulate receivable in evidence in courts of the United States. This act is as follows:

“That copies of all official papers and papers belonging to or filed or remaining in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, shall, when certified under the hand and official seal of the proper consul, vice-consul or commercial agent, be admitted in evidence in all the courts of the United States.”

“It is my duty to bring to the notice of the commissioners the fact that many claimants, having small claims, allege that it will be impossible for them to comply with the rule which requires the translation and printing of memorials. I am persuaded that no hardship will be occasioned by this rule in the large majority of claims; but I feel impressed by the suggestion that in some small cases the claimants will find great difficulty in advancing the necessary money to pay the expense of the printing.

“In this situation of the matter I have said to the representatives of several claimants who assured me that it would be impossible for their clients to incur the expense of printing their petitions, that I presumed that the commissioners would entertain a motion in any case, where the fact of poverty was established by affidavit, or otherwise, to permit the case to proceed without printing the memorial.

“It seems to me that while no express exception should be made in the present rule, it might advantageously be understood that the counsel of each government should be at liberty to apply for a relaxation of the rule in any case where he can show by proper proof the necessity for such relaxation.”

December 20, 1869, Mr. Cushing, as counsel for Mexico, filed the following paper:

“The undersigned, counsel and agent of the Mexican Republic, in response to the motion of Mr. Ashton, counsel and agent of the United States of America, of the 18th inst., has the honor to state as follows:

“I. It was the object of counsel on both sides in the presentation of the draft of regulations prepared by them, as truly suggested by Mr. Ashton,

¹ 15 Stats. at L. p. 266.

in the above-mentioned motion, to follow in substance and language the precedents of previous commissions of this nature, in so far as they might be applicable to the circumstances of the present commission, and in this point of view particular attention was given by us to the regulations of the United States commission for the adjudication of claims under the treaty of Guadalupe Hidalgo, those of the mixed commission between the United States and New Granada (now Colombia), and that between the United States and the Republic of Costa Rica.

"But the regulations of the two last-named commissions follow almost literally the regulations of the first named; and in this respect they are imperfect, and inapplicable to the present circumstances; for the commission under the treaty of Guadalupe Hidalgo was an *ex parte* and exclusive commission, in which the United States of America alone, and no other government, took part or had interest. It was in fact a purely domestic tribunal, established as such by a law of the American Congress. Its regulations were formed on that hypothesis, and in that respect they do not suffice for the purposes of a mixed commission, representing two distinct sovereign powers.

"Thus it is that those regulations contain the following article:

"'5. All testimony taken in any foreign language, and all papers and documents in any foreign language, which may be exhibited in proof, must be accompanied by a translation of the same in the English language.'

"This provision, assuming that all language not 'English' was 'foreign' to the commission, and implying that all papers in the Spanish language must be translated into English, plainly indicates the *ex parte* character of the commission, and of its regulations.

"But the present commission is a mixed one to which the Spanish language is no more foreign than the English; so the phrase in these regulations quoted by Mr. Ashton as to taking depositions 'without the limits of the United States' by consuls, assumed that the United States, and they alone, were interested or had jurisdiction of the subject-matter.

"The undersigned while revising in cooperation with Mr. Ashton the regulations of previous commissions and rendering them applicable to the present commission by proper modifications, had no object in view except that of rendering the regulations perfectly reciprocal and equal as they should be in order to assist the commissioners in doing impartial justice to the independent powers which they respectively represent, each of them having reclamations against the other subjected to the adjudication of the honorable commissioners.

"And the undersigned considered that this perfect reciprocity of regulation was important on the present occasion, not merely on account of its intrinsic and unquestioned justice, but also on account of the great number and of the immense magnitude in amount and in signal instances the apparently fraudulent character of claims preferred by citizens of the United States against his client, the Mexican Republic.

"II. In this view it was, and in this only, that any modification was proposed by the undersigned in the regulations touching the matter of evidence.

"In this respect the Mexican Government has no desire apart from that

of making just inquiry after truth and of excluding falsehood; which objects, it is conceived, must be equally important in the estimation of the American Government. And it is not the object or desire of the Mexican Government to interpose any impediment whatever in the way of claimants, citizens of the United States, seeking testimony within the Mexican Republic; on the contrary, its desire and object are that such citizens of the United States shall enjoy all fit and legal facilities in this respect, in the same way that it expects that Mexicans shall enjoy similar facilities within the territory of the United States.

"In both cases, however, testimony must be taken in conformity with the laws of the country in which it is taken. Otherwise such testimony will be comparatively valueless, or will at any rate be destitute of any sanction of law binding on the conscience of the witness, so as to open wide the door to admit falsehood and misrepresentation without check or stint.

"In this view the language of the regulation on the subject of consuls proposed by Mr. Ashton seems to the undersigned to be more comprehensive than would be compatible with the laws either of the Mexican Republic or of the United States, and to be of inconvenient extension.

"It may be tested by applying it to the taking of testimony within the United States.

"The proposed amendment provides, in effect, that depositions in support of claims of citizens of the Mexican Republic may be taken in the United States, before any disinterested diplomatic, consular, or any other public civil officer of the Mexican Republic resident in the United States.

"But has the Mexican minister in Washington or the Mexican consul in New York any power to compel the attendance before him, as deponent, of any citizen of the United States or any subject of England, France, or Germany? Could such minister or consul administer a lawful or obligatory oath to any such deponent? Would a voluntary deposition given under such circumstances have any legal sanction? Would it be received in any court of justice of the United States? To each and all these questions the answer must be in the negative, as the undersigned humbly conceives.

"Similar questions with similar answers would have to be given in respect to depositions taken in the Mexican Republic by any diplomatic, consular, or other public civil officer of the United States resident there, unless in the case of depositions by citizens of the United States.

"But the Mexican Government desires to go to the utmost point of legality in order to facilitate the business of the commission, and it is not presumed or supposed that the American Government can desire to go beyond that point.

"III. Entertaining these views of the question the undersigned, in lieu of the provision proposed by Mr. Ashton, proposes the following, viz.:

"Depositions, whether in support of claims of citizens of the United States and in response thereto, or in support of claims of citizens of the Mexican Republic and in response thereto, may be taken within the jurisdiction of either government by any magistrate, public functionary or other person, before whom such depositions may be lawfully taken,

according to the laws of the United States of America, if the depositions be taken there, or according to the laws of the United Mexican States, if taken within the Mexican Republic.'

"IV. The undersigned sees no objection to the other amendment of the rules proposed by Mr. Ashton, if there be any occasion for it. It is in effect but declaratory of that which seems to be the proper construction of the existing rules.

"If, however, it has intention of possible construction beyond this, then the undersigned thinks it ought not to be adopted by the commissioners. He does not think it was the purpose of the commission to enable parties to be dispensed from all legal modes of proof, by filing them with the executive officers of the respective governments. Papers heretofore filed, protests, depositions, letters, may come before the commissioners for what they are worth. But to make the executive of each government the channel of the introduction before the commissioners of anything and everything, hereafter and at all times, in the place of regular evidence, would unsettle the business of the commission, obstruct instead of promote the search after truth, add greatly to the labor of counsel, and especially to that of the defensive duties incumbent on the agents of the respective governments.

"For it is to be remembered that the duties of the commission involve the reception and hearing of much responsive evidence, which will be necessary in behalf of the United States and still more so in behalf of the Mexican Republic.

"V. As to the third amendment proposed by Mr. Ashton, the undersigned respectfully submits that it would be inexpedient to change the standing rules in this respect, and that if any claims present themselves so trivial in amount as not to support the small cost of printing, such cases may well be left to be disposed of as they arise in the merciful discretion of the commissioners.

"VI. The undersigned begs leave to suggest to the commissioners the necessity of making some provision on the subject of translations; which are uniformly required by all courts of justice, and which have been heretofore required by previous commissions."

December 23, 1869, the commissioners, having considered the motion of Mr. Ashton and Mr. Cushing's reply, directed the following preamble and order to be entered in the journal:

"The commissioners being of the opinion that they have no power to regulate the taking of evidence or the production of the same before them, either in support of or in answer to any claim, but that the whole matter by the treaty has been reserved to the discretion of the high contracting parties; it is

"Ordered, That the rules heretofore promulgated by this commission, regulating the taking of depositions and authentication of papers and documents be rescinded; and that the secretaries communicate this act to the Secretary of State of the United States and the minister of Mexico resident at Washington, and further cause the same to be published in a convenient number of the newspapers of both countries."

The rules as thus amended and promulgated were as follows:

"Rules and Regulations of the Commissioners appointed under the Convention between the United States of America and the United States of Mexico, of July 4, 1868, as adopted August the 10th 1869 and amended by order of the 23d of December 1869.

"1. All claims filed with the commission by the respective governments shall be entered in duplicate dockets, one kept by each of the two secretaries, in his respective language, in the order in which they are referred.

"Separate dockets shall be kept for the claims respectively of citizens of the United States, and for those of citizens of the Mexican Republic.

"Duplicate records shall be kept in like manner of all the proceedings of the Commissioners.

"2. All claims provided for by the Convention shall be presented through the respective governments, on or before the 31st day of March, 1870, unless at a later day, for special cause shown to the satisfaction of the Commissioners.

"3. All persons having claims shall file memorials of the same with the respective secretaries.

"Every memorial shall be signed and verified by the claimant, or, in his absence from the District of Columbia, by his attorney in fact, such absence being averred by such attorney, and it shall be subscribed by his solicitor or counsel.

"It shall set forth, particularly, the origin, nature, and amount of the claim, with other circumstances, as follows:

"(a) The amount of the claim; the time when and place where it arose; the kind or kinds and amount of property lost or injured; the facts and circumstances attending the loss or injury out of which the claim arises; and all the facts upon which the claim is founded.

"(b) For and on behalf of whom the claim is preferred.

"(c) Whether the claimant is now a citizen of the United States or of the Mexican Republic, as the case may require; and if so, whether he is a native or naturalized citizen, and where is now his domicile; and if he claims in his own right, then whether he was a citizen when the claim had its origin, and where was then his domicile; and if he claims in the right of another, then whether such other was a citizen when the claim had its origin, and where was then, and where is now, his domicile; and if in either case the domicile of the claimant, at the time the claim had its origin, was in any foreign country, then whether such claimant was then a subject of the government of such country, or had taken any oath of allegiance thereto.

"(d) Whether the entire amount of the claim does now, and did at the time when it had its origin, belong solely and absolutely to the claimant, and if any other person is or has been interested therein or in any part thereof, then who is such other person and what is or was the nature and extent of his interest; and how, when, and by what means, and for what consideration, the transfer of rights or interests, if any such was made, took place between the parties.

"(e) Whether the claimant, or any other who may at any time have

been entitled to the amount claimed, or any part thereof, had ever received any, and if any, what sum of money, or other equivalent or indemnification for the whole or any part of the loss or injury upon which the claim is founded; and if so, when and from whom the same was received.

"(f) Whether the claim was presented prior to the 1st of February 1869 to the Department of State of either government, or to the Minister of the United States at Mexico, or that of the Mexican Republic at Washington, and to which and at what time.

"4. All motions and arguments addressed to the Commissioners shall be made in writing and filed with the secretaries, who shall note thereon the time when they are received.

"Brief verbal explanations may be made after the opening of each day's session, by or in behalf of the agents of the respective governments.

"5. Of all memorials, twenty printed copies in quarto form in English, and twenty in Spanish, shall be filed with the respective secretaries.

"Citizens of the United States may file their documents and proofs in English, and citizens of the Mexican Republic may file theirs in Spanish, and in both cases in manuscript, subject to the further order of the Commissioners in this respect.

"6. When a claimant shall have filed his proofs in chief and argument in support thereof, the adverse proofs and argument on the part of the United States, or of the Mexican Republic, shall be filed within the term of four months; but upon good cause shown on either side this period may be extended in particular cases.

"By order of the Commissioners:

"GEORGE G. GAITHER,

"J. CARLOS MEXIA,

"Secretaries."

From time to time the commissioners adopted various orders. August 12, 1869, it was ordered—

"That the secretaries of this commission take charge of all the papers belonging to the commission, and not allow them to be withdrawn from the office, but furnish parties interested or their counsel all convenient opportunities, in the office and in presence of either of the secretaries, of examining and making extracts from the same."

December 29, 1869, the commissioners made the following order:

"That the secretaries keep a book, to be called the 'Notice Docket.'

"(a) A claim is prepared in chief whenever a memorial, with the proofs and argument relied on in support thereof shall be filed. Such claim shall be entered, by direction of the agent representing it, on the Notice Docket, the secretaries noting the date of the entry on the docket.

"(b) Such entry shall be notice, under the rules, to the government against whom such claim is preferred, that the claimant is ready; thereupon proofs and arguments in answer thereto (if any are insisted on) must be filed in four months from the date of such entry, unless, for cause shown, further time is allowed.

"(c) Rebutting proofs and argument in support of the claim may be afterwards filed or waived, and in either case the claim shall be entered "heard" by the Commissioners."

January 21, 1870, they ordered as follows:

"Every claimant purporting to be a citizen of either country, party to this convention, shall disclose the facts upon which he bases his citizenship, either in his memorial or by affidavit. If a native, he shall, so far as in his power, disclose the time and place of his birth; if naturalized, he shall file a copy of his naturalization papers, in all cases where it is in his power, and if not in his power to do so, he shall show why: *Provided*, the affidavit above required may be put in at any time before a hearing, on such terms as may be deemed proper."

January 31, 1870. it was upon due consideration by the commission—

"*Ordered*, That further time is now granted to all claimants whose cases are on the files of this commission, to file memorials until the first day of June next."

Also:

"2. The secretaries are directed to receive all claims presented to this commission, during the adjournment by either government, noting the time of offering the same in each case; such claims to be held subject to the further order of the commissioners, the question of extending the time for filing such claims being held under advisement and not disposed of."

June 20, 1870, the commissioners adopted the following orders:

"1. That all claims presented to this commission since the adjournment¹ be received and entered upon the dockets for preparation, investigation, and decision, as in other cases.

"2. That the time for filing claims before this commission be extended from the 31st day of March last to the 30th of June instant, and including the latter day, after which time no further claims will be received.

"3. That further time be granted to all claimants whose cases are or may hereafter be entered on the dockets of this commission, to file memorials of the same until the first day of January 1871."

June 27, 1870, a communication was laid before the commission from the minister of foreign relations of Mexico, representing the hardship to Mexico of the rule requiring defensive evidence to be filed within four months after the filing of the memorial. It was asked that the commission would at least add to that period in the case of Mexico the time required to send the papers to that country.

June 28, 1870, the commissioners made the following order:

"In all cases in which it shall be represented by the agent of the government against which any claim has been preferred, that the period granted to file the proofs and argument in defense of said government is not sufficient, said period will be extended to six months, if the commission deems it proper."

¹The adjournment referred to was from January 31, 1870, to June 1, 1870.

June 28, 1870, the commissioners called upon the agents of the two governments for an expression of opinion as to the propriety of modifying the rule forbidding the withdrawal of papers from the files. Both agents expressed themselves as being opposed to any such modification. and the commissioners decided not to make it.

July 13, 1870, the commissioners adopted the following order :

"All claimants who have heretofore filed memorials, as required by the rules, and have not prepared their claims for hearing, must make preparation on or before the 1st of November next, at which date the secretaries of this commission are directed to enter such claims upon the Notice Docket; and all other claims not now ready must be prepared by claimants on or before the 1st of January next, at which period the secretaries are directed to place them, also, upon the said docket; and claims thus placed will be disposed of under the rules applicable to other cases on that docket."

The commissioners delivered the following opinions on questions of practice and procedure :

JEAN MARIE FLEURY }
v. } 312, A. D.
MEXICO. }

Mr. Commissioner Wadsworth read the opinion of the commissioners on the motion heretofore filed by the agent of the Republic of Mexico, to dismiss and disallow this case, as follows :

"The agent for the Republic of Mexico filed reasons in writing and moved to 'dismiss and disallow' the claims set forth in the above memorial.

"The reasons upon which this motion is based may be reduced to this, viz: The claimants are not citizens of the United States within the meaning of the treaty; but are French subjects, as it appears from their own statements in the memorial.

"The agent of the United States objects to the consideration of this motion, by the commissioners, because, as he maintains, the motion rests 'on the sole ground that the averments in the memorial are insufficient to show a claim of indemnity protected by the convention,' and he holds that it is not competent for the commissioners to dismiss a claim in any case, against the objection of the government preferring it, without an investigation of the accompanying proofs, and upon the statements of the memorialist alone.

"By the third article of the treaty it is provided that 'it shall be competent for the commissioners conjointly, or for the umpire, if they differ, to decide in each case whether any claim has, or has not, been duly made, preferred and laid before them, either wholly or to any and what extent' etc. By the second article of the treaty, the order and manner of investigation and decision, is placed entirely within the discretion of the commissioners.

"The commissioners can not doubt that it is eminently proper in the investigation and decision of any case, first to dispose of the question of

jurisdiction. But may this be done upon the affirmative statements of the memorial? For it will be seen here that the motion to dismiss is not based upon the absence of material averments from the memorial (as counsel argues), but upon the facts therein disclosed under the oath of the party who has been injured, as it is claimed. When the memorialist avers that at the time the wrongs were committed and for which the government of the United States now makes reclamation, he was a French subject, and does not pretend that he then had the national character of the government asserting the claim, are the commissioners under the necessity imposed by the text of the treaty, or considerations of public law, equity or justice, to look into the proofs, if possibly they may thereby correct the statements of the memorial?

"We can answer this question in the negative with some confidence, particularly in the absence of any suggestion from counsel that the statements of the memorial were ill-advised, and are not supported by the proofs already made, or to be introduced.

"We are of the opinion, therefore, that the objections by the agent of the United States to the motion to dismiss must be overruled.

"The motion to dismiss, however, was made before the order of this commission provided for a notice docket; and we are of opinion that questions to the jurisdiction of any case, should not be considered, until the party has placed his claim upon the Notice Docket, and thus announced himself ready, unless indeed where the agent of both governments can agree to present the question. The agent for Mexico can therefore have leave to withdraw his motion in this case for the present."

LOUIS DUSENBERG }
 v. } No. 388 A. D.
 MEXICO. }

Mr. Commissioner Wadsworth read the opinion of the commissioners, on the objections heretofore offered to the reception of the memorial in this case, as follows, viz:

"Three objections are urged by the agent of Mexico to the memorial in this case.

"1st. That the claim is not preferred by Dusenberg or anybody professing to have competent authority in his behalf.

"The paper purports to be the memorial of Louis Dusenberg by his attorney in fact Jonathan D. Stevenson, and recites that the said claimant is absent from the State of California, his *present residence*, as we may infer from the memorial by a liberal construction. It is verified by the attorney in fact.

"We are of opinion that a party may by his attorney in fact in his absence from the State where he resides, file his memorial.

"As the paper sets forth that Stevenson is the attorney in fact of Dusenberg and the affidavit makes the same statement, the claim in our judgment is preferred by one having competent authority. The first objection is therefore overruled.

"2nd. The second objection is as follows, viz:

"It does not appear and is not averred, except on hearsay by an unauthorized person, that the claimant was at the time of the occurrences complained of a citizen of the United States."

"We have already held that it does appear from the statement of the memorial, sufficiently, that Stevenson is authorized to act for the claimant; but the statements as to citizenship are vague and too general. It is not said whether he is a native or naturalized citizen, but as this may be done by affidavit at any time hereafter before the case is heard, it furnishes no reason for rejecting the memorial on this ground.

"But a more serious objection to the statements as to citizenship exists. It does not appear from the memorial that Dusenbergh was a citizen of the United States, at the time the wrongs complained of supervened; nor does he state where *then* was his domicile. It is merely said that Dusenbergh is (at the date of the memorial) a citizen. It appears indeed that prior to the 30th April 1855 claimant had been a 'resident' of California, but residence alone can not constitute domicile, or confer citizenship. This residence however ceased when he left it and took service in the navy of a foreign power, and the memorial makes no statements as to whether the claimant, when he left his residence, left it for a temporary purpose, consistent with its continuance, and with the mind of returning, or left it permanently without intending to return.

"What we hold to be indispensably necessary on the part of the claimant it so show, by the memorial, that he was, *at the time the injury or loss complained of by him was sustained*, a citizen of the country whose government prefers his claim before this commission. He can state the facts upon which he bases his claim to citizenship in his own way, but it must appear from the memorial that he was a citizen *at the time of his injury or loss*.

"We need not now define what constitutes citizenship within the meaning of the treaty, whether birth, naturalization, or residence with the mind of remaining. It will be sufficient if the party states in his memorial that at the time of his losses or injuries he was a citizen of the country whose government here asserts his claim.

"3rd. The third objection is also well taken. The claimant does not disclose his domicile at date of the wrongs and losses complained of by him. The statement that on the 30th April 1855 he was *residing* in California, does not show that even then he was *domiciled* in that country. It requires something more than residence, lengthy or brief, to constitute domicile. There must be both intention and fact to constitute it. We do not intend to violate the warning given by Lord Alvanley in *Sommerville v. Sommerville*, 5 Vesey's Reports, 750, by hazarding any definition of our own of domicile, but we will be excused for quoting with approbation the definition of some American courts and judges, strongly commended by foreign writers upon the subject.

"Domicil is defined to be, in *Guier v. O'Daniel*, 1 Binney's Reports, 349 Note, 'a residence at a particular place accompanied with positive or presumptive proof of continuing it for an unlimited time;' in *Ebberts & Kraft v. United Insurance Co.*, 16 Johnson's Reports, 128, 'residence with an indefinite intention of remaining;' (see also *Livingston & Gilchrist v. Maryland Insurance Co.*, 7 Cranch, 542); in the case of the *Frances*, 8 Cranch, 'a permanent settlement for an indefinite time.' Judge Story says 'that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom.' (Story's Conflict of Laws, par. 43.)

"We have ventured to say this much on this important subject at this time

because we have noticed in the memorials a reprehensible indifference to all the facts which go to make up national character on the part of claimants, without which indeed there can be no valid claim made in this forum.

"Claimants can state concisely the facts constituting the domicile claimed by them, or they can directly aver that *at the time* of the several wrongs and injuries complained of by them they were domiciled in the United States or Mexico, in such or such a place, as the case may be; but our rules require that the domicile must be disclosed *at that time*, as well as at the date of the memorial.

"These rules are important and not numerous or difficult to be understood by any who will give them some careful study. It is our duty and purpose to require a substantial conformity to them.

"For the reasons above given the memorial of Louis Dusenbergh is rejected, but without prejudice and with leave to amend."

JULES E. CAIRE }
v. } No. 119 A. D.
MEXICO. }

Mr. Commissioner Wadsworth read the opinion of the commissioners on the objections heretofore filed to the memorial in this case, as follows, viz:

"The objection to this memorial by the agent of Mexico is well taken. The memorialist fails to disclose his domicile at this time or at date of the injuries complained of by him. He must disclose his domicile at both periods of time.

"His memorial shows that he moved with his family to the city of Mexico in 1858, and there embarked with a French subject, in the publication for their joint account of a newspaper, and continued there in that business as late as 1862, when the publication of the paper was suppressed by order of President Juarez; whether he continued his residence afterwards, or now resides there, does not appear from the memorial. It is under these circumstances important that he should disclose his domicile *now, and at the time of the suppression of his paper, etc., as complained of by him.*

"We refer to our brief observations on the subject of domicile, in the matter of Louis Dusenbergh's memorial, for further illustration of this subject.

"The memorialist fails also to state whether he presented his claim 'prior to the 1st February 1869 to the Department of State of either government, or to the minister of the United States at Mexico, or that of the Mexican Republic at Washington,' and if so 'to which and at what time.'

"This information the rules call for at the hands of the claimant in every case. It is deemed important by the commissioners and must be furnished.

"The memorial is rejected, but with leave to amend."

HELENA D. CHASE }
v. } No. 408 A. D.
MEXICO. }

Mr. Commissioner Wadsworth read the opinion of the commissioners on the objections heretofore filed to the reception of the memorial in this case, as follows, viz:

"It is objected to the memorial herein by the agent of Mexico (1) that it does not show that the claimant was a citizen of the United States at

the time of the occurrence complained of by her; and (2) that the memorial is not subscribed by any solicitor.

"Although Helena D. Chase sets forth that she is administratrix of her deceased husband, Ormond Chase, it must be understood that she is complaining of an injury done to *her* by the cruel death of her husband, at the hands of the Mexican authorities as she avers. If *she* was not *then* an American citizen, she could not have redress, perhaps, for a wrong done to her by the execution of her husband. But she avers that she, although of foreign origin, came into the United States at ten years of age, resided there and married a native-born citizen of that country. We think this gave her the American character within the meaning of the treaty, and we must suppose that as this character was acquired before the event complained of, it continued till that time, until the contrary appears.

"But it is her duty, under our rules, to show where was her domicile at the time the wrongs were committed, for which she claims \$100,000 damages. Where was then her domicile will depend upon the domicile of her husband, Ormond Chase, at that time. But there is no disclosure in the memorial as to the domicile of either. It appears, indeed, that her husband was at the time residing in Mexico, engaged in his business of machinist and as acting English consul at Tepic. Yet this business may have been of a limited character and his residence not intended to be permanent and his domicile in the United States, the domicile of origin. She does not state where he claimed or had his domicile, and it is highly important that she should, both for her sake as well as for the sake of the government defending. (See opinion in *re* Lonis Dusenberg.)

"With regard to the second objection we observe that it will not be necessary for her solicitor to sign the memorial, as his name appears in the body of the paper; that appearing to us to be sufficient.

"But because the memorial does not disclose the domicile of claimant's husband at the time of his death, it is rejected, and she has leave to amend."

H. G. NORTON, CLAIMANT,	} No. 398 A. D.
<i>v.</i>	
THE REPUBLIC OF MEXICO.	

Mr. Commissioner Palacio read the opinion of the commissioners, on the objections heretofore filed by Mr. Cushing on behalf of the Republic of Mexico, to the reception of the memorial offered in this case, as follows, viz:

"The agent of Mexico in this commission objected to the reception of the memorial of H. G. Norton in his claim against that Republic, for the sum of \$500,000, because of its defect in form; inasmuch as it does not contain the requisites fixed in the rules adopted by the commission, nor set forth clearly and distinctly the circumstances which are necessary to be known in order to decide whether the claim is within the convention, or is just in itself.

"The agent of the United States made no objection to the admission of this motion, merely observing very aptly, that the decision of this question was reduced to this, namely, whether the memorial should or should not be received in the form in which it was presented, without prejudging the merits or validity of the claim itself. As the question to which the

agent of the United States alludes is the only one that can be considered and decided at present, the agents of both governments agree in submitting it to the decision of the commission.

"The commissioners believe that, considering the object for which they meet and the power given them by the treaty to regulate their proceedings, they ought not to be strict in relation to forms, nor prescribe any form as indispensable to fix the facts from which a claim arises, in order to be presented before this commission, or to determine the loss or damage for which indemnity is asked. The rules adopted by the commission only require what is absolutely necessary for its ends; and even in cases where they are not strictly observed, it will be no cause of rejection, provided they contain the other indispensable requisites.

"Notwithstanding this decision of the commission, the memorial of H. G. Norton seems inadmissible in its present form, because it does not offer evidence of nationality, or titles of claim, or give the facts from which his right is derived. As the defects of this memorial have been carefully pointed out by the agent of Mexico, it will be sufficient to mention briefly the importance of each one of them, in order to show that the commission could arrive at no other conclusion than that which has been reached. However, it is proper to repeat an observation of my respected and learned colleague, which alone is sufficient to justify the present decision. It is this: that in fact it can not be known from the memorial who comes forward as claimant before this commission. The document called a memorial is merely a confused statement of injustice and violence, which G. Naphegyi alleges he suffered from the Mexican Government, as he says in one place, or from the rebels, as he states in another. On concluding this statement Naphegyi asks the commission to award him a certain sum, and in the same breath says he has ceded his right to H. G. Norton, who, on his part, only signs the so-called memorial, and adds the title of 'claimant' to his name. It is thus plain that two distinct persons are presenting themselves as claimants and we can not tell precisely which is the proper party to the suit, nor to which belong the duties and responsibilities as such. If Norton is the assignee of Naphegyi's rights, as appears, the memorial should have been presented by the former and he should have complied with all the requisites of the rules. The commission can not decide in Norton's favor at Naphegyi's request; nor can it award to Naphegyi what he has conveyed to Norton. In fact, the commission, in all cases where there has been an assignment or transfer of a claim, would prefer to have the petition made jointly, by the assignor and assignee, from the obvious propriety of such an act; yet for such reasons it does not propose to neglect the rules of common law, which determine when, and in what way a grantee is to assert the rights assigned to him.

"Turning now to the objections made by the agent of Mexico, a careful examination of the memorial will demonstrate without doubt the justice of his observations. It is clear that Norton, who assumes the title of claimant, does not declare himself to be an American citizen, either by birth or naturalization; and though such a title might be alleged to be more essential to the original claimant, yet Naphegyi makes no formal declaration to that effect. In only two places of the Spanish memorial does he refer to himself as an American citizen; and it is singular that no such mention is made in the English copy.

"It is equally clear that there is no specific assignment of Naphegyi's right to Norton, as required, in order to determine the propriety, legality or validity of such an act.

"The designation of complainant's domicile, at the time the claim originated, is of so much importance that in many cases, without knowing this, no decision could be rendered in relation to the nationality of the claimant, as required by the terms of the convention. There is no averment of citizenship anywhere in the memorial.

"The rules require an express declaration whether the claim has ever before been presented to either of the two governments; and this is done for many good reasons: as to be assured that the affair has not been settled: or has not been subject to separate negotiation: or has been admitted or rejected for reasons that would prevent the government that presents it from supporting it again; or finally, if there are antecedents to show that the case is not within the terms of the treaty, or the limits of the jurisdiction of this commission.

"As it is composed of persons of different nationalities, speaking different languages, neither of which has been officially adopted for the use of the commission to the exclusion of the other, it becomes necessary for the memorials to be presented in English and Spanish, similar in substance and in meaning, with no discrepancy except such as may become necessary from the grammar and peculiar nature of the language. Were it otherwise the memorials would be two, and this would be worse than none; for there would be no excuse for preferring the English to the Spanish and vice versa; or for accepting the statements of the facts, circumstances and motives, as detailed in one, when they are found to be materially different in the other. This is precisely the case in the Spanish and English statements of Naphegyi.

"As the agent of Mexico has justly observed, one is not a translation of the other; they differ in material points—facts which might have much influence in determining the rights affirmed in one and entirely omitted in the other. For instance I will point out the two most glaring differences. In one of the memorials it is stated that the injuries done to Naphegyi were committed by the reactionary party that was making war upon the government recognized by the United States, while in the other they are attributed to the government itself. The other discrepancy to which I allude is in the Spanish memorial, where Mr. Forsyth, the American minister, is asked to intervene in Naphegyi's favor, and a petition is presented to Mr. Matthews, the English minister, to interfere, as the United States has no representative near the rebels, though they were worthily represented by Mr. McLane near the Mexican Government. In the English memorial there is no mention of either of these circumstances, and it is useless to insist on the influence they might have in the final solution of the question.

"These are not all the important differences between the two memorials; and I omit to mention others for fear of rendering this opinion too prolix; but, at the very judicious suggestion of my esteemed colleague, I have made a long list of the discrepancies in question, intended as an appendix to this paper.

"Its perusal and the reading of the two memorials might give rise to the impression that they were intended to suit what were supposed to be

the views, intentions, or opinions of each commissioner, an artifice as reprehensible as inefficacious; inasmuch as the commissioners have the firm intention to proceed with the most cautious deliberation in concert, and with the greatest mutual deference, until they reach a point where persons who are in search of truth in entire faith can agree, and whose intentions can not differ in the least, although they may possibly differ in their legal opinions.

"The observations above written have determined the commission to decide that the memorial of H. G. Norton, in his claim against Mexico, can not be received, yet without prejudice to his right to amend his petition, and without prejudging in any particular the claim which he presents."

H. G. NORTON }
 v. } No. 401 A. D.
 MEXICO. }

Mr. Commissioner Palacio read the opinion of the commissioners on the objections heretofore filed to the memorial in this case, as follows, viz:

"In this case the agent of Mexico has repeated most of the objections which, in another case presented by the same claimant, served as a foundation for the decision whereby the memorial was rejected; and this gave occasion to the agent of the United States to discuss lengthily and with skill a point which in a former opinion of the undersigned was touched upon *perfunctorie*, because it was not the only nor perhaps the principal foundation for the decision which was rendered at that time. This point is the determination of the person who ought to present himself as the principal party in the prosecution of those claims that may have been assigned by the person possessing the original right, to another individual who may afterwards claim in his own name. To fix upon a decision precisely commensurate with the subject-matter in question, devoid of everything irrelevant, it is proper to consider only those transfers in which the assignor as well as the assignee are of the same nationality, and in which the transfer has been total, the grantor conveying to the grantee the entire interest of the claim, subrogating him in his right, and constituting him, as the common law terms it, *procurator in propria causa*.

"That such are the circumstances of the present case there can be no doubt, since both Naphegyi, the assignor, and Norton, the assignee, assume the title of American citizens, though in a different way; and the transfer is declared to be for the entire claim, without deduction or reservation. In such cases natural reason, the laws of all countries and the records of all courts suggest a single solution of the question, which is, to declare the assignee to be the person in whom is vested the formal and perfect right to make the petition and institute the suit for the thing assigned. Now it is evident that he has all the right he can use effectively, and towards third persons and to all courts, the assignor, once possessor of the right, has lost it as completely as if he had never held it, to such an extent that if he were sued in such a case and the judgment were against him, no exception *rei judicate* could be alleged against the assignee, who might justly term such a sentence *res inter alios acta*. But it would be just the contrary with a judgment given in a suit prosecuted by the

assignor; for the action certainly would then perish in such a manner that it could never be revived.

"The practice followed in courts of justice of permitting the assignor to be a party to the suit even after the assignment has been made to the end that the final result may be favorable to the assignee, occurs only in those cases where the latter can not be a party to the suit, for want of some requisite of form, to enable him to act in his own name, or because the assignment does not qualify him for it. Therefore to preserve a right essentially valid from being lost by a strict observance of forms, an assignor is allowed in equity to bring suit on account and at the risk of the assignee. It is evidently on this principle that the enlightened and respectable tribunal called the Court of Claims takes cognizance of suits against the United States. As these hypothetical rights, contested and not recognized by virtue of a very wise law, can not be assigned or transferred previous to their final determination, it was not only just but positively necessary to consider the legal capability of asserting them as belonging to the original claimant, whatever may have been his contracts and stipulations that another person should profit by them.

"This commission reasons from very different principles. Believing, with the intelligent agent of the United States, that whenever the fact of an injury is proved to have been inflicted by one of the two contracting countries upon a citizen of the other, a just indemnity should be allowed, it has not sought to prohibit or limit the assignment or transfer of the right of claiming, but has left the largest liberty therefor. But for this reason and because the nature of the rights that are to be enforced makes it necessary for the claimant to comply with certain requisites and establish certain circumstances in intimate relation with his personality, it becomes indispensable to have plain, simple, uniform, and well-defined rules to determine who can in every case present the respective claim. When the person who has received the injury preserves his right intact there is no doubt that he alone, in his own person, or by an attorney duly empowered, ought to come forward. When an assignment has been made, then it is to be determined whether it is the assignor or the assignee that is to raise his voice in the claim. The commission has certainly manifested the amplitude of its views and its liberality in declaring that in all cases it would like both interested persons to appear and enforce their mutual rights jointly; yet this desire of the commission can not properly be construed as mandatory, but leaves the parties full liberty to act jointly or not.

"If a case is presented where it is doubtful whether the assignor or the assignee has the right to prefer the claim, because the assignment is contingent, subject to a future event, or made so that the interest is joint, or not clearly defined, then the commission, in such a case, will decide the question of personality, properly and formally presented; but I am not now prepared to decide a question not involved in the case which is now before us. But when a complete transfer is announced as well of the right as of the material result of the claim, and there is no indication that the assignor has made any reservation for himself, he must consider himself foreign to the prosecution of the suit, with no connection with it, other than that arising from the fact of having been the object or occasion

of the injury upon which the claim is founded. This connection may render his appearance beneficial to the claimant, and useful to the commission; but he can not be considered as a person legally qualified to present the claim in his own name, nor to give depositions and comply with the requisites exacted of the claimant. The value of his declaration arising from his better knowledge of certain facts is not vitiated because another enforces the right; and the effect of another person obliging himself to prove qualities or facts pertaining to the person who received the injury, is reduced to a change of form and almost to grammatical accidents.

"The oath to support the claim has a similar effect in obliging him to tell the truth, when he puts it in a memorial as in a separate declaration for the benefit of another person; and as in no case was his deposition taken as proof, but as the affirmation of a fact, the truth of which was to be proved by other means, it is not important who makes the affirmation, provided it can be controverted and duly accredited so as to unite the indispensable qualities required in the person of him who received the injury.

"To allow either of the persons interested to present the claim, as the agent of the United States proposes, would give rise to uncertainty and differences in regard to what ought to be required of the claimant, and leave in doubt the efficacy of the final decision of the commission, for want of the legal intervention of the real person interested. It is certainly the duty of the commission, and it intends to do this duty, to declare a right to indemnity, whenever there exists an injury which ought to be taken into consideration and which vests in the person who has the right to claim it; but to fix the mode of arriving at such a conviction and to secure the result of its awards, it is expedient if not indispensable to determine the real legal representative of the claims.

"Applying these principles to the case in question, the memorial can not be received, because it is not presented in the name of the person who appears to hold the right of claiming, and is not ratified by him; because it does not state that the person who received the alleged injuries was at that time an American citizen and does not state clearly where was then his domicile.

"Although the amount paid for the right which has been transferred is not given, this would not vitiate the memorial, provided it is distinctly stated that the transfer was total and that the consideration was for the payment of a debt, and that is sufficient to give cognizance of the case on this point.

"A comparison of the memorials in Spanish and English reveals differences that might lead to different opinions in relation to the nationality of the persons complaining of the injuries and the authorities causing them, both important circumstances in the final decision of the case.

"As it is necessary for the memorial to be amended in these particulars, when it is defective, the permission asked for by the agent of the United States to do this ought to be allowed.

"The objections made to the memorial in case 399, being identical with these and the same reasons being applicable this decision comprises that case."

GEORGE T. KNOX }
 v. } No. 394 A. D.
 MEXICO. }

Mr. Commissioner Wadsworth read the opinion of the commissioners on the objections heretofore filed to the reception of the memorial in this case, as follows, viz:

"It is objected to this memorial by the agent of Mexico that the claimant, professing to be a naturalized citizen of the United States, does not aver that he had such a character at the time of the occurrence complained of. The objection is well taken. For all that appears to the contrary, memorialist may have been, at the time he enlisted in the military service of Mexico, an alien, naturalized after the event.

"In reply to the suggestion of the agent of the United States that this defect may be cured by the naturalization paper when filed, we observe that the paper is *not filed*, or its absence explained, and we can not tell whether it will bear date when filed (if ever) before or after the events complained of. It was so obviously necessary to state the time and place of naturalization and file a copy of the paper, if in the party's power, or explain its absence, or aver citizenship at the date of the events upon which the claim is based, that we deem it proper to rule promptly on the objection taken.

"It is true that the claimant states that he was practicing law in the various courts of the city of San Francisco in August 1866, at which time he enlisted in the military service of the Mexican Government. It would be difficult to conclude from this statement that the memorialist was domiciled in San Francisco in August 1866, since residence alone does not constitute domicile, except when, from its peculiarity, it sufficiently establishes intention. But, if an alien at that time, although domiciled in the United States, yet if the party quits the jurisdiction of the United States and enlists in the military service of a foreign power, it raises a serious and important question for decision.

"The claimant must state his citizenship at date of the losses sustained by him; also where was *then* his domicile, and where it is now, all of which he fails to disclose.

"This memorial also fails to state whether the claim was ever presented prior to February 1st, 1869, as required by Rule 3 (*f*).

"Wherefore it is rejected, with leave to amend."

PETER BERG }
 v. } No. 253 A. D.
 MEXICO. }

Mr. Commissioner Wadsworth read the opinion of the commissioners on the objections heretofore filed to the reception of the memorial in this case, as follows, viz:

"This memorial is not signed by any solicitor. All we deem it necessary now to say on that point is, that it does not appear that the claimant has any solicitor, and we do not wish to construe the rule in such a manner as to *require* claimants to employ counsel.

"The claimant, for the details of the voyage which ended in his capture, and of the treatment which he received while a prisoner, refers specially to the petition of William Wallace and others who were companions in his imprisonment and to the deposition of Forsythe given in the case of said Wallace. This is sufficient. The details of the voyage and capture

of the *Archibald Gracie* given by the fellow travelers and prisoners of the memorialist have been sufficiently elaborated in the numerous petitions referred to, and we see no good purpose that could be served by their repetition in this instance.

"The claimant sets forth plainly though briefly (which is not amiss) the injuries, losses, and expenses for which he makes claim against the Republic of Mexico, and we deem his exhibit in this particular sufficient. He seems to have stated his own case without a solicitor, and has succeeded in complying with the rules far better than most of the learned counsel who have filed memorials for other claimants.

"He states where his domicile now is; where it was at date of the wrongs complained of; who is interested in his claim; that he has never received any payment or indemnification; that it has been presented to the Department of State at Washington prior to February 1st, 1869, and refers to the files in proof; and finally, avers 'that he is a naturalized citizen, declaring his intention to become a citizen of the United States at Colonia, Eldorado County, California, before A. St. C. Denver, clerk of the district court, in and for said county on the 7th day of May 1855.'

"His whole memorial only covers a printed page, and all things considered does its author credit.

"It is objected however 'that the petitioner claiming to be a naturalized citizen does not allege he was such at the time of the occurrences complained of, nor does he state when he became such.'

"If the claimant's statement (above quoted) is attentively considered it will be seen that he only means to claim that he was naturalized by the step taken by him on the 7th day of May 1855; or that he was naturalized, declaring his intention on that day and completing the process under the municipal laws of the United States afterwards and necessarily under the statute, after the wrongs and losses complained of, since these occurred in the fall of the same year 1855; so that it is plainly evident the memorialist had proceeded no further with naturalization at the time of the injuries than the declaratory oath of May 7th, 1855; whether he ever afterwards completed the process can not vary the question presented in his case, viz: did he acquire the character of a citizen of the United States by declaring his intention, under the municipal law, to become a citizen, and following it up by residence, until his departure on the unfortunate voyage made by the *Archibald Gracie* in the fall of 1855?

"This question we need not now decide since it is not before us. All we now decide is that the memorial fairly presents this question and is in other respects sufficient.

"Wherefore the objections are overruled."

The mixed commission at Lima, under the convention between the United States and Peru of December 4, 1868, adopted on October 8, 1869, at its eighth meeting, the following rules:

"Rules and Regulations of the Joint Commission appointed under the Treaty of December 4th, 1868, between the United States of America and the Republic of Peru for the final settlement of the claims of citizens of either country."

"ARTICLE 1. The meetings of the Commissioners shall be holden on Monday, Wednesday and Friday of every week, feast days excepted, from

one o'clock until four o'clock p. m. at the office of the Commission, in the Palace of Justice, Hall of the Lawyers' College.¹

"ARTICLE 2. One of the Secretaries will be in attendance daily at the office of the Commission to receive and file all documents addressed to the Commissioners.²

This amendment was made in order to prevent the recurrence of an irregularity committed by the chargé d'affaires of the United States, who, in a certain case which was pending before the umpire, sent some documents directly to the latter. The umpire sent them to the United States agent, who filed them before the commission; and the commissioners then amended the second rule in the manner above disclosed.

"ARTICLE 3. The Secretaries shall keep a journal in duplicate in English and Spanish, of the labors of the Commission each day, and also keep a duplicate list of all claims in the order in which they may be submitted to the Commission, specifying in brief terms the nature and basis of each one and also the amount.

"ARTICLE 4. The journal of the proceedings of the Commission and its decisions shall be authenticated by the Commissioners and one of the Secretaries and its decisions by the Commissioners only.

"ARTICLE 5. Orders for the adjournment of the Commission from time to time, and all other orders, except those relating to the decisions upon claims, may be made by joint written direction of the Commissioners filed with the Clerks.

"ARTICLE 6. All persons having claims against the Government of Peru or against the Government of the United States of America, shall file, through the Agent of their respective Governments, memorials of the same with the Secretaries of this Board.

"ARTICLE 7. In every such memorial shall be set forth the amount of the claim; the time when and place where it arose; the kind or kinds and amount of property lost or injured; the nature and extent of injury to persons, limbs or life; the facts and circumstances attending the loss or injury out of which the claim arises.

"ARTICLE 8. Each claim shall be considered by the Commission according to the order in which it may appear on the Secretaries' list, and shall be finally decided upon by the Commissioners in the same order, within five days to count from that upon which the Commission shall have resolved to consider it.

"ARTICLE 9. All motions and arguments addressed to the Commission shall be made in writing and filed with the Secretaries, who shall note

¹ December 15, 1869, this rule was amended so as to read as follows:

"Rule 1. The meetings of the commission will take place daily, Sundays and feast days excepted, from 1 till 4 o'clock p. m., in the office of the commission, Palace of Justice, Hall of the Lawyers' College, Lima."

The sessions were afterward held at the hours from 2 to 5 p. m.

² This rule was afterwards amended so as to read as follows: "Rule 2. All claims and all documents relating to claims which are presented by either government or on its behalf, shall be presented in the office of the commission, in order that they may be first filed by a secretary. For this purpose one of the secretaries will be in attendance daily at the office of the commission, to receive and file all the documents addressed to it."

thereon the time when they are received; but Counsel may be heard orally, on written briefs, filed, setting forth the points of law and fact relied upon by them respectively.

"ARTICLE 10. When any case occurs in which the Commissioners may not agree; or when any difference arises in the course of their proceedings, the same shall, on the request of either Commissioner, be passed to the Umpire for his decision, together with a copy of the proceedings which set forth the cause or reason of disagreement, which shall be signed by the Secretaries who shall take a receipt for the document they deliver; and the Umpire shall send to the Commissioners his decision on that particular case within ten days after his reception of said document.

"ARTICLE 11. The Commissioners shall give their decision on all claims presented to them on or before the fifteenth day of the month of February, eighteen hundred and seventy and all cases pending on said date, in which they may not agree, shall be passed by them to the Umpire for his decision before the seventeenth day of February eighteen hundred and seventy and the Umpire shall give his decision on all such cases before the fourth day of the following month of March."

Spanish Commission
of 1871. The mixed commission under the agreement between the United States and Spain of February 12, 1871, adopted on June 10, 1871, the following rules:

"Regulations adopted June 10, 1871, by the Commission on claims of citizens of the United States against Spain, by agreement of February 12, 1871."

"I. In addition to the representation of his claim, and the exhibits or proofs in support thereof, which may have been or shall be presented to or filed in the Department of State of the United States, every claimant shall file in the office of this Commission a statement of his claim in the form of a memorial.

"II. Every memorial shall show the full name of the claimant, his place of birth, and if he be a naturalized citizen of the United States, the time and place and the style of court before which his 'declaration of intention' shall have been made, and the time and place and the style of court by which his letters of naturalization shall have been granted; and authenticated copies of both these acts shall be exhibited with the memorial. Secondary evidence will be admitted upon proper foundation, according to recognized rules of evidence.

"III. If the claim be preferred on behalf of a firm or association of persons, the name of each person interested, both at the date the claim accrued and at the date of verifying the memorial, must be stated, with the proportions of the interests of each person.

"IV. Each memorial shall state the particulars of the claim, the general ground on which it is founded under the public international law, and the amount claimed. It shall be verified by the oath of the claimant, or if the claim be by a firm or association of persons, by the oath of one of them; or in the case of a corporation by the oath of the President, secretary, or other officer thereof, such oaths to be taken, if in the United States, before any officer having power to administer judicial oaths according to the law of the place where administered, and the official

character of such officer shall be duly authenticated according to the laws of said place. If such oath be taken without the territory of the United States, it may be administered by the legation or nearest Consul of the United States.

"V. The Arbitrators may, in their discretion, order any claimant to answer on oath such interrogatories as may be submitted to the Commission for the purpose, by or on behalf of either Government.

"VI. Every claimant shall be allowed two months' time, next following the filing of his memorial, in which to take and file his proofs, and three months next following the same shall be allowed for the taking and filing of proofs on the part of Spain, which respective periods may be prolonged by special order on cause shown.

"VII. All depositions shall be taken on notice, specifying the time and place of taking, to be filed in the office of the Commission, with a copy of the interrogatories, or upon a statement in writing by the advocate of the Government adducing the witness, to be filed in like manner, showing the subject of the particular examination with sufficient precision to be accepted by the advocate of the Government against whom such witness is to be produced, to be signified by his indorsement thereon. Such interrogatories or statement to be filed in the office of the Commission at least twenty-one days before the day named for the examination.

"Every deposition taken, either in the United States or in Spain or her possessions, shall be taken before some officer competent to administer judicial oaths under the laws of the place, whose official character shall be duly authenticated according to said laws, and each witness shall state whether he is interested, directly or indirectly, and how, in the matter of the claim, and whether he is agent or attorney for any party interested, directly or indirectly therein.

"Depositions, taken outside of the United States or of Spain and her possessions, may be taken before the legation or nearest consul of either Government, in the election of the advocate thereof.

"VIII. Public acts, decrees, orders, laws, and other official instruments and copies, shall be authenticated according to the country from which they emanate.

"IX. Such documents and proofs are liable to be impeached for fraud, in any manner recognized in similar cases, by the laws of the country from which they emanate, or by the law of nations.

"X. After the proofs on the part of Spain shall have been closed and filed, the Commission shall, in every case, when the claimant shall desire to take rebutting proof, accord a reasonable time, in its discretion, for the taking of such rebutting proof.

"XI. The rules of evidence, as to the competency, relevancy, and effect of the same, shall be determined by the Commission, in view of these regulations, the laws of the two nations and the public law.

"XII. Each memorial and all exhibits and proofs, shall be filed in original manuscript, and the same, and all matter, including briefs and arguments, shall be printed at the expense of the party adducing or propounding the same, at least thirty printed copies of each being filed.

"XIII. All cases will be submitted on printed arguments, but brief oral explanations will be received at all times from the advocate of either government.

"Argument of special counsel will be received in print, when submitted by the Advocate of either Government, and not otherwise.

"XIV. All claims filed with the Commission shall be entered in a docket to be kept by the Secretary.

"On the first Monday in December next the Arbitrators will proceed to call and hear any case or cases which may be ready for hearing, in conformity with these regulations.

"XV. The Secretary shall take charge of all the papers belonging to the Commission. He will not allow them to be withdrawn from the office, but will furnish to parties, or special counsel, all convenient opportunity for inspecting the same, and making extracts therefrom in his presence."

March 23, 1872, on motion of the advocate for Spain, the advocate for the United States consenting, the arbitrators adopted the following amendment:

"In all cases heretofore filed before this Commission the memorials, exhibits, and testimony now on file in the English language shall be translated into Spanish, and such translations shall be furnished and filed by the respective claimants, on or before the first day of June 1872.

"In all cases of memorials, or of exhibits and testimony hereafter to be filed the claimants are required to furnish such translations and to file the same together with the English originals. Of the printed copies now required by the rules, fifteen shall be in English and fifteen in Spanish. Printed briefs and arguments may be filed in the English language, only, as heretofore."

It was ordered that the secretary communicate this change in the regulations by mail to each special counsel in the causes then pending before the commission.

June 8, 1872, the arbitrators made the following order:

"That Rule XVI. of the Regulations adopted on the 23rd of March last past, be so amended as to read as follows:

"In all cases heretofore filed before this Commission, the memorials and exhibits now on file in the English language shall be translated into Spanish, and such translations shall be furnished and filed by the respective claimants on or before the first day of June 1872.

"In all cases of memorials and exhibits hereafter to be filed, the claimants are required to furnish such translations and to file the same together with the English originals. Of the printed copies now required by the rules, fifteen shall be in English and fifteen in Spanish.

"Printed briefs and arguments may be filed in the English language only, as heretofore."

The secretary was directed to communicate this change in the rules to special counsel.

May 17, 1873, the advocate on the part of Spain submitted the following question:

"When interrogatories in chief are filed in writing, under Rule VII., by one side, is the other side bound to file cross-interrogatories in writing, so that the examination shall be confined to such interrogatories and

cross-interrogatories only, without the presence of counsel on either side at the examination of witnesses? or may, in such case, the opposite party abstain from filing cross-interrogatories in writing, and then appear before the commissioner designated to take the depositions and cross-examine the witnesses orally?"

The commission decided that the party upon whom notice may have been served under Rule VII. was not bound to file cross-interrogatories in the office of the commission, but might appear by counsel before the commissioners designated to take the depositions and cross-examine the witnesses orally.

On May 31, 1873, it was—

"*Ordered*, That in all cases where written interrogatories have been or shall be filed to be propounded to witnesses the counsel of the party filing such may, at the examination, propound other interrogatories orally, when suggested by the cross-examination, or when strictly pertinent to the matters disclosed by the original written interrogatories."

On May 9, 1874, the advocate of Spain moved for an *order* "that Rule VII. of the Rules and Regulations adopted June 10, 1871, be amended by inserting after the words 'according to said laws,' line 10, "but all depositions taken in the United States after this 9th day of May 1874 must be taken before a United States commissioner, unless otherwise specially authorized by the commission, or unless notice designating some other officer shall have been already served and accepted by the respective advocates of the two governments."

The motion was granted.

In the case of *Anna Thompson Duggan v. Spain*, No. 39, in the absence of a United States commissioner in Henry County, Illinois, a justice of the peace was substituted.

April 3, 1875, it was—

"*Ordered*, That no notice of closing testimony is to be given by either party until all the testimony in his behalf shall have been printed."

June 26, 1875, it was—

"*Ordered*, First. That in all cases where witnesses are to be examined out of the United States, the examination shall be conducted in written interrogatories and cross-interrogatories.

"Second. That in all instances whatever, where witnesses are to be examined, the names and residences of the same shall be furnished in the notice to take testimony."

April 9, 1881, it was—

"*Ordered*, That whenever claimants may be ordered to answer interrogatories under Section V. of original rules, whether on application of Spain or the United States, the cost of such proceeding shall be borne by the commission as one of its general expenses."

March 25, 1876, it was—

Submission of Matters

to the Umpire.

"Ordered, That, whenever a case was to be sent to the umpire, the secretary, before transmitting the record to him, should notify the advocates of the two governments in writing and furnish them a list of the papers contained in the record made up by the secretary, and upon the approval of the list by both advocates, or, in the event of their disagreement, by the commissioners or either of them, the record should immediately be transmitted to the umpire, but not otherwise."

November 13, 1880, with the consent of both advocates, the following additional rules were offered, read, and adopted:

"I. The additional rule adopted by this Commission on the 25th day of March 1876 is hereby rescinded.

"II. Hereafter, as soon as the evidence in any case shall be closed on both sides, and all the evidence in said case shall be printed, it shall be the duty of the Secretary to make up six copies of the printed record to consist of: 1st, the memorial (in both languages) and exhibits; 2nd, all evidence in chief for claimant; 3rd, all evidence for defense; 4th, any evidence in rebuttal; 5th, any printed motions or other interlocutory proceedings in the case.

"The Secretary shall thereupon serve a list of the papers included in said record upon the advocate of each government, and if no defect in the said record be shown by either advocate within four days from such service, it shall be the duty of the secretary to page the record continuously from beginning to end, and to furnish a copy to each advocate, and to each arbitrator, and to retain the two remaining copies in the office of the Commission; and on the date of said distribution he shall enter the fact of such distribution, under the title of the case, in the docket of the Commission, and thereupon the argument shall begin.

"III. Within three weeks after the date of the distribution under the preceding rule, the brief of the advocate of the United States for the claimant shall be placed in the hands of the printer, and when the same shall be printed and filed in the office of the Commission with the secretary the time of the advocate of Spain for filing his brief shall begin to run, and he shall have three weeks in which to put his brief in the hands of the printer, and when returned to him and filed, in the office of the Commission with the secretary, the time of the advocate of the United States for filing his closing brief shall begin to run; and within three weeks from that date he shall place his brief in the hands of the printer, and when the same shall be printed and filed in the office of the Commission with the secretary, the case shall be deemed closed, and no further or other brief shall be filed by either party for the case before the arbitrators, unless, upon application filed in the office of the Commission, the Arbitrators, either in vacation or at a regular session, shall grant leave to file an additional brief in reply to the last one filed.

"When the argument shall be upon a motion to dismiss, demurrer or other suggestion, when the affirmative rests with the advocate for Spain he shall have the right to open and close the discussion; and no brief or argument shall be filed after the closing brief, except upon application and leave granted as above provided.

"When on disagreement between the arbitrators a case or question in a case shall be referred to the Umpire, the course of proceeding with regard to the argument shall be the same as provided in this rule for arguments before the arbitrators, *mutatis mutandis*.

"IV. When on disagreement between the arbitrators a case, or any question in a case, shall be referred to the Umpire, the secretary shall notify the advocates when the record is complete, and the said record shall be open to objection during four days from such notice; and if such objection cannot be solved by the advocates, it shall be laid before the arbitrators to decide, and, in case of their disagreement, the objection and what it is founded on shall go to the Umpire with the case, to be by him disposed of. When the record shall be then completed the arguments shall be filed with the secretary of the Commission in the same manner and under the same regulations as are provided for arguments before the arbitrators, and on the filing of the last argument they shall be forthwith sent with the record to the Umpire and no further argument shall be allowed, unless upon application made and leave granted as hereinbefore provided.

"In all cases heretofore referred to the Umpire, in which no printed argument for the use of the Umpire has yet been filed, the present rule shall operate from the date of the taking effect of these rules, when the delays for filing printed arguments shall begin to run; and in cases where printed arguments for the use of the Umpire have been filed, the delay for filing a reply or a closing argument shall begin to run from the date of the taking effect of these rules.

"The Secretary shall make up the record for the Umpire as for the arbitrators, adding what comes into the record after submission to the latter, and completing the paging.

"V. In any case, whether before the arbitrators or the Umpire, the time for filing briefs may be enlarged by the arbitrator of the government whose advocate requests it (and, in the absence of such arbitrator, by simple request of the advocate to the Secretary of the Commission), provisionally until the next meeting of the Commission, and may be then further enlarged by concurrence of both arbitrators.

"VI. If any brief on behalf of either party be not filed within the time allowed by these rules, the other party may file his brief, and if he files none within the prescribed time the discussion shall be considered as closed, and it shall be the duty of the Secretary to enter in the docket of the Commission, as of course, that the case is submitted for decision, and to give notice to the arbitrators or the Umpire, as the case may be.

"VII. These additional rules shall take effect on the 1st day of December next."

December 16, 1871, Mr. Durant, the agent
 Taking of Testimony of the United States, in accordance with a
 in Cuba. previous notice given by him, submitted to
 the arbitrators some suggestions touching the taking of testi-
 mony in Cuba. These suggestions were as follows:

"I find on examination and am informed that in many of the cases to arise it will be necessary to take testimony in the Island of Cuba, and

under the rules now existing, as I understand them, it will be necessary in each of such cases to specify the time and place of taking the depositions, as well as the names of the witnesses, and to indicate the name and official title of the officer of the Spanish Government in Cuba before whom the depositions are to be taken. To do this, however, will be a matter difficult if not, in most cases, impossible.

"It will not always be practicable to give the name and title of such officials, nor will it be possible in every instance to give even the names of the witnesses, owing to the changes which may have occurred and the insurrectionary disturbances in some parts of the islands.

"In order to provide for this condition of affairs, the undersigned suggests that a commission be appointed to take depositions of witnesses in the Island of Cuba, to consist of some officer of the Spanish Government and of the consul-general of the United States in that island, who shall together take the depositions of witnesses who may be brought before them, to be used in evidence in all cases pending before this commission.

"The undersigned also respectfully suggests that some time should be provided within which cross-interrogatories may be filed under the provisions of the Rule VII."

June 8, 1872, the arbitrators, on motion of the advocate on the part of the United States, the advocate on the part of Spain assenting, adopted the following order:

"It being suggested to the Commission by the Advocate of the United States, that delays now exist, and have long existed in procuring evidence both documentary and oral, in the Island of Cuba, resulting as the claimants alleged from the want of a proper and sufficient joint authority of the two respective Governments to take depositions of witnesses and call for copies of official documents and papers. Now, in order to provide a remedy for this state of things the Commission do hereby recommend to the respective Governments the appointment of a joint Commission in the Island of Cuba, to be composed of one Spanish and one United States officer, who shall be authorized jointly to take depositions of witnesses on oaths by them administered or by a judicial officer of the place in their presence, at such times and places as to them may seem meet; and shall be authorized on the application of the claimants or their attorneys to call for copies of all such official documents and papers as may in their judgment be necessary in any case before this Commission.

"It is further—

"*Ordered*, That the Arbitrator on the part of the United States do transmit a copy of the above order to the Honorable Hamilton Fish, Secretary of State of the United States, and that the Arbitrator on the part of Spain do transmit a copy of the above order to Admiral J. Polo de Bernabe, envoy extraordinary and minister plenipotentiary of Spain in the United States."

September 28, 1872, the arbitrators, on motion of the advocate of the United States, the advocate on the part of Spain assenting, ordered that the running of the time allowed to claimants for taking testimony be suspended until the further

order of the commissioners, to be made when the arrangements, then in course of adjustment between the two governments, should have been completed for the taking of depositions and the procuring of evidence in the Island of Cuba. A similar order was also made in regard to the time allowed for the taking and filing of proofs on the part of Spain.

December 30, 1872, Mr. Fish, as Secretary of State of the United States, inclosed to Mr. Henry C. Hall, vice-consul-general of the United States, as the representative of the United States on the subcommission to take testimony in Cuba, some instructions prepared by Mr. Durant, the agent of the United States before the mixed commission, and dated December 23, 1872. With these instructions Mr. Fish also inclosed a copy of the agreement of February 12, 1871, and a copy of the rules of the commission thereunder.¹ The instructions were as follows:

"A Memorandum of General and Special Instructions for the guidance of H. C. Hall, Esq., Vice-Consul General of the United States at the port of Havana, in the discharge of the duties of his appointment as member on behalf of the United States of the Sub-Commission constituted by the Governments of Spain and the United States to facilitate the taking of depositions and securing documentary and other evidence in the Island of Cuba in support of claims now pending or hereafter to be instituted before the Commission sitting in the City of Washington, D. C., under the agreement between the two governments of 12th February, 1871.

"1°. Mr. Hall should without delay seek an interview with the Spanish Sub-Commissioner and come to an understanding with him as to the place at which the meetings of the Sub-Commission shall be held; as to the proper modes of proceeding to be had. He should see that a declaration may be entered in the minutes or journal of the Sub-Commission declaratory of the fact that the Sub-Commission is organized and ready to proceed to business, of which fact immediate notification should be given to the Department of State of the United States. He should see that such rules are adopted for the despatch of business as the local circumstances and manners and custom of the country may render possible or necessary.

"2°. The exigency which gave rise to the constitution of the Sub-Commission must be kept steadily in view, namely, the protracted delays amounting to a refusal to act, with which applicants for documentary evidence to support claims pending before the Commission were met by officials of the Spanish Government in Cuba, and the state of alarm and trepidation which pervaded, as was alleged, the minds of witnesses whose testimony it was likely would be required to such an extent as to render them reluctant to come forward to give their evidence. It will be the duty of Mr. Hall, then, to concert such measures in conjunction with his associate Señor Don Antonio Batanero, who will undoubtedly display the

¹ MS. Dom. Let. XCVII. 116.

best disposition, as will tend to restore to all who are called upon to testify a complete state of confidence, founded on the dignity and good faith of the Spanish Government as well as on that of the United States to afford them every species of protection.

"3°. Among the duties of the Sub-Commission to be called to the attention of Mr. Hall shall be that of taking down, or causing to be taken in writing, the depositions of all such witnesses as may be designated to the subcommission for examination, in every case by a Commission or other formal order addressed to them for that purpose by the Joint Commission sitting at Washington; and that of executing all such other orders in relation to claims as may be issued to them from the Commissioners at Washington and of their action to make due and proper return to the Joint Commission here.

"4°. Mr. Hall will also bear in mind that it shall in like manner be the duty of the said Sub-Commission to make in due form requisitions upon the proper officer of the Spanish Government in Cuba for duly authenticated copies of any and all documents which may be required by the Joint Commission at Washington for the investigation and decision of any claim existing before it, and to forward said copies without delay to the Commissioners here.

"5° Also to ensure such action of the Sub-Commission as may, whenever in their opinion it shall be necessary, procure without special order to that effect from this Commission a duly authenticated copy of any document which they may deem important or necessary in any case pending before the Commission, and forward the same to the Commission here.

"6° It should also be suggested to Mr. Hall to report to the Department, so soon as sufficient progress shall have been made with the business of the Sub-Commission, as to enable him to form a prudent judgment what effect the functions and existence of the Sub-Commission may have had upon the disposition of witnesses on behalf of claimants and also to make known to the Department the disposition displayed by the proper officers in complying with the requisitions of the Sub-Commission for copies of documents or other information required for the use of the Commission here.

"THOMAS J. DURANT, *Adv. U. S.*

"WASHINGTON, D. C., 23 December 1872."

January 30, 1873, the mixed commission at Washington adopted, with reference to the subcommission in Cuba, the following rules:

"A Sub-Commission having been duly appointed under the authority of the two nations, for the purpose of examining such witnesses as may be adduced before them by either party in the respective claims pending before this Commission, and for the authentication of official documents, at the city of Havana in the Island of Cuba, the following general order is made by this Commission.

"I. All the testimony taken before the said Sub-Commission shall be subject to the general provisions and directions contained in the regulations heretofore adopted and published by this Commission, and especially to the provisions of S. VII. of those regulations.

"II. In each case in which testimony is to be so taken, without further order of this Commission, a copy of the notice, interrogatories, and cross-interrogatories, or statements which may have been filed in lieu thereof, together with printed copies of the memorial and exhibits in the English and Spanish languages, shall be by the Secretary of this Commission sealed in one package and directed to the members of the said Sub-Commission jointly, at the city of Havana, in the Island of Cuba, and delivered to the Secretary of State of the United States, to be forwarded to the said Sub-Commission.

"Where authenticated copies of documents are required, a motion, in writing, sufficiently describing such document or documents, shall be filed by the Advocate of the Government, on whose part such motion shall be made, and no objection thereto having been interposed by the advocate on the other part within ten days after such motion shall have been filed, it shall be the duty of the Secretary of this Commission to enter upon the record that such motion is granted, and thereupon to transmit a copy of such motion and the order thereon to the said Sub-Commission in like manner as is above provided with reference to the examination of witnesses."

February 15, 1873, the commission received and ordered to be spread upon the records a communication from the sub-commission in Havana, dated February 1, accompanied with an official certificate of its organization. This certificate recited that on January 30, 1873, "Mr. Henry C. Hall, vice-consul-general of the United States of America, and Don Antonio Batanero, a magistrate of the Real Audiencia Pretorial, together with Don José Amor, secretary and notary public, met at No. 1 Aguiar street in the city of Havana," and after attending to the necessary preliminaries declared the subcommission to be organized. The subcommission then adopted the following rules:

"First. That in order to insure the requisite dispatch of all matters coming before the Sub-Commission and taking into consideration its international character, which does not permit of the application of certain rules in force in the Province that might tend to retard its proceedings, let a communication be transmitted to the Supreme authority representing the Superior Political Government of the Island, setting forth the convenience that would result from the issuance of an order addressed by said superior authority to the officers having charge of the various public offices of the different branches of the Government, to the effect that whenever they shall receive communications from the Sub-Commission, they shall give them all due preference and have them answered as soon as possible; that they shall forward to the said Sub-Commission any papers or information for which it may make application, and that in cases where the said Sub-Commission may deem it necessary to personally attend to the procuring of the proofs which they may be required to furnish, they shall be allowed to examine, in the same office in which they may exist, any government or judicial documents, except those relating to causes

"en sumario" so that the Notary of the Sub-Commission may be enabled to take the copies of such documents that may be required.

"Second. That the correspondence of the Sub-Commission shall, with all proper precaution, be sent to the care of the Department of State at Washington, and that for such as may be required from or addressed to different parts of the Island, a box shall be obtained in the General Post Office.

"Third. That when the witnesses to be produced are Spanish or Americans, their depositions shall be taken in their own respective language, which shall be in continuation translated into English or Spanish as the case may be; and with regard to witnesses of other nationalities, the practice of the tribunals of the Island shall be adhered to.

"And that in order to facilitate the attendance of all witnesses and to enable them to declare freely, the Commissioners shall in each case adopt such precautions as may be most proper, especially in cases where a witness may refuse to appear, which it is not probable will happen.

"Fourth. That the proceedings had on account of any request or order emanating from the Mixed Commission at Washington, shall be written out in continuation of such request or order, and the testimony and other papers which may be received or presented by the parties interested, shall be attached to the said proceedings in the language in which they may be so presented, and authenticated in the form observed in the country, and if possible at the expense of the said interested parties; also that before the request or order be returned, a copy thereof and of all the papers thereunto annexed shall be placed on the records of the Sub-Commission.

"Fifth and last. That if any difficulty should arise for which provision has not been made either in the instructions received or in these regulations, it shall be decided in accordance with the rules adopted by the Mixed Commission at Washington on the 1st of July 1872, and if these do not provide for its solution, then by the joint agreement of the Commissioners, and these failing to agree it shall be referred to the Commission at Washington."

February 11, 1873, the subcommission adopted various resolutions, among which were the following:

"That the depositions of witnesses, in accordance with the royal decree of the thirtieth of January one thousand eight hundred and fifty-five, and in consideration of the fact that the rules of the Commission provide that such depositions shall be taken according to the laws, usages and customs of the country, shall be taken upon notice to the proper officer of the Ministerio fiscal, who is the advocate of the Government in all cases in which the same is interested, and that such notice, as provided by the said rules, shall, together with a copy of the interrogatories, be given him twenty-one days before the examination is to take place, so as to give him an opportunity to file cross-interrogatories, or cross-question the witnesses at the time of making his declaration.

"It was also agreed that, as, according to the laws of the country, and especially the said royal decree of the thirtieth of January one thousand eight hundred and fifty-five, no judge is competent to administer oaths and take the depositions of the witnesses in cases which do not come within his jurisdiction, and further, as the royal order of the twelfth of October

one thousand eight hundred and seventy-two, and also the instructions received by Mr. Hall, invest the Sub-Commission with power to administer oaths and take depositions of witnesses, in all cases where witnesses are to be examined before the Sub-Commission, the Commission itself shall, as the law provides, administer oaths to such witnesses and take their depositions; thus acknowledging that the Commissioners, the one on the part of Spain as a Magistrate and the one on the part of the United States as Consul of that country, have power to administer oaths.

"Finally. That in order to legalize and authenticate all documents and declarations in accordance with the laws and usages of the country, which may be procured through this Sub-Commission, the Superior Political Government, at the request of the Commissioner on the part of Spain, and with the consent of the other on the part of the United States, has appointed Don José Maria Conte, a lawyer of this capital city, to act as legal Secretary to this Sub-Commission, in acceptance of which appointment he herewith affixes his signature in connection with the respective Commissioners; to each of whom a copy hereof is ordered to be given and another forwarded to the Mixed Commission at Washington, as I, the recording Secretary, certify.

"HENRY C. HALL.

"ANTONIO BATANERO.

"JOSÉ MARIA CONTE.

"JOSÉ AMOR."

The subcommission, when fully organized, established its offices at No. 17 Aguiar street, in Havana. It gave due notice of its organization to the superior political government of the island, which in turn gave notice of the facts to the authorities and the public generally, and instructed the authorities to assist the subcommission to the utmost of their ability in the discharge of its duties.

Time Allowed for Ob- March 19, 1881, the arbitrators adopted the
taining Evidence. following amendments and rules:

"I. That rule 7 be amended by striking out 'twenty-one days before the day named for the examination,' and inserting 'ten days before the day named for the examination,' with the addition of one day for every 500 miles of distance from Washington to the place of examination, and thirty days thereafter for the examination of the witnesses and return of the depositions, subject to the discretion of the arbitrators to extend the time on a proper showing.

"II. Copies of official documents in the archives of the Government of the United States must be applied for by order of this Commission on motion of the party requiring them, within ten days from the filing of a claim or of the closing of testimony on either side, when after such closing any copies may be required; and thirty days will be allowed the party applying for such copies from the time the order of this Commission shall have been communicated to the proper Department by the Secretary of the Commission, but this time may be enlarged by the arbitrators on a proper showing.

"III. Witnesses residing in Cuba or other Spanish provinces will be examined under the notice and forms prescribed by existing rules; provided, however, that when ninety days shall have elapsed from the date of the forwarding of the order and papers by the Secretary of this Commission to the Sub-Commission in Havana, for taking the depositions of witnesses on behalf of claimants, and no return shall have been made and no proper showing offered by the advocate for Spain, for an extension of time or for the failure to examine the witnesses, the claimant or his duly authorized attorney may then put in an affidavit of the substantial facts proposed to be proved by the witnesses, subject, however, to cross-examination by the advocate for Spain, which affidavit the Commission may consider as if the facts had been sworn to by the witnesses. But if at any time before the decision of the case shall be made by the arbitrators the depositions of such witnesses shall arrive, then such depositions shall be used by the arbitrators instead of the aforesaid affidavits.

"IV. Copies of documents from the archives of the Spanish authorities in Cuba will continue to be procured, under the notice and forms prescribed by existing rules; provided, however, that when ninety days shall have elapsed from the date of the forwarding of the order and papers by the secretary of this Commission to the Sub-Commission in Havana for copies demanded by claimants, and no return shall have been made and no proper showing offered by the advocate for Spain for an extension of time or for the failure to procure the documents, the claimant or his duly authorized attorney may then put in an affidavit of the substantial facts proposed to be shown by the said documents, subject, however, to cross-examination by the advocate for Spain, which affidavit the Commission may consider as proof instead of the copies asked for; but if, at any time before the decision of the case by the arbitrators, such copies shall arrive, they shall be used by the arbitrators instead of the affidavit of the claimant or his attorney."

February 25, 1881, the arbitrators, for the purpose of carrying into effect the additional article, concluded February 23, 1881, to the agreement of February 21, 1871, adopted the following rules:

Rules as to Additional
Article of 1881.

"I. The Secretary shall prepare and keep a trial calendar, in which he shall enter as ready for hearing before the arbitrators all cases in which the testimony on both sides is closed and printed, entering the same in the order in which the several cases shall have been so made ready. Upon entering any such case upon the calendar, the Secretary shall forthwith furnish to each of the arbitrators and advocates a complete copy of the record paged continuously.

"Ten days after any case shall have been entered on the calendar, the advocate for the United States may call up the case for argument, and the respective advocates shall thereafter argue the same orally or in print, or both. The Counsel for the United States shall in every case file in print a summary of the items of the claim and amount of money claimed for it.

"II. All motions made by either advocate which he desires to argue and to have determined by the Commission shall be filed in print, and on

being filed shall be entered upon the calendar to be kept by the Secretary and called the motion calendar. Every motion shall be called for hearing three days after being so entered.

"III. The additional rules adopted on the 13th of November, 1880, are thus amended:

"Strike out the last paragraph of Rule III., beginning with the word 'when,' and ending with the word '*mutandis*.'

"For the first paragraph of Rule IV., substitute the following:

"When, on disagreement between the arbitrators, a case or any question in a case shall be referred to the Umpire, the Secretary shall at the expiration of one week thereafter forward the record to the Umpire, with any arguments which may have been, since such reference, filed in his office."

Special Orders. June 8, 1872, on motion of the advocate of the United States, the Commission—

"*Ordered*, That the Secretary issue a communication addressed to the Collector of the Port at Ragged Island, authorizing him to take the depositions under oath of all such witnesses as may be produced before him on behalf of the claimants in the cases against Spain of Charles H. Campbell, No. 94, and Augustin A. Arango, No. 95, on interrogatories and cross-interrogatories annexed to said commission and of the same to make due return to this Commission."

September 28, 1872, the commission made the following order:

"*Ordered*, That the Secretary communicate to the Department of State of the United States the request of this commission that the Department may ask from the Government of Spain duly authenticated copies of the following described documents, to be used as evidence in the case of Paulina A. Mestre, No. 55, and alleged to be now existing in the archives of the proper offices of the Spanish Government in the Island of Cuba, to wit: "

(Here followed a list of seven documents.)

On January 11, 1873, on written application of the advocate for Spain, and for the reasons therein set forth, it was ordered that the memorialists in the cases of Charles H. Campbell, No. 94, and Augustin A. Arango, No. 95, submit themselves for cross-examination at the times and places designated in the application.

Special Orders as to On June 14, 1873, the commission agreed the Subcommission. upon the following:

"In all cases of examination of witnesses before the sub-commission, the claimant may be present, and may be represented by his advocate or attorney, or both, who may examine the witnesses of the claimant, on any matter pertinent to the notice given to the advocate of Spain, or pertinent to the matter of the interrogatories, when such shall have been filed in writing, or pertinent to any new matter that may be brought out on cross-examination, and may also be present for the purpose of cross-examining any witnesses examined on behalf of the Government of Spain.

"The Government of Spain may in like manner be represented before the honorable sub-commission for similar purposes of examination and cross-examination."

A copy of this rule was ordered to be transmitted to the subcommission in Havana.

Under date of July 15, 1873, the journal of the commission contains the following entry:

"The commissioners having received a communication from the Hon. Sub-commission in Havana to the effect that a difference of opinion had arisen between the said sub-commissioners in the claims of Lucien Lavigne and of William A. Jones, as to whether a commission to take depositions in said case could be executed by a judicial officer of Spain at Santiago de Cuba, or whether the sole authority to execute commissions for taking depositions did not pertain to said sub-commission, and whether all witnesses to be examined in claims before this commission, and residing in the island of Cuba, should not appear before said sub-commission at Havana; and the commission having considered the difference of opinion in view of the rule VII. and the concluding paragraph thereof, which is in the following words:

"Every deposition taken, either in the United States or in Spain or her possessions, shall be taken before some officer competent to administer judicial oaths under the laws of the place, whose judicial character shall be duly authenticated according to said laws; and each witness shall state whether he is interested, directly or indirectly, and how, in the matter of the claim, and whether he is agent or attorney for any party interested, directly or indirectly, therein'—

"Do now declare: That the witnesses in the said claims of Lucien Lavigne, and of William A. Jones, as well as in all other cases, when necessity may arise, residing out of the city of Havana, may be examined on due notice to the opposite party, before any officer competent by the laws of Spain, to administer judicial oaths."

March 25, 1876, the commission—

Special Orders as to
Printing and Trans-
lations.

"Ordered, That the secretary shall cause to be printed, immediately on the filing thereof, any evidence filed on behalf of any claimant, or on behalf of Spain, and shall observe such a system of continuous paging that the evidence for claimant and the evidence for Spain, each beginning with page 1, shall be paged through until the evidence shall be closed by the respective parties.

"Ordered, That whenever any case shall be referred to the umpire for the decision of questions on which the commissioners shall have disagreed, the secretary shall forthwith make up a complete record in said case, and, before transmitting the same to the umpire, he shall notify the respective advocates, in writing, that a record in such case is about to be sent to the umpire, furnishing at the same time a list of the papers contained in the record so made up by him, and upon the approval of said lists by the advocates of both governments, or, in the event of their disagreement, by the commissioners, or either of them, the record shall be immediately transmitted to the umpire, and not otherwise."

March 16, 1878, the commission—

“Ordered, That henceforth it shall not be necessary to translate the merely formal parts of records coming from Cuba or elsewhere, such as headings, certificates, etc.”

January 10, 1872, the secretary presented to the commission letters from certain claimants asking for an extension of time for the taking of depositions. The commission declined to receive the petition except through the advocate of the United States, on whose subsequent presentation it was granted.

The arbitrators also refused to make orders in cases in which memorials had not been filed.

May 31, 1873, it was ordered that a large number of cases be dismissed unless on or before the 11th of the following September the manuscript memorial and printed copies prescribed by the rules should be filed in the office of the commission. The time specified in this order was extended in a number of cases in which it was alleged that notice of the order had not been promptly sent. It appeared that the secretary had not kept any memorandum of the sending out of the notices, and the commission, in the absence of evidence of that character that notice had been sent, thought it only just to grant the extension.

September 6, 1873, on the discovery that a person who was employed in the office of the secretary as an assistant, and who had in that capacity had access to all the papers of the commission, was acting as counsel for various claimants, the commission, deeming such a relation incompatible with an official function, ordered that the person in question should no longer be admitted to act as special counsel in any case then or thereafter pending before it, and that notice of the order should be given to him and to the parties for whom he appeared.

In several cases questions of procedure were formally argued before the commission and formally decided by it. In the case of Young, Smith & Co., No. 96, after a decision by the umpire, Baron Blanc, the claimants asked the arbitrators to allow interest on the amount awarded, the umpire having said nothing as to interest. The arbitrator for Spain, the Marquis de Potestad, took the ground that it was “not competent for the arbitrators

Finality of Umpire's
Decisions.

to enlarge or diminish the award of the umpire in any case, and still less in a case where, as in this, a matter of claim has been urged before him and not admitted." The arbitrator for the United States, Mr. Segar, however, though the question of interest was argued in the papers before the umpire, thought that the latter might have been misled by his (Mr. Segar's) opinion, in which interest was not allowed nor mentioned, owing to a mistake on his part as to the law in Cuba on the subject. A motion was then made to refer the case back to the umpire, for correction of the amount stated in his decision, and the arbitrator for Spain, on the following ground, concurred in granting the motion:

"The arbitrator for the United States has suggested that he made a mistake in his opinion, and as the umpire refers to and adopts the amount computed by him, he may have misled the umpire.

"Under these circumstances the undersigned is willing, as an act of courtesy to his colleague, and lest there should be a failure of justice from any mere mistake, to unite in the following order:

"*Ordered*, That the secretary be directed to transmit to the umpire a copy of his own opinion in this case, and of the letter of the American arbitrator addressed to the advocate for the United States, dated January 10, 1880, and filed by the latter in the commission on the same day, and also to return to him the record which was before him in this case, with such additional argument as either advocate may think proper to address to the umpire on the point now at issue, in order that the umpire may have the opportunity to correct the amount stated in his decision, if he should find that he has made the mistake suggested."

Baron Blanc, when the case thus came before him again, declared that "whatever inadvertence there may have been on the part of the American arbitrator, there was none on the part of the umpire;" and that in not allowing interest, a claim for which was distinctly advanced on the part of the memorialists, he had acted on full consideration. He therefore, for reasons which he now set forth at length, declined to increase his award. Among the reasons thus set forth were the facts (1) that the claimants had, before they brought their claim before the commission, refused to accept a decree of the captain-general of Cuba, ordering the payment to them of the amount found by the commission justly to be due to them, and (2) that they had been guilty of delay in the prosecution of their claim, far in excess of what was a reasonable period for closing claims before the commission.

The advocate for the United States then filed a paper addressed to Baron Blanc, as umpire, in which he called the

latter's attention to certain alleged errors of fact in his statement, (1) as to the amount ordered by the captain-general to be paid to the claimants, and (2) as to the alleged delay of the claimants in pressing their suit before the commission to a conclusion. On the ground of these alleged errors, the advocate for the United States subsequently moved before the arbitrators for a second rehearing of the question of interest.

The arbitrator for Spain, who was now Mr. Brunetti y Gayoso, held that the question had been decided by the umpire, and that his award must be accepted as final and conclusive. The arbitrator for the United States, now Mr. Stewart, concurred in this view, and gave the following reasons:

"The distinguished gentleman to whom as umpire said paper was addressed, had already sent in his resignation of the position of umpire to the Spanish minister and the Secretary of State of the United States, so that said paper, so addressed to him by the advocate for the United States, upon the errors of fact stated to be shown in his decision, and consequent error in the true application of equity in said award, and his review thereof, remains, and must continue to remain, unanswered. * * *

"While I do not doubt the power of this commission to grant rehearings in the exercise of a sound discretion for sufficient cause shown, yet it must be a judicial discretion, guided to some extent by precedent, and governed by public law.

"It is well settled that a court of chancery will, under certain circumstances, correct its own mistakes by motion, petition, or bill of review; and that 'orders and decrees in chancery may be altered, revised or revoked during the term at which they have been passed, on motion or by petition; but after the term the party can only obtain relief by original bill or bill of review.' (*Burch v. Scott*, 1 Bl. 112.)

"The reversal of its own judgment by the Supreme Court of the United States, referred to in claimant's brief, was upon the rehearing of a case 'they had but just decided;' and Sir Edward Thornton, as umpire in the Mexican Claims Commission, is cited as having reversed his own former ruling in *Schreck v. Mexico* after a patient rehearing, and made an award in favor of claimant. In each of these instances the tribunal reviewing and reversing its own decisions was not only the same, but the membership was the same. The judges of the Supreme Court who had given premature judgment, and the umpire who had acted similarly, each after further consideration altered his opinion and so expressed himself within a reasonable period, before execution could be had in one instance, and before the term closed in the other. Every court has control of its judgments until the end of the term during which they are rendered.

"The case presented for the consideration of this commission is different from either of these. An award has been made and entered up on the docket by the arbitrators and the umpire authorized to make the same, and possessing every requisite of a legal award.

"It is consonant to the submission; it is certain; it is possible to be performed; it is not contrary to law or reason, and it is final.

"It is an award made after a rehearing upon the precise question for which a second rehearing is now asked. * * *

"By a singular combination of circumstances it has happened that the entire personnel of this commission has been changed. Neither of the present arbitrators nor the umpire has heard or passed upon the questions involved in the claim as originally presented. It is true that this commission is a continuing body, and that changes in its individual membership ought not to affect the rights of parties to suits before it; but it is also true that no board of arbitration can properly pass upon the payment of interest unless it should pass upon the payment of the principal sum upon which the interest is sought to be charged. The arbitrators who heard the case originally were divided upon the question of allowing the principal sum awarded. It was by the action of the umpire that the final award was made. We are not asked to rehear the case, or, in terms, to set aside the award. We are asked to accept the award as a finality as far as it goes, and, without altering the amount or reviewing its equities, to add interest thereto. There is a lack of mutuality in such a proceeding which fails to commend it to judicial discretion. * * *

"The Supreme Court of the United States has decided that 'if an award is within the submission and contains the honest decision of the arbitrators, after a full and fair hearing, a court of equity *will not set it aside for error in law or fact.*' (*Burchell v. Marsh*, 17 H. 344.)

"There is alleged error of fact in the statement of grounds for reaffirming his award by the umpire in this case, but it does not follow that these were the only grounds for his award; inasmuch as he distinctly states that 'the evidence in his judgment fails to establish the right of the claimants to any amount beyond the estimated value of the cargo as admitted by the authorities of Cuba. To that amount, less the freight money paid, there should be an award in their favor, as found by the arbitrator of the United States, namely, \$13,600.'

"There is no lack of precision in the terms employed by the umpire in making his award; it appears to contain his honest decision after a full and fair hearing, and therefore belongs to that class of awards which a court of equity will not set aside for error in law or fact.

"I am therefore of opinion that the motion for a rehearing on the question of interest ought to be overruled."

In the case of *F. M. de Acosta y Foster*, No. 118, the arbitrator for Spain, as an act of courtesy, consented to reopen a case that

had been dismissed by the arbitrators, such reopening having been requested by the arbitrator for the United States on the ground that his first examination of the case was hasty. The case being reopened, both sides produced new evidence, and after the usual proceedings the case was again submitted to the arbitrators on January 29, 1881. The arbitrator for the United States, finding in the evidence that the claimant, who was born in Cuba, was the natural son of an American woman by a Spanish father, requested by a written

notice filed April 23, 1881, the views of the respective advocates on the question whether the son did not take the nationality of his mother. May 21, 1881, Mr. Durant, the advocate for the United States, filed the following motion:

"And now comes the advocate of the United States, Thomas J. Durant, and suggests to the commission that, by reason of the written notification to the advocates of the two governments placed on file in this case by the arbitrator on behalf of the United States, on Saturday, the 23d of April 1881, it is necessary to take further evidence in this case. He, the said advocate of the United States, now moves that the order of submission heretofore made in this case be withdrawn and the case opened for further evidence on both sides."

The arbitrators having disagreed as to this motion, the advocate for the United States, June 20, 1881, made the following additional motion:

"And now comes the advocate of the United States, Thomas J. Durant, and suggests to the arbitrators that this case was submitted to them without due advisement for decision; that on more careful examination he finds the evidence in certain respects to be defective, more particularly as to the rents of the real property in Havana and the value of the personal property, and he further suggests that the interest of the claimant should not be allowed to suffer from the want of due consideration of his counsel in submitting his cause, but that justice requires it should be restored to the docket for further evidence. Wherefore the advocate aforesaid prays that the arbitrators may order this case to be restored to the docket for further evidence."

The arbitrators having also disagreed on this motion, their differences were submitted to the umpire, Count Lewenhaupt, who decided that both motions should be granted.

Umpire's Functions. After this decision was rendered, the advocate for the United States presented a petition for a rehearing, which was transmitted by the secretary of the commission to the umpire. On April 25, 1881, Count Lewenhaupt addressed a reply to the secretary, in which he stated that he was not, in his opinion, authorized to take any action with regard to a petition which did not seem to have been transmitted to him by order of the arbitrators. "The functions of the umpire," said Count Lewenhaupt, "are limited by article 1 of the agreement to the decision of questions upon which the arbitrators are unable to agree, and which they submit to him for his decision."

In the case of Alfred G. Compton, executor of Ana Thompson, No. 39, one of the successive umpires held that damages were due for the deterioration that embargoed property always suffered. The advocate for the United States maintained that

the decision thus made must be considered as the settled law of the commission. Count Lewenhaupt, the last umpire, held that as by Article III. of the agreement he was "bound to impartially hear and determine to the best of his judgment, according to public law and the treaties in force between the two countries and these present stipulations," and as there was no stipulation that an umpire was bound by the decisions of previous umpires, he was not so bound; and that inasmuch as there was no evidence in the case before him that the injuries for which indemnity was asked "were caused by any specific act of the Spanish authorities," they must be held to be "the result of use, accident, and the like," and that no indemnity was due on that account.

December 23, 1878, Baron Blanc, the umpire, addressed to the arbitrators the following communication:

"The undersigned, umpire of the commission of the United States and Spain, having recently received some communications from the advocates of the said governments about the claims submitted to the commission of arbitration, must state that his office as umpire includes only the cases which, having been a matter of disagreement between the arbitrators, may be submitted to him by the arbitrators themselves; and that for the introduction of a case, and even for any communication concerning a case already submitted to the umpire, he is not bound to receive or answer any communication, except through the commissioners of the governments of the United States and Spain."

April 6, 1878, Baron Blanc rendered the following decision:

"Mr. Thomas J. Durant, advocate of the United States, has made application by his communications of the 14th and 30th of last March, to the undersigned, umpire of the commission of the United States and Spain, for a review and reconsideration of the decision of the precedent umpire, M. Bartholdi, in the case of *Leopold A. Price v. Spain*, No. 6.

"Such application must be dismissed on the grounds hereafter stated:

"1. The office of the undersigned umpire includes only the cases which, having been a matter of disagreement between the arbitrators, may be submitted to him by the arbitrators themselves. Such is not the aforesaid case, which is considered by the arbitrators, as Mr. Thomas Durant is well aware, to have been irrevocably settled by the decision of M. Bartholdi.

"2. For the introduction of a case, and even for any communication concerning a case already submitted to the umpire, it has been understood by the governments of the United States and Spain that the undersigned umpire shall not be bound to receive or to answer any communication except through the commissioners of the said governments.

"3. As a rule, the undersigned umpire does not consider himself empowered to review the formal decisions of the precedent umpires, such decisions being essentially definitive, according to international usages."

May 21, 1881, the advocate for the United States, referring to article 3 of the agreement of February 12, 1871, made a motion before the arbitrators for an order of the commission

“recognizing his right to appear before the umpire in person or by written or printed application, and requesting the umpire to recognize this right in the case above named.” Mr. Stewart, the arbitrator for the United States, June 3, 1881, delivered the following opinion:

“The arbitrator for the United States, while agreeing with the learned umpire that his functions are limited by Article I. of the agreement to the decision of questions upon which the arbitrators are unable to agree and which they submit to him for decision, does not regard this as precluding him from correcting and reviewing or granting a rehearing upon any of his own decisions, if in the exercise of his judicial discretion he should think proper to do so; a right exercised by Sir Edward Thornton as umpire in the Mexican Claims Commission in the rehearing of *Schreck v. Mexico*, by the Supreme Court of the United States, and all other judicial tribunals; and respectfully refers to the views heretofore expressed by him in No. 96, No. 130, and No. 131.

“The advocate for either government, under Article III., of 1871, has the right to appear before the umpire either in person or by written address for any purpose whatever, which in said advocate's opinion may be necessary to promote the interests of the party whom he represents before this commission, whose cases or questions arising therein may be referred by the arbitrators to the umpire. I do not understand the umpire to have denied this right, but to have declined action upon the petition sent to him, on the ground that it did not seem to have been transmitted by the order of the arbitrators, and that his functions were limited to the decision of questions upon which the arbitrators were unable to agree and which they submit to him for decision. As I do not view a motion for a rehearing as transcending this limit, it follows that such a motion and the reasons to sustain it must be addressed to him either by the advocate for Spain or the advocate for the United States, and such a motion being an appeal to him for the exercise of a discretionary power, the advocates of both parties would have the same right to appear before him in support of their respective views as at the original hearing.”

The Marquis de Potestad, arbitrator for Spain, delivered the following opinion:

“The agreement of 1871 constitutes a tribunal which, unless on the happening of a contingency therein named, is to consist of only two arbitrators. It is only in the event of an inability on the part of these two arbitrators to agree upon a decision of a question submitted to them that the aid of an umpire is to be invoked; and when the aid of the umpire is thus invoked his only function is to decide the question of controversy which the arbitrators have, on account of disagreement, been unable to decide. The umpire, by the agreement of 1871, is not to act in conjunction with the arbitrators, but as a substitute for them in the particular

question about which the arbitrators are unable to agree, and by virtue of which disagreement the jurisdiction of the umpire thereby attaches to the question. In respect to that question, the umpire becomes, in one sense, a sole arbitrator, and is a new tribunal.

"There is, I am told, a somewhat similar contrivance to be found in the laws of the United States (see sections 693 and 697 of the Revised Statutes of the United States), whereby if in the trial of any suit before two judges of the circuit court of the United States the said judges shall certify that their opinions were opposed upon any question which occurred upon the trial, the question shall be stated under the direction of the judges, and certified during the same term of the court under the seal of the court to the Supreme Court of the United States at its next session for final decision by the said court, and 'such decision in the premises shall be remitted to such circuit court, and be there entered of record, and shall have effect according to the nature of such judgment and order.' * * *

"Whenever the jurisdiction of the umpire has attached by virtue of a certificate of disagreement between the arbitrators, then it is undoubtedly competent for either advocate to present to the umpire such petitions, arguments, or memorials as, in his opinion, shall be pertinent to the question thus pending before the umpire.

"But when the umpire has formulated his decision upon the question or controversy thus submitted to him by the arbitrators, and has transmitted that decision to the secretary of the commission and the decision has been laid before the arbitrators who have directed it to be spread upon the records of the commission, or such decision has been incorporated in their judgment, and an award has been made in conformity thereto, then the jurisdiction of the umpire has been exhausted as to that particular question or controversy, and as to it the umpire has become *functus officio*.

"When a case or claim is in the predicament in which the case of Machado, No. 129, was, after the arbitrators, on August 7, 1880, ordered the case to be stricken from the docket in obedience to the decision of the umpire, transmitted July 13, 1880, no motion or application respecting any feature of that case or claim can be made, excepting on the ground of accident or mistake, to the arbitrators. If the advocate for the United States had presented his application for a rehearing of the case of Machado to the arbitrators on such grounds, and the arbitrators had been 'unable to agree' in disposing of that application, then a certificate of such disagreement must, under the convention of 1871, have been transmitted to the umpire for decision, and thereby the jurisdiction of the umpire would have attached. Then it would have been competent for the advocate for the United States to argue the question before the umpire.

"I have already referred to what I have been informed is a similar arrangement for the conduct of the judicial business of the courts of the United States, and I infer that if the two judges of the circuit court of the United States had certified to the Supreme Court 'the point upon which the former disagree,' and such opinion had been finally decided by the Supreme Court, and its decision and order in the premises had been remitted to such circuit court and there entered of record, the Supreme Court would not entertain a petition or application for a rehearing of the question. That court would probably answer that its jurisdiction had

been exhausted since the record had been sent to the circuit court, to which court any application for a rehearing must be made. I have been referred to the decision of the Supreme Court of the United States in the case of *Browder v. McArthur*, reported in the seventh volume of *Wheaton's Reports*, page 58, in which that court said: 'It was too late to grant a rehearing in any case after it had been remitted to the court below to carry into effect the decree of this court according to its mandate.'

"The view of the relation of the umpire to the arbitrators on one hand and to the respective advocates on the other hand, which has been in this case taken by Count Lewenhaupt, seems to me to have been taken by every umpire in this commission who has had occasion to deal with the question, and notably was taken by Baron Blanc." * * *

The arbitrators having differed in opinion, the matter was referred by them to the umpire, Count Lewenhaupt, who rendered the following decision:

"It is admitted that the only stipulations in the agreement of 1871 bearing on the questions involved in this motion are the following:

"ART. I. ' * * An umpire, who shall decide all questions upon which they shall be unable to agree. * * *

"ART. III. Each government may name an advocate to appear before the arbitrators or the umpire, to represent the interests of the parties, respectively. * * *

"The functions of the umpire are limited by Article I. of the agreement to the decision of questions upon which the arbitrators are unable to agree, and which they submit to him for his decision. The arbitrator for the United States admits that this limitation exists; 'but,' says the arbitrator, 'as I do not view a motion for a rehearing as transcending this limit, it follows that such a motion and the reasons to sustain it must be addressed to him either by the advocate for Spain or the advocate for the United States; and, such a motion being an appeal to him for the exercise of a discretionary power, the advocates of both parties would have the same right to appear before him in support of their respective views as at the original hearing.'

"The umpire is of opinion that the rule generally adopted by courts of arbitration is, that the umpire has no discretionary power to set aside his own decisions; that he has a right to correct clerical errors so long as the decision has not been satisfied, but that an error of judgment cannot be corrected after due notification of the decision; except, if the case be submitted again through the authorized channel. If a petition for rehearing is submitted by the arbitrators, the duty of the umpire to examine the points submitted is the same as if the case had never been before the umpire, and he has to give a decision; but if one of the arbitrators refuses to certify the disagreement, the case cannot again come before the umpire under the agreement of 1871.

"For these reasons the umpire hereby decides that the advocates are authorized to appear before the umpire, in person or by written or printed arguments, memorials, or applications, but that the umpire has no power to decide the petition for rehearing referred to in the above motion, unless the same be certified to him by the arbitrators as a question upon which the arbitrators have been unable to agree."

In 1871 John F. Machado filed a memorial *Identity of Cases.* in which he claimed damages for the embargo of a house by the Spanish authorities in Cuba, for the loss of debts due to him from various parties in the island, and also for the seizure of cattle and horses by the same authorities. December 20, 1873, this case (No. 3) was dismissed for want of prosecution, the "commission reserving to itself the right to reinstate the said case on motion by the advocate for the United States, sufficient causes being shown in support thereof." In 1879 Machado filed another memorial, in which he set forth the restoration of his house in July 1876, and claimed rent and damages for its detention by the Spanish authorities up to that time. This case was numbered 129. In March 1880 the advocate for Spain moved to strike it from the docket, on the ground that it was the same as No. 3. The advocate for the United States contended that the claims were different, and prayed that the motion of the advocate for Spain might be dismissed. The arbitrator for the United States, Mr. Segar, thought that the motion of the advocate for the United States should be granted. He said that the two claims were "not the same;" but the ground on which he chiefly relied was that claim No. 129 belonged to "a recognized class of demands against Spain," namely, "rents and profits and damages on property once embargoed and seized and afterward disembargoed and returned to the owner." He said that it was the settled law of the commission that the return of embargoed property carried with it "the right to rents and profits of every kind and damages, however or to whatever extent inflicted."

The Marquis de Potestad, arbitrator for Spain, pointed out that Machado in his first memorial claimed from the Government of Spain both the value of the house, "the rent of said house during its sequestration by the Spanish Government, and all reasonable expenses he shall have incurred in making application to the Spanish Government for the restoration of his property, or for the value thereof." It thus appeared, said the Marquis de Potestad, that a claim for the very injury set up in memorial No. 129, in 1879, was filed in 1871, and that the commission actually allowed the claimant sixteen months in which to prove his case; that after this indulgence the case was dismissed for want of prosecution, the commission reserving to itself the right to reinstate it, on motion of the advocate

for the United States, sufficient cause being shown; that during six years no such motion had been made, and that "after this lapse of time part of the original claim, with the accretions of time added," had been presented to the commission as a new claim under a new number.

The arbitrators being thus of opposite opinions upon the motion to strike from the docket, the question was referred to the umpire, Count Lewenhaupt, who on July 12, 1880, rendered the following decision:

"The umpire is of opinion that the question whether case No. 3 may be reopened has not been referred; that the question whether this claim No. 129 is a new one, or the same as No. 3, does not depend upon whether the items included be the same in both cases, but that the test is whether both claims are founded on the same injury; that the only injury on which claim No. 129 is founded is the seizure of a certain house; that this same injury was alleged as one of the foundations for claim No. 3, and that in consequence claim No. 129, as being part of an old claim, can not be presented as a new claim under a new number. For these reasons the umpire decides that this case, No. 129, be stricken from the docket."

Danford Knowlton & Co. and Peter V. King & Co., citizens of the United States, presented a claim (No. 97) under the agreement of February 12, 1871, for damages for the seizure by the Spanish authorities in Cuba of the property of a Cuban firm in which the claimants were special partners. The arbitrators dismissed the claim for want of jurisdiction, on the ground that the Spanish authorities had a right to seize the property in which the claimants were interested; that "application to the said authorities or to the courts of justice of the Island of Cuba was the proper course for them to pursue, and in fact they did pursue such course;" that "no undue delay in deciding upon the claimant's rights of property" had been shown, nor "any proof whatever of a denial of justice on the part of the Spanish authorities or of the Spanish tribunals;" and that the claimants should "prosecute their claim before the local tribunals in the Island of Cuba," which afforded "a full and complete remedy for their case." The arbitrators at this time were Mr. Segar for the United States, and the Marquis de Potestad for Spain.

Besides presenting their claim jointly with Peter V. King & Co. in case No. 97, Danford Knowlton & Co. also presented their claim separately as No. 33. When the arbitrators came to decide the latter claim, Mr. Segar changed his mind and

held that the commission had jurisdiction. The Marquis de Potestad held that as the circumstances in both cases were the same, case No. 33 should have been included in the same judgment with case No. 97.

On July 30, 1879, Baron Blanc, umpire, to whom the question was referred, held that the arbitrator for the United States had failed to show how case No. 33 was "taken out of the purview" of the decision in No. 97; that the conclusions of the arbitrator for the United States in No. 33 could not be "accepted either in whole or in part without directly impugning the joint judgment of the arbitrators in case No. 97," which judgment the umpire was "not allowed to ignore nor called upon to review," and that this judgment must be considered as covering case No. 33.

After this decision of Baron Blanc, Danford Knowlton & Co. and Peter V. King & Co. presented a new memorial and renewed their claim as No. 131. In so doing they alleged what they maintained to be a distinct ground of jurisdiction, which they had not previously presented—that is to say, that the partnership property was in reality "confiscated" by the political authorities in Cuba, who had "thereby deprived the claimants of any right to appear before any court of law in the Island of Cuba, and placed the whole matter under the absolute control of the political authorities of Spain."

The advocate for Spain moved to dismiss the case on the ground that it had already been decided by the commission, and therefore was presented in violation of article 7 of the agreement of February 12, 1871.

Mr. Stewart, arbitrator for the United States, and Mr. Brunetti, arbitrator for Spain, differing in opinion on this motion, it was referred to the umpire, Count Lewenhaupt, who on March 31, 1881, held that "in case of seizure a claim can be presented on account of that injury, but that confiscation of the same property can not, as a distinct injury, be made the foundation of a new claim under a new number; that the present claim is part of claim No. 97, and that the question whether claim No. 97 may be reopened has not been referred." He therefore decided that the case should be stricken from the docket.

In considering the opinion of Count Lewenhaupt, as above quoted, it should be noticed that the arbitrators, in dismissing

for the United States, sufficient cause being shown; that during six years no such motion had been made, and that "after this lapse of time part of the original claim, with the accretions of time added," had been presented to the commission as a new claim under a new number.

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"The umpire is of opinion that the question whether case No. 3 may be reopened has not been referred; that the question whether this claim No. 129 is a new one, or the same as No. 3, does not depend upon whether the items included be the same in both cases, but that the test is whether both claims are founded on the same injury; that the only injury on which claim No. 129 is founded is the seizure of a certain house; that this same injury was alleged as one of the foundations for claim No. 3, and that in consequence claim No. 129, as being part of an old claim, can not be presented as a new claim under a new number. For these reasons the umpire decides that this case, No. 129, be stricken from the docket."

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Besides presenting their claim jointly with Peter V. King & Co. in case No. 97, Danford Knowlton & Co. also presented their claim separately as No. 33. When the arbitrators came to decide the latter claim, Mr. Segar changed his mind and

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After this decision of Baron Blanc, Danford Knowlton & Co. and Peter V. King & Co. presented a new memorial and renewed their claim as No. 131. In so doing they alleged what they maintained to be a distinct ground of jurisdiction, which they had not previously presented—that is to say, that the partnership property was in reality "confiscated" by the political authorities in Cuba, who had "thereby deprived the claimants of any right to appear before any court of law in the Island of Cuba, and placed the whole matter under the absolute control of the political authorities of Spain."

The advocate for Spain moved to dismiss the case on the ground that it had already been decided by the commission, and therefore was presented in violation of article 7 of the agreement of February 12, 1871.

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In considering the opinion of Count Lewenhaupt, as above quoted, it should be noticed that the arbitrators, in dismissing

case No. 97, said that it was admitted "that the Spanish authorities had a right to seize the property" in which the claimants were interested, and that "application to the said authorities or to the courts of justice of the Island of Cuba was the proper course for them to pursue." The allegation of confiscation subsequently made by the claimants was merely the presentation in a new light of the action taken by the Spanish authorities prior to the filing of the memorial in case No. 97, in order to show that the claimants had no recourse before "any court of law" in Cuba. It was therefore not decided in the case which Count Lewenhaupt dismissed that a subsequent act of confiscation would not have afforded ground for a new claim. When the property of the Cuban firm was seized the claimants were citizens of the United States, and any denial of justice to which they were subsequently subjected might perhaps have been considered as constituting in itself a valid ground of claim against Spain. Such a case would not have been the same as that of the confiscation of the property of a person who was a Spanish subject at the time of its seizure, but who became naturalized as a citizen of the United States before the decree of confiscation. To treat such a claim as an American claim might have seemed to involve the dividing up of a continuous proceeding of which the commission could not originally have taken jurisdiction, the decree of confiscation being but the consummation and termination of the process by which a Spanish subject was deprived of his property; while, if the claimant was originally American, the decree of confiscation might be regarded merely as the completion of his injury.

The same principle as was laid down in the cases just mentioned was applied in the case of *Vincent Neuninger v. Spain*, No. 139.

José G. Delgado, as a naturalized citizen of the United States, preferred a claim against Spain for the seizure and detention—the embargo—of certain real estate by the authorities in Cuba in 1869, and the damages resulting therefrom, and for certain personal property alleged to have been seized by those authorities at the same time. The arbitrators, being opposed in opinion on the question of citizenship, on May 15, 1875, ordered that question to be submitted to the umpire for his decision. On the question of damages they expressed no

opinion and directed no reference to the umpire. May 29, on motion of the advocate for the United States, they amended the order of reference so as to submit to the umpire the further question:

"What amount of indemnity, if any, is said Delgado entitled to receive from the Spanish Government on account of rents, issues, profits, and income of the real estate in petition mentioned from the time of the embargo thereof by the Spanish authorities in Cuba unto this date, and on account of the personal property in said petition mentioned?"

On December 18, 1875, the umpire, M. Bartholdi, decided that the claimant was entitled to appear as an American citizen; and as to the question of damages he rendered the following award:

"The papers on record in the case do not furnish a sufficient basis of estimate to make a fair evaluation of the claimant's property at the time it was seized; and as long as satisfactory evidence on this point is not furnished to the umpire, he must abstain from answering to the second question which was put to him by the commission."

January 15, 1876, the advocate for the United States made a motion before the commission, asking "leave to produce further evidence in this case in pursuance of the umpire's opinions." The facts in respect to the proceedings in the case before its submission to the umpire in May 1875 were as follows: The claimant completed his evidence in August 1873 and his case was closed on notice voluntarily given by him. In June 1874 the advocate for the United States filed an argument in the case. Evidence for the defense was then introduced, and the case for Spain was duly closed; and an application subsequently made by the advocate for Spain for leave to introduce additional defensive evidence was denied. The case was then argued and disposed of in the manner above disclosed.

On the motion of the advocate for the United States, of January 15, 1876, the arbitrators differed in opinion, and on April 22 following they submitted the question to the umpire, who was then present. The umpire decided that the motion be overruled, and it was so ordered.

Two years later, in April 1878, the advocate for the United States moved for a rehearing of the case and for leave to present additional evidence. Both arbitrators concurred in refusing this application, and the arbitrator for the United States,

in an opinion filed on April 18, 1879, in which he referred to the prior disposition of the case by the umpire, said:

"This has been regarded (and I think properly) as a negative of all right of the claimant to demand damages upon his exhibited petition. That question was referred to him and by him accepted and unconditionally ignored, and the only other question that can arise is whether the umpire had the legal authority to solve the point. On this point there can scarcely be doubt, for the first article of the joint agreement expressly provides that the Secretary of State of the United States and the envoy extraordinary and minister plenipotentiary of Spain at Washington shall name an umpire, who shall decide all questions upon which they shall be unable to agree. The umpire, then, having decided that point, as the tribunal of last resort for the commission, and thus made an end of it, I am not at liberty to reverse his decision by the granting of a rehearing to Delgado."

The case now assumed a new phase. On the 28th of May, a little more than a month after the denial by the arbitrators of the motion for a rehearing, the private counsel of Delgado presented to the Department of State at Washington a memorial and accompanying exhibits. On the following day the Acting Secretary of State transmitted the papers to the advocate for the United States, with a letter in which he referred to the desire of the claimant's counsel that they "should be presented to the United States and Spanish Commission," and which he concluded by saying that "the determination of the proper amount of pecuniary indemnity seems fitly to be a question for the commission to pass upon." The memorial and exhibits were presented to the commission by the advocate for the United States, and were filed as case No. 125.

A few days later the advocate for Spain moved to dismiss this case on the ground that it was the same as case No. 12, the re-presentation of which was forbidden by article 7 of the agreement of February 12, 1871, by which the two governments agreed to "accept the awards made in the several cases submitted to arbitration as final and conclusive."

The advocate for the United States, in opposing this motion, maintained that the cases were not the same for the reasons (1) that, while in case No. 12 a claim was made for "the seizure and detention of Mr. Delgado's property and the damages consequent thereto," a claim was made in case No. 125 for "the value" of the property and the "value of net annual revenues for ten years;" (2) that new injuries were alleged in case No. 125, viz, (a) the failure of the Spanish authorities to execute

an order of **disembargo** of the real estate, and (b) an alleged **collusive sale** of the real estate on a mortgage, by which claimant's title was divested, after the proceedings in case No. 12 were begun; (3) that the fact that the Government of the United States had sent the claim to the commission "must be received as conclusive proof that the claim was regarded as a new, unadjudicated, open, and valid claim, to be decided on the merits."

The advocate for Spain, in support of his motion, contended (1) that the test of identity was not whether the measure of relief demanded, but whether the injury that formed the foundation of the claim, was the same in both cases; (2) that in both cases the claimant, the act of seizure, and the property seized were the same, and only the measure of relief demanded was different; (3) that in fact, as appeared by an analysis of the two claims, the amount claimed in the first case covered the value of the property; (4) that, neither in fact nor in law, did the transmission of the papers by the Acting Secretary of State to the advocate for the United States involve a judgment upon the question whether they constituted a new case, and that the commission was the judge of its own jurisdiction.

The arbitrators differed in opinion upon the motion to dismiss, and referred the question to Count Lewenhaupt, the umpire, who on May 27, 1881, rendered the following decision:

"The umpire is of opinion that the question whether this claim, No. 125, is a new one or the same as No. 12 depends upon whether new rights are asserted in this claim.

"In case No. 12 the claimant appealed to the commission for indemnification and compensation on account of the seizure and detention of a certain estate and the destruction or loss while in the hands of Spanish authorities of the personal property upon the same estate. This case was decided on its merits by the umpire, M. Bartholdi, April 22, 1876, and this decision must be regarded as a negative of all right of the claimant at the time to demand indemnity before this commission on account of the seizure referred to. It is now contended that, although the injury complained of in the present case, No. 125, is the same seizure of the same property, the claimant's right to recover indemnity on account of this seizure ought to be examined again by the commission, inasmuch as the claimant in the former case only asked for the rents, issues, profits, and income of the land, and that in this he demands the value of the land; but this conclusion cannot be accepted. Even if the claimant did not at the time of the former case ask indemnity of the commission for the value of the lands, the claimant had the same power to do so as other claimants in other cases where it has been done, and he can not have relief by a new claim before a new umpire.

"However, it is further contended that the Spanish Government has, by a decree of November 1873, ordered the restoration of the claimant's property, and that the rights acquired under this decree were not asserted before the umpire in case No. 12.

"The umpire hereby decides that the part of the claim which is founded on the decree of November 1873 may be presented again with further argument on the question whether the commission has jurisdiction to hear and determine a case of violation of the rights asserted, but that the part which is alleged to be founded on other injuries be dismissed."

On June 15, 1881, the advocate presented to the commission a suggestion, which the arbitrators ordered to be communicated to the umpire, together with a copy of his own opinion and the other papers in the case. This suggestion was to the effect that the umpire had erred in the following statement made in his decision:

"Even if the claimant did not, at the time of the former case, ask indemnity of the commission for the value of lands, the claimant had the same power to do so as other claimants in other cases where it has been done, and he cannot have relief by a new claim before a new umpire."

On this suggestion Count Lewenhaupt, on February 6, 1882, said:

"In the opinion of the umpire the only question to be considered is whether, so far as the commission is concerned, the claimant was at liberty, in case No. 12, to present a claim for the value of the lands, and the umpire has been unable to find that the above statement contains any error of fact or judgment. Therefore the decision of the umpire in this case, of May 27, 1881, is hereby affirmed."

In the cases of J. G. Angarica, No. 17; Antonio M. Mora, No. 48; Ramon de Rivas y Lamar, No. 73, and certain other cases, a motion was made by the advocate for Spain for an order to revoke the reference to the umpire in certain of the cases and to recall the order of submission to the arbitrators in the rest of the cases, in order that he might put in evidence certain alleged entries in the books of the so-called Central Republican Junta of Cuba and Porto Rico, for the purpose of connecting the claimants with that organization. This evidence was alleged to have been newly discovered since the making of the orders above referred to. The motion was granted by the arbitrators.

In the case of Buzzi, No. 22, after the case was referred to the umpire, the claimant was permitted to produce evidence which he had found of the naturalization of his father.

In the case of Duggan, No. 39, after the case was closed on both sides, the arbitrators granted a motion of the advocate for the United States to reopen it for further evidence.

Arbitrators must necessarily exercise a wide, though sound, discretion in all such cases.

In the case of Miguel Aldama, No. 140, the arbitrators, by special indulgence, permitted a memorial to be filed after the time limited for filing claims had expired. A similar indulgence was extended when printed copies of the claim were filed after the time fixed by the rules. The rules allowed two months after the filing of the memorial for the production of proofs in support of it. Six months were tacitly allowed by the commission in the present case; but at the end of that time such proofs not having been filed, the advocate for Spain moved that the case of the claimant be closed, and the commission so ordered. A motion was then made in behalf of the claimant that this order be vacated and that two months more be allowed for the filing of his proofs. This motion was denied by the arbitrators, and they dismissed the case for want of prosecution.

The rules of the mixed commission which American-British sat at Washington under the 12th article of Commission of 1871. the treaty of Washington of May 8, 1871, recited Articles XII. to XVII. of the treaty, inclusive, all of which related to the commission's constitution, duties, and functions. The rules themselves were as follows:

"1. In addition to the representation of his claim, and the proofs in support thereof, which shall have been presented to his government, the claimant shall file in the office of the commission a statement of his claim, in the form of a memorial, accompanied by twenty printed copies thereof.

"In cases where the amount claimed is less than one thousand dollars, the memorials will be printed at the expense of the commission.

"One copy of each memorial will, by the Secretary, be furnished to each commissioner, and five copies to the agent of each government.

"2. Every memorial shall state the full name of the claimant, the place and time of his birth, and the place or places of his residence between the 13th day of April 1861 and the 9th day of April 1865, inclusive. If he be a naturalized citizen or subject of the government by which his claim is presented, an authenticated copy of the record of his naturalization shall be appended to the memorial, and he shall state whether he has taken any and what steps towards becoming naturalized in any country other than that of his birth.

"3. If the claim be preferred on behalf of a firm or association of persons other than a corporation or joint-stock company, the names of each person interested, both at the date of the claim accruing and at the

date of verifying the memorial, must be stated, with the proportions of each person's interest. And all the particulars above required to be given in the case of individual claimants must be stated in respect of each member of such firm or association, unless the same be dispensed with on special order of the commission. If any transfer of the claim, or any part thereof, has occurred, the nature and mode of such transfer must be stated.

"4. The memorial must state the particulars of the claim, the general grounds on which it is founded, and the amount claimed. It shall be verified by the oath or affirmation of the claimant, or, in the case hereinafter provided, of his agent or attorney; or if the claim be by a firm or an incorporate association of persons, then by the oath or affirmation of one of them; or in the case of a corporation or joint-stock company, by the oath or affirmation of the president or other officer. Such oaths or affirmations may be taken, if in the United States or Great Britain, before any officer having authority, according to the laws of the place, to administer oaths or affirmations; and they may be taken in the said countries, or elsewhere, before any consul or diplomatic agent of either government. The verification may be by the agent or attorney only when verification by the claimant is substantially impracticable, and can only be given at great inconvenience. And in case of verification by agent or attorney, the cause of the failure of the claimant to verify it shall be stated.

"Objection to the jurisdiction of the commission, or to the sufficiency of the case stated in the memorial, may be made in the form of a demurrer, stating, without technical nicety, the substantial ground of the objection. Any new matter, constituting a special ground of defense, may be stated in a plea, which may be the subject of demurrer, and all demurrers may be set for hearing on a ten days' notice.

"5. Every claimant shall be allowed two months after the filing of his memorial to complete his proofs; and after the completion of his proofs, and notice thereof given, two months shall be allowed for taking proofs for the defense, with such further extension of time in each case as the commission on application may grant for cause shown.

"After the proofs on the part of the defense shall have been closed, the commission will, when the claimant shall desire to take rebutting proof, accord a reasonable time for the purpose.

"6. All depositions, after the filing of the memorial, shall be taken on notice, specifying the time and place of taking, to be filed in the office of the commission, with a copy of the interrogatories, or a statement in writing by the counsel of the government adducing the witness, showing the subject of the particular examination with sufficient precision to be accepted by the counsel of the government against whom such witness is to be produced, to be signified by his indorsement thereon. Such interrogatories or statement to be filed in the office of the commission at least fifteen days before the day named for the examination, with one additional day for every five hundred miles of distance from Washington to the place where the deposition is to be taken. When depositions are to be taken elsewhere than in North America, thirty days will be allowed.

"7. Every deposition taken in the United States shall be taken before some officer authorized to take depositions in cases pending in courts of the United States. Depositions in Great Britain and her possessions may be

taken before any person authorized to take depositions, to be used in courts of record, or any justice of the peace. Depositions in those countries or elsewhere may be taken before any consul or diplomatic agent of either government.

"In all cases the cross-examination of the witness may be by written interrogatories or orally, in the election of the party cross-examining.

"8. The commissioners may at any time issue a special commission for the taking of testimony, on the application of either party; such testimony to be taken either in written interrogatories or orally, as the commissioners may order.

"The commissioners may also, on motion of either party, order any claimant or witness to appear personally before them for examination or cross-examination.

"9. When any original papers filed in the State Department of the United States or in the archives of the British legation in Washington, cannot be conveniently withdrawn from the files, copies thereof will be received in evidence, when certified by the State Department or by the British legation, as the case may be.

"10. When the time has expired for taking proofs, or the case has been closed on both sides, the proofs will be printed under the direction of the secretary, and at the expense of the commission. The argument for the claimant shall be filed within fifteen days after the papers shall have been printed, and the case shall stand for hearing ten days thereafter.

"11. The secretary will prepare, from time to time, lists of cases ready for hearing, either upon demurrer or upon the merits, in the order in which they are entitled to be heard, or in which the counsel for the two governments shall agree that they shall be heard.

"12. All cases will be submitted on printed arguments, which shall contain a statement of the facts proven and references to the evidence by which they are proven, and, *in addition*, the counsel for the respective governments will be heard whenever they desire to argue any cause orally: Arguments of counsel for individual claimants will be received, in print, when submitted by the counsel of either government, and not otherwise.

"13. Claims against the United States and Great Britain, respectively, will be entered in separate dockets kept by the secretary. The dockets shall contain an abstract of all proceedings, motions, and orders in each case.

"14. The secretary will keep a record of the proceedings of the commission upon each day of its session, which shall be read at the next meeting, and will then be signed by him and approved by the signature of the preceding commissioner.

"15. The secretary will keep a notice book, in which entries may be made by the counsel for either government, and all entries so made shall be notice to the opposing counsel.

"16. The secretary shall provide books of printed forms, in which will be recorded the awards of the commission, signed by the commissioners concurring therein. The awards against each government will be kept in a separate book.

"17. A copy of each award, certified by the secretary of the commission, will be furnished, on request, to the party upon whose claim such award shall have been made.

"18. The dockets, minutes of proceedings, and records of awards, will be kept in duplicate, one of which will be delivered to each government at the close of the duties of the commission.

"19. The secretary will have charge of all the books and papers of the commission, and no papers shall be withdrawn from the files or taken from the office, without an order of the commission."

After the rules were adopted, they were amended as follows:

"Rule 1.

"Amended December 6, 1871, to read as follows:

"In addition to the representation of his claim, and the proofs in support thereof, which shall have been presented to his government, the claimant shall file in the office of the commission a statement of his claim, in the form of a memorial, addressed to the commission."

"Rule 2.

"Amended November 15, 1871, to read as follows:

"Every memorial shall state the full name of the claimant, the place and time of his birth, and the place or places of his residence between the 13th day of April 1861 and the 9th day of April 1865, inclusive; if he be a naturalized citizen or subject of the government by which his claim is presented, an authentic copy of the record of his naturalization shall be appended to the memorial, and the memorial shall also state whether he has been naturalized in any other country than that of his birth, and if not so naturalized, whether he has taken any and what steps toward being so naturalized."

"Rule 10.

"October 5, 1872, the last sentence of the rule was ordered to be stricken out, and the following substituted:

"The arguments on each side shall be filed within fifteen days after the papers shall have been printed, and notice thereof given by the secretary."

"Rule 17.

"This rule was stricken out altogether on May 9, 1873.

"Rule 20.

"Added February 10, 1872:

"Whenever any deposition, or other competent evidence, shall have been filed in any case before this commission, either party to any other case may use such evidence on the hearing thereof with the same effect as if originally taken or filed in such case, provided that the party so desiring to use the same in a case in which such evidence was not originally taken or filed, shall, before the closing of his proofs, file a notice in the case in which such evidence is sought to be used, specifying particularly the depositions or other papers sought to be so used, and the case or cases in which the same were originally taken or filed."

The rules, as thus finally amended, were as follows:

"1. In addition to the representation of his claim, and the proofs in support thereof which shall have been presented to his government, the

claimant shall file in the office of the commission a statement of his claim, in the form of a memorial, addressed to the commission.

"2. Every memorial shall state the full name of the claimant, the place and time of his birth, and the place or places of his residence between the 13th day of April 1861 and the 9th day of April 1865, inclusive. If he be a naturalized citizen or subject of the government by which his claim is presented, an authenticated copy of the record of his naturalization shall be appended to the memorial. And the memorial shall also state whether he has been naturalized in any other country than that of his birth; and if not so naturalized, whether he has taken any, and what, steps toward being so naturalized.

"3. If the claim be preferred in behalf of a firm or association of persons other than a corporation or joint-stock company, the names of each person interested, both at the date of the claim accrued and at the date of verifying the memorial, must be stated, with the proportions of each person's interest. And all the particulars above required to be given in the case of individual claimants must be stated in respect of each member of such firm or association, unless the same be dispensed with on special order of the commission. If any transfer of the claim, or any part thereof, has occurred, the nature and mode of such transfer must be stated.

"4. The memorial must state the particulars of the claim, the general grounds on which it is founded, and the amount claimed. It shall be verified by the oath or affirmation of the claimant, or, in the case hereinafter provided, of his agent or attorney; or if the claim be by a firm or an incorporate association of persons, then by the oath or affirmation of one of them; or in the case of a corporation or joint-stock company, by the oath or affirmation of the president or other officer. Such oaths or affirmations may be taken, if in the United States or Great Britain, before any officer having authority, according to the laws of the place, to administer oaths or affirmations; and they may be taken in the said countries, or elsewhere, before any consul or diplomatic agent of either government. The verification may be by the agent or attorney only when verification by the claimant is substantially impracticable, or can only be given at great inconvenience. And in case of verification by agent or attorney, the cause of the failure of the claimant to verify it shall be stated.

"Objection to the jurisdiction of the commission, or to the sufficiency of the case stated in the memorial, may be made in the form of a demurrer, stating, without technical nicety, the substantial ground of the objection. Any new matter, constituting a special ground of defense, may be stated in a plea, which may be the subject of demurrer, and all demurrers may be set for hearing on a ten days' notice.

"5. Every claimant shall be allowed two months, after the filing of his memorial, to complete his proofs; and after the completion of his proofs, and notice thereof given, two months shall be allowed for taking proofs for the defense, with such further extension of time, in each case, as the commission, on application, may grant, for cause shown.

"After the proofs on the part of the defense shall have been closed, the commission will, when the claimant shall desire to take rebutting proof, accord a reasonable time for the purpose.

"6. All depositions after the filing of the memorial shall be taken on notice, specifying the time and place of taking, to be filed in the office of

the commission, with a copy of the interrogatories, or a statement in writing by the counsel of the government adducing the witness, showing the subject of the particular examination with sufficient precision to be accepted by the counsel of the government against whom such witness is to be produced, to be signified by his indorsement thereon. Such interrogatories or statement to be filed in the office of the commission at least fifteen days before the day named for the examination, with one additional day for every five hundred miles of distance from Washington to the place where the deposition is to be taken. When depositions are to be taken elsewhere than in North America thirty days will be allowed.

"7. Every deposition taken in the United States shall be taken before some officer authorized to take depositions in causes pending in courts of the United States. Depositions in Great Britain and her possessions may be taken before any person authorized to take depositions to be used in courts of record, or any justice of the peace. Depositions in those countries or elsewhere may be taken before any consul or diplomatic agent of either government.

"In all cases the cross-examination of the witness may be by written interrogatories, or orally, in the election of the party cross-examining.

"8. The commissioners may at any time issue a special commission for the taking of testimony on the application of either party; such testimony to be taken either in written interrogatories or orally, as the commissioners may order.

"The commissioners may also, on motion of either party, order any claimant or witness to appear personally before them for examination or cross-examination.

"9. When any original papers filed in the State Department of the United States or in the archives of the British legation in Washington cannot be conveniently withdrawn from the files, copies thereof will be received in evidence, when certified by the State Department or by the British legation, as the case may be.

"10. When the time has expired for taking proofs, or the case has been closed on both sides, the proofs will be printed under the direction of the secretary, and at the expense of the commission. The argument for the claimant shall be filed within fifteen days after the paper shall have been printed, and the case shall stand for hearing ten days thereafter.

"11. The secretary will prepare, from time to time, lists of cases ready for hearing, either upon demurrer or upon the merits, in the order in which they are entitled to be heard, or in which the counsel for the two governments shall agree that they shall be heard.

"12. All cases will be submitted on printed arguments, which shall contain a statement of the facts proven and reference to the evidence by which they are proven, and, *in addition*, the counsel for the respective governments will be heard whenever they desire to argue any cause orally. Arguments of counsel for individual claimants will be received, in print, when submitted by the counsel of either government, and not otherwise.

"13. Claims against the United States and Great Britain, respectively, will be entered in different dockets kept by the secretary. The dockets shall contain an abstract of all proceedings, motions, and orders in each case.

"14. The secretary will keep a record of the proceedings of the commission upon each day of its session, which shall be read at the next meeting, and will then be signed by him and approved by the signature of the presiding commissioner.

"15. The secretary will keep a notice book, in which entries may be made by the counsel for either government, and all entries so made shall be notice to the opposing counsel.

"16. The secretary shall provide books of printed forms, in which will be recorded the awards of the commission, signed by the commissioners concurring therein. The awards against each government will be kept in a separate book.

"17. A copy of each award, certified by the secretary of the commission, will be furnished, on request, to the party upon whose claim such award shall have been made.

"18. The dockets, minutes of proceedings, and records of awards will be kept in duplicate, one of which will be delivered to each government at the close of the duties of the commission.

"19. The secretary will have charge of all the books and papers of the commission, and no papers shall be withdrawn from the files or taken from the office without an order of the commission."

The commission made the following orders:

"No. 1. December 16, 1871.

"As to the filing of demurrers.

"Ordered, That all demurrers shall be filed within ten days after notice; the papers demurred to, and the argument in support of the demurrer within five days after the filing of such demurrer; and the answer to such argument must be filed within ten days thereafter."

"No. 2. March 20, 1872.

"As to applying for documentary evidence from either government.

"Ordered, That the secretary shall apply by direction of this commission to any department of the Government of the United States or Great Britain, for any copies of documents or papers, or other information, whenever the agent of the other government shall desire the same as evidence in any case pending before this commission."

"No. 3. April 4, 1872.

"As to the manner of taking evidence.

"Ordered, That in taking depositions, the commissioner, or other officer taking the same, shall put such interrogatories as counsel shall direct, and take the answers thereto which witnesses shall give in their own language. He shall in no case undertake to determine upon the propriety of an interrogatory, or to refuse to propound it, or to take the answer of the witness thereto. When objection is made to an interrogatory or an answer, he shall merely state the fact."

The following notices were issued to claimants:

"Notice to American claimants.

DEPARTMENT OF STATE,

"Washington, August 30, 1871.

"Claimants who have not already filed in the Department of State their claims against Great Britain growing out of the acts committed by the several vessels which have given rise to the claims generically known as the *Alabama* claims, are requested to do so without delay, in order that they may be taken into account in presenting the aggregate claims of the United States to be brought before the tribunal of arbitration which is to meet in Geneva in the month of December next.

"It will not be necessary for claimants who have already filed their claims sustained by proofs to take any steps under this notice unless they have additional proof to file. No papers already filed can be withdrawn.

"Claimants must prepare for themselves the proof of their claims. This Department will, on application, forward to claimants a copy of the Treaty and a circular showing the form of proof that is advised by the Department in the absence of all rules by the tribunal which will pass on the same.

"The early attention of claimants who have not already filed their claims is invited to this notice.

"HAMILTON FISH, Secretary."

DEPARTMENT OF STATE,

"Washington, August 23, 1871.

"Notice is hereby given that by the terms of the treaty concluded on the 8th day of May 1871, between the United States and Great Britain, all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Her Britannic Majesty, arising out of acts committed against the persons or property of citizens of the United States, during the period between the 13th of April 1861 and the 9th of April 1865, inclusive, not being claims growing out of the acts of the vessels referred to in Article I. of the said treaty (generically known as the *Alabama* claims), and which yet remain unsettled, are referred to three commissioners, to meet in Washington, for the examination, investigation, and decision of such claims, as well as like claims on the part of subjects of Her Britannic Majesty upon the Government of the United States.

"By the terms of said treaty all such claims, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall, from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible.

"Robert S. Hale, esq., of New York, has been appointed, under said treaty, agent of the United States, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof before the said commission. Corporations, companies, or private individuals, citizens of the United States, having claims against the Government of

Her Britannic Majesty, coming within the terms of the above-recited provisions of the treaty, are requested forthwith to send to the agent above named, at the Department of State, Washington, D. C., a statement of their respective claims, showing the name and residence of the claimant, the nature and amount of the claim, with a brief general statement of the time, place, and circumstances of the transactions out of which the claim arose.

"It will be understood that the statement so invited is preliminary merely, and does not preclude the necessity of a subsequent formal memorial or statement, to be presented in conformity with such rules or regulations as the commission or its organization may prescribe.

"It is provided by the treaty that the commissioners shall meet at the earliest convenient period after they shall have been respectively named. It is expected that they will meet during the ensuing month of September.

"HAMILTON FISH, *Secretary.*"

"Notice to British claimants.

"With reference to my notice dated July 15, 1871, requesting subjects of Her Britannic Majesty to send to me particulars of claims which they may have upon the United States Government, arising out of acts committed against their persons or property during the period between the 13th of April 1861 and the 9th of April 1865, inclusive, and which yet remain unsettled, I hereby give notice that the commission appointed under the twelfth article of the treaty of Washington of May 8, 1871, for the settlement of such claims, held their first meeting on the 26th ultimo, and that, in accordance with Article XIV. of the aforesaid treaty, every claim must be presented to the commissioners within six months from that date.

"Claimants are accordingly requested to file their memorials at my office, 703 Fifteenth street, with as little delay as possible.

"By order of the commissioners the said memorials must be in print, and twenty copies thereof furnished for the use of the commission.

"Such claimants as may desire copies of the rules, as laid down by the commissioners for the guidance of claimants in the presentation of their claims, can obtain them by application to me.

"HENRY HOWARD,

"Her Britannic Majesty's Agent for British Claims.

"703 FIFTEENTH STREET,

"Washington, D. C., October 2, 1871."

"FOREIGN OFFICE, October 21, 1871.

"Mr. Henry Howard, Her Majesty's agent at Washington for British claims, has been instructed, in reply to an inquiry made by him, that he is not to present to the commissioners any documents which may have been transmitted to him from the foreign office or Her Majesty's legation in the United States on behalf of any claimant until such claimant shall have filed in the office of the commission the formal statement of his claim required by rule 1 of the commissioners, as published on the 16th instant in the supplement to the *London Gazette* of the 13th instant, and republished in the *Gazette* of October 20, and which, for the convenience of claimants, is here republished."

Mr. Henry Howard, British agent, issued the following directions for the taking of testimony on notice:

"The notice to be addressed to Henry Howard, esq., Her Britannic Majesty's agent, mixed commission.

"The notice must be sent to Mr. Howard, who will serve it on the United States agent.

"The notice must state—

"Firstly. The date on which the examination is to take place.

"Secondly. The time at which the examination is to commence.

"Thirdly. The name and title of the officer before whom the examination is to be taken.

"Fourthly. The number of the house and the street, or a description of the building in which the examination is to be held.

"Fifthly. The name of the city, town, or village in which the examination is to be held, as also the name of the county or parish, and the name of the State in which such city, town, or village is situated.

"Sixthly. The names of the witnesses who are to be examined; and it is well always to add the words 'and others' after the names of the witnesses, so that other witnesses than those specially named in the notice can be examined in case of need.

"Seventhly. The object of the testimony of the witnesses to be examined, or the interrogatories to be propounded to such witnesses, must be appended to the notice.

"The notice, as also the statement as to the object of the testimony to be taken, or the interrogatories, must be sent in duplicate.

"The only officers before whom testimony can be taken for this commission are—

"In the United States:

"Firstly. Any United States commissioner.

"Secondly. Any judge of a court which is a court of record.

"Thirdly. Any parish judge in States where there are parishes instead of counties.

"Fourthly. Any British consul, vice-consul, or acting consul or vice-consul.

"In foreign countries:

"Firstly. Any officer who is authorized to take testimony for the courts of the government of the country.

"Secondly. Any British or United States consul, vice-consul, or acting consul or vice-consul.

"Mr. Howard must give the United States agent fifteen days' notice for any examination to take place within 500 miles from Washington, D. C., and an additional day for every 500 miles beyond.

"He must give the United States agent thirty days' notice for any examination to take place out of North America. Claimants will please remember this when fixing the date of the examination.

"The notice must be signed by the claimant or his attorney.

"When the depositions have been taken, the officer before whom they have been taken must send them to the secretary of this commission, whose address is 703 Fifteenth street, Washington, D. C.

"If the United States agent, or his representative, objects to any witness or to any question put to any witness, the officer taking the testimony

must note down such objection, but will take the testimony thus objected to, notwithstanding the objection made.

"All expenses must be defrayed by the claimant.

"When the United States takes testimony against the claimant, the notice served on Mr. Howard by the United States agent for such purpose will be sent by him to the claimant; and if the claimant wishes to be represented at the examination, he must employ private counsel for that purpose, or else send cross-interrogatories to Mr. Howard, to be put to the witnesses to be examined by the United States.

"Her Britannic Majesty's government can not undertake to furnish claimants with counsel to attend such examinations, and Mr. Howard can not undertake to prepare the cross-interrogatories.

"Two calendar months are allowed to claimants for taking their proofs. Mr. Howard will always inform claimants of the date from which their time for taking testimony commences.

"Form of notice.

"JOHN SMITH
vs.
"THE UNITED STATES. } "No. 100.
"To HENRY HOWARD, Esq.,

"H. B. M.'s Agent, Mixed Commission, Washington, D. C.

"SIR: Please take notice, that on the 20th day of April 1872, at 10 o'clock a. m., before Isaac Morrison, an United States commissioner, at his office, No. 42 North Court street, in the city of Memphis, county of Shelby, State of Tennessee, the testimony of James Williams, John Snowden, and others will be taken.

"A statement as to the object of said testimony is appended hereto.

"JOHN BROWN,
"Attorney for Claimant.

"MEMPHIS, April 1, 1872."

French and American
Claims Commission.
The mixed commission under the convention between the United States and France of January 15, 1880, adopted the following rules:

"Rules of the Commission for the Settlement of Claims under the Convention between the United States of America and the French Republic of January 15, 1880.

"I. In addition to the representation of his claim, and the proofs in support thereof which shall have been presented to his government, the claimant shall file in the office of the commission a statement of his claim, in the form of a memorial, addressed to the commission.

"No allowance will be made to any person for any share of, or interest in, a claim unless he appear as claimant and set forth his interest.

"If a claimant be dead, his executor or administrator, or the legal representatives of the estate, must appear, unless it be shown that there are no creditors, and that the estate is settled.

"If there be a widow of the deceased claimant, she must appear as claimant, or her share will not be allowed.

"If there be heirs, they must appear, unless they are minors, under 21 years of age. Minors must appear by guardian or tutrix.

"All persons may be joined as claimants in whom the right to any legal or beneficial relief is alleged to exist, whether jointly, severally, or in the alternative. Any award may be given to such one or more of the claimants as he or they may be entitled to.

"II. Every memorial shall state the full name, residence, and post-office address of the claimant, the place and time of his birth, and if a French citizen, the place or places of his residence between the 13th April 1861 and the 20th August 1868, and if an American citizen, the place or places of his residence during the war between France and Mexico, the late war between France and Germany, and the 'insurrection of the Commune.'

"III. The memorial must state whether the claimant is a French or an American citizen; whether native or naturalized, and if he claim in his own right, when the claim had its origin, and of what country he was then a citizen; if in the right of another, whether such other was a French or an American citizen when the claim had its origin, and where was then, and is now, his domicile. If he be a naturalized citizen of the government by which his claim is presented, an authenticated copy of the record of his naturalization must be appended to the memorial. But in case of loss or destruction of letters of naturalization, the memorial must state the fact and the circumstances attending the same as far as known to the claimant. And the memorial shall also state whether he has been naturalized in any other country; and if not so naturalized, whether he has taken any, and what, steps toward being so naturalized.

"IV. If the claim be preferred in behalf of a firm or association of persons other than a corporation or joint-stock company, the name of each person interested, both at the date the claim accrued and at the date of verifying the memorial, must be stated, with the proportion of each person's interest. And all the particulars above required to be given in the case of individual claimants must be stated in respect of each member of such firm or association, unless the same be dispensed with on special order of the commission. If any transfer of the claim, or any part thereof has occurred, the nature and mode of such transfer must be stated, the person to whom made, how, when, by what means, and for what consideration.

"V. The nationality of the firm must also be stated.

"VI. The memorial must state whether the claimant or any other person entitled to the amount claimed, or any part thereof, has ever received any, and if any, what sum of money for the claim or any part thereof; and if so, when and from whom the same was received;

"Whether the claim, or any part of it, has ever been presented to any tribunal, department, or authorities of either the United States or France; and if so, when, where, and what proceedings were had in regard to the same, as far as such facts may be known to the claimant;

"And whether the claim, or any part of it, has been already disposed of, diplomatically, judicially, or otherwise, by competent authorities of either government.

"VII. The memorial must state the particulars of the claim, its amount, the time and the place where and the acts from which it arose; the names

and rank and regiment or office of the persons committing the acts from which it arose; the kind or kinds and amount of property lost or injured, and all the facts and circumstances attending the loss or injury out of which the claim arises, so far as known to or ascertained by the claimant.

"The items of the claim must be numbered in order, and in every claim the cause of action and amount of damages shall be fully and specifically set forth, and the articles of personal property taken, and the kinds, quantities, and values, and in case of personal injuries, the time and place and the name and rank or office of the person committing the act, if known, must be stated.

"If any voucher, receipt, or other writing was given for the property, the names of the parties to it and its substance must be given. If the claimant have the original or a copy of it he may append a copy to the memorial, if it is lost or destroyed, he must state how lost or destroyed, or account for its absence.

"If the acts were committed upon the high seas, the memorial must state them, the name of the vessel from which the acts proceeded, the name of the commanding officer, and when, where, and by whom committed, if known to claimant, and whether claimant was present, and all the circumstances attending the transaction.

"VIII. If the claim be against the United States, the memorial must state that the claimants were not in the service of the enemies of the United States and did not voluntarily give aid or comfort to the same between the 13th of April 1861 and the 20th of August 1866.

"If the claim be against the French republic, the memorial must state that the claimants were not in the service of the enemies of France, and did not voluntarily give aid or comfort to the same, during the late war between France and Germany, or during the insurrection of the Commune.

"IX. The claimant must state distinctly in his memorial the amount for which he asks judgment, giving the amount of principal and interest separately.

"X. The memorial shall be verified by the oath or affirmation of the claimant, or, in the case hereinafter provided, of his agent or attorney; or if the claim be by a firm or an unincorporated association of persons, then by the oath or affirmation of one of them; or in the case of a corporation or joint-stock company, by the oath or affirmation of the president or other officer. Such oaths or affirmations may be taken, if in the United States or France, before any officer having authority, according to the laws of the place, to administer oaths or affirmations; and they may be taken in the said countries or elsewhere, before any consul or diplomatic agent of either government. The verification may be by the agent or attorney specially authorized for that purpose only when verification by the claimant is substantially impracticable, or can only be given at great inconvenience, and in case of verifications by agent or attorney, the cause of the failure of the claimant to verify shall be stated.

"XI. Objections that the claim has not been duly made, preferred, and laid before the commissioners, either wholly or to any extent, pursuant to the eighth article of the convention, must be filed with the secretaries within thirty days after the filing of the memorial.

"Objection to the jurisdiction of the commission, or to the sufficiency of the case stated in the memorial, may be made in the form of a demurrer, stating without technical nicety the substantial ground of the objection. Any new matter constituting a special ground of defense may be stated in a plea, which may be the subject of demurrer. Demurrers and pleas may be set for a hearing by the party demurring or pleading, as the case may be, on twenty days' notice.

"XII. It shall not be necessary for either government to deny specially in writing the validity of any claim; but a general denial of every claim shall be entered of record by the secretaries, as of course, and thereby all the material allegations of the memorial shall be considered as put in issue, and the claimant required to prove them by legal and sufficient evidence.

"XIII. The memorial may be amended upon notice given by the agent of one government to the other, at any time during the period of six months granted to claimants to file their memorials; but in any other case, except as hereinafter provided, no leave to amend memorial shall be granted. Whenever the demurrer interposed by the government defendant is sustained, leave may be granted by the commission to amend the memorial in the cause, provided no new parties shall be introduced or the cause of action changed."

"As to taking of evidence.

"XIV. No evidence or information will be received except such as shall be furnished by or on behalf of the respective governments. (See Art. V. of the convention.)

"(a) Every claimant shall be allowed three months after the filing of his memorial to complete his proofs, and after the completion of his proofs, and notice thereof given, three months shall be allowed for taking proofs for the defense, with such further extension of time in each case as the commission, on application, may grant for cause shown.

"After the proofs on the part of the defense shall have been closed, the commission will, when the claimant shall desire to take rebutting proofs, accord a reasonable time for the purpose, and if the adverse government shall desire to take proof in reply to the rebutting evidence, the commission will accord a reasonable time therefor, and one-half of such time shall be given to claimant, and then the testimony shall be closed.

"(b) Depositions in France and her possessions may be taken before any person authorized by the laws of France to take depositions to be used in courts of record.

"Depositions out of the United States and out of France may be taken before any consul or diplomatic agent of either government.

"But the counsel of the respective governments may agree upon any magistrate, notary public, or other officer, authorized by the laws of the State in which he resides to administer judicial oaths and to take testimony, to take the testimony of witnesses in the State in which he is appointed, to be used before this commission; and if the counsel do not agree in regard to the same, the commissioners, on application and notice, will appoint an officer to take the testimony.

"(c) All depositions, after the filing of the memorial, shall be taken on notice, specifying the time and place of taking, and the same shall be

filed in the office of the commission, with a copy of the interrogatories, or a statement in writing by the counsel of the government adducing the witnesses, showing the subject of the particular examination of each witness with sufficient precision to be accepted by the counsel of the Government against whom such witness is to be produced, to be signified by his endorsement thereon; such notice and interrogatories or statement to be filed in the office of the commission at least eighteen days before the day named for the examination, with one additional day for each one hundred miles of distance from Washington to the place where the deposition is to be taken. When depositions are to be taken elsewhere than in North America thirty days will be allowed.

"(d) After the claimant has taken the testimony of his witnesses pursuant to the notice, or has taken the testimony of some of them, and has finished for the occasion in that locality, the attorney or agent of the adverse government then present may take the testimony of witnesses of that vicinity in answer to the claim, giving twenty-four hours' notice thereof to the claimant or his attorney then present, with a list of the witnesses and their residences; and the officer taking the testimony in behalf of claimant shall take the testimony of such witnesses in answer to the claim. The claimant, likewise, after the agent of the adverse government has finished taking the testimony of his witnesses in any vicinity, may forthwith take the rebutting testimony of other witnesses of that vicinity before the same officer, giving twenty-four hours' notice thereof, with a list of witnesses and their residences.

"(e) Each witness shall state whether he is interested in the claim; and if so, how, and also whether he is agent or attorney for any party interested therein, and whether he is related, and if so, how, to any of the claimants in the case.

"(f) In taking depositions, the commissioner or other officer taking the same shall put such questions or interrogatories as counsel shall direct, and take the answers thereto which witnesses shall give, in their own language. He shall in no case undertake to determine upon the propriety of a question or an interrogatory, or refuse to propound it, or refuse to take the answer of the witness thereto. When objection is made to an interrogatory, or an answer, he shall merely state the facts and grounds of the objection.

"Upon motion of either party, made to this commission, improper, irrelevant, immaterial, or scandalous testimony, will be stricken from the record.

"(g) In all cases the examination and cross-examination of the witness may be by written interrogatories, or orally, in the election of the person examining; and whenever the party entitled to cross-examine a witness shall, after the examination in chief shall have been concluded, request a delay, such delay shall be granted as of right for a time not exceeding fifteen days; and after the cross-examination is concluded, the opposite party shall be entitled to a redirect examination of the witness.

"(h) Leading questions must not be put to the witness by the party calling him, and if any suggestions are made to the witness as to his answers, the officer taking the testimony shall make a note thereof at the time in the body of the deposition.

"XV. (a) Witnesses must affirm or make oath, before any questions are put to them, to tell the truth, the whole truth, and nothing but the truth, relative to the cause in which they are to testify."

"(b) The officer should so connect the sheets of the deposition that they cannot be tampered with, and should return them sealed together. He should sign, and make the witness sign, each sheet; and generally he should spare no pains to return to the commission the exact evidence he has taken. All exhibits should be carefully marked so as to be capable of immediate identification, and, when practicable, should be attached to the deposition under seal.

"(c) The officer must state, in the caption of the deposition, the cause in which it was taken, the place and date of taking, the name of the witness, the party by whom called, and the names of the parties and counsel present. And in the body of the deposition it must also be shown by whom the witness was examined and cross-examined.

"(d) In his return the officer must show that the witness took an oath or affirmed, in due form, and that the answers were taken down in his presence, and read over to and signed by the witness.

"(e) The officer must enclose the commission, depositions, and exhibits in a packet, under his seal, and direct the same to the secretaries of the commission at Washington, and deposit the packet in the post-office, or in an express office, or he may transmit the same by a messenger, whose name shall be by him endorsed on the packet.

"(f) The testimony, when so sealed, must not be opened till it is filed with, and opened by, the secretaries. The secretaries shall enter upon the docket the date when received, the names of the witnesses, and give notice to the counsel of both governments.

"XVI. The rules of evidence as to competency, relevancy, and effect of the same shall be determined by the commission, in view of the convention of January 15, 1880, the laws of the two nations, the public law, and these regulations.

"XVII. The commissioners may at any time issue a special commission for the taking of testimony on the application of either party; such testimony to be taken either on written interrogatories or orally, as the commissioners may order.

"The commissioners may also, on motion of either party or for their own satisfaction, order any claimant or witness to appear personally before them for examination or cross examination.

"XVIII. When any original paper filed in the State Department of the United States, or in the archives of the French legation in Washington, or in the consulates of either government, or in one of the several legislative branches or executive departments of either government, cannot be conveniently withdrawn from the files, duly certified copies thereof will be received in evidence; but all such papers will be subject to all objections as to competency, relevancy, credibility, or value as evidence.

"XIX. When the time has expired for taking proofs, or the case has been closed on both sides, the proof shall be printed under the direction of the Secretaries and at the expense of the commission. (See Convention, Art. X.) The argument for the claimant shall be filed within fifteen days after the papers shall have been printed, the argument for the defendant fifteen

days thereafter, and the case shall stand for hearing ten days thereafter, the reply thereto in ten days. Motion to extend the time may be submitted to the commissioners.

"XX. The secretaries shall prepare, from time to time, lists of cases ready for hearing, either upon demurrer or upon the merits, in the order in which they are entitled to be heard, or in which the counsel for the two governments shall agree that they shall be heard.

"XXI. All cases will be submitted on printed arguments, which shall contain a statement of the facts proven and reference to the evidence by which they are proven, and the counsel for the respective governments will be heard whenever they desire to argue any case orally. Arguments of counsel for individual claimants will be received, in print, when submitted by the counsel of either government, and not otherwise.

"XXII. Claims against the United States and France, respectively, will be entered in different dockets kept by the secretaries. The dockets shall contain an abstract of all proceedings, motions, and orders in each case.

"XXIII. The secretaries will keep a record of the proceedings of the commission upon each day of its session, which shall be read at the next meeting, and if no objection be made, it shall be approved by the signature of the presiding commissioner and the secretaries.

"XXIV. The secretaries will keep a notice book, in which entries may be made by the counsel for either government, and all entries so made shall be notice to the opposing counsel.

"XXV. The secretaries shall provide books of printed forms, in which will be recorded the awards of the commission, signed by the commissioners concurring therein. The awards against each government will be kept in a separate book.

"XXVI. A copy of each award, certified by the secretaries of the commission, will be furnished, on request, to the party upon whose claim such award shall have been made.

"XXVII. The dockets, minutes of proceedings, and records of awards will be kept in duplicate, both in French and English, one of which will be delivered to each government at the close of the commission.

"XXVIII. The secretaries will have charge of all the books and papers of the commission, and no papers shall be withdrawn from the files or taken from the office without an order of the commission. The secretaries will furnish to parties or special counsel all convenient opportunity for inspecting the papers and making extracts therefrom."

February 23, 1881, the commission, on motion of Mr. Boutwell, adopted the following orders:

"Ordered, That subdivision 'c' of Article XV. of the rules be amended by adding thereto the following paragraph, viz:

"After a witness has fully answered an interrogatory, and the answer thereto is reduced to writing, the commissioner will read the answer to the witness, and corrections of the answer may then be made by additions thereto, but without erasures or interlineations, and before each adjournment the witness will be required to sign the deposition. When the examination of a witness is concluded, and before the certificate of the

commissioner is affixed, he may make additions, corrections, or explanations, and the same shall be reduced to writing and added to the deposition in the manner prescribed by the rules."

"Ordered, That the forms following marked 'A,' 'B,' and 'C,' be, and the same are hereby adopted as rules of the commission:

"(Form "A.")

"FRENCH AND AMERICAN CLAIMS COMMISSION,

"1518 H Street, Washington, ——— 188—.

"SIR: We enclose herewith interrogatories and cross-interrogatories to be used in the examination of ——— of the ——— in the claim of ——— vs. The (United States or vs. The French Republic, as the case may be), No. ———.

"And you are hereby authorized to act as a commissioner for that purpose.

"In the examination of witnesses you will conform to the Rules of this commission, a copy of which is herewith transmitted to you.

"Respectfully,

"———,
"———,

"Secretaries.

"To ———, Esq.,
Commissioner, &c."

"(Form "B.")

"Deposition of ——— of ——— taken in the case of ——— claimant, vs. (The United States or The French Republic, as the case may be), No. ———, upon written interrogatories filed by ——— and cross-interrogatories filed by ——— at ——— before me, a duly appointed commissioner, on the ——— day of ——— 188—, to be used in the hearing of the aforesaid claim before the French and American Claims Commission."

"(Form "C".)

"I, ——— of the ———, a commissioner duly appointed by the French and American Claims Commission, to take the deposition of ——— of the ——— to be used in the case of ——— vs. The (United States or The French Republic,) No. ———, before the said commission do hereby certify that on the ——— day of ———, 188—, I caused the said ——— to appear before me at the ———, no one else being present (except ———, a clerk employed by me to write out the deposition), and the said ——— being first duly sworn by me to tell the truth, the whole truth, and nothing but the truth relative to the matter to be inquired of, his deposition was taken and reduced to writing by (me or by the said ——— clerk, who has no interest whatever in the said case); that the said deposition was read to him, the said ———, and that the same was subscribed to by him; and all in my presence.

"And I do further certify that I have no interest whatever in the said claim, either on behalf of claimant or of the (United States or The French Republic).

"In testimony whereof, I hereunto set my hand and seal, this ——— day of ———, 188—.

"———"

December 24, 1880, the commission adopted the following orders:

"It is hereby ordered, That the laws of France and the decrees made in pursuance thereof by the French Government, the laws of the United States and the orders of the President, in pursuance thereof, shall be evidence in all cases to be submitted to the commission, and that in all cases said laws, decrees and orders, shall be considered as proven.

"*Ordered*, That the agent and counsel of the Government of the United States to this commission is hereby requested to ask the Secretary of State and the other heads of the several departments to exhibit to the respective claimants before this commission or to their attorneys, any original papers relating to the said claims other than the official letters relating thereto, sent by the French minister at Washington to the honorable Secretary of State or through him to any one of the above-named departments, and that said departments be requested, upon proper application by the parties interested, to furnish certified copies of said original papers.

"*Ordered*, That the agent of the French republic is hereby requested to call upon the proper officials of the French Government to exhibit to the respective claimants before this commission or to their attorneys, any papers relating to their claims other than privileged official letters, and that said officials be requested upon proper application by the parties interested to furnish certified copies of said papers."

January 12, 1881, the commission made the following orders in lieu of those previously adopted in relation to the same subject-matter:

"*Ordered*, That the agent and counsel of the Government of the United States to this commission is hereby requested to ask the Secretary of State and the other heads of the several departments to exhibit to the respective claimants before this commission, or to their attorneys, any original papers relating to their claims including the official letters relating thereto, and that said departments be requested, upon proper application by the parties interested, to furnish certified copies of said original papers.

"*Ordered*, That the agent of the French republic is hereby requested to call upon the proper officials of the French Government to exhibit to the respective claimants before this commission, or to their attorneys, any original papers relating to their claims, including the official letters relating thereto, and that said officials be requested, upon proper application by the parties interested, to furnish certified copies of said original papers."

The following stipulations were then presented by the agent and counsel of the respective governments, and ordered by the commission to be extended upon the minutes:

" French and American Claims Commission.

"It is hereby stipulated and agreed that the claimants are authorized to take proofs in support of the allegations of their respective memorials before a commission of any of the courts of the United States, or other person duly authorized by said courts to take depositions to be used therein.

"It is stipulated and agreed that this stipulation may be ended by notice in writing given by one party to the other.

"Washington, January 12, 1881.

"GEO. S. BOUTWELL,

"*Agent and Counsel for the United States.*

"A. LANEN,

"*Agent for the French Republic.*

"CHARLES A. DE CHAMBRUM,

"*Counsel.*"

May 6, 1882, the president of the commission announced the following orders:

"*In the matter of the motion of the United States Counsel, that all claimants be required to close the taking of testimony by the 1st day of June next.*

"1. The term of this commission expires on the 22d day of next March. There remain, therefore, only ten months and sixteen days in which to complete the whole work of the commission.

"This time must be distributed so as best to secure the objects for which the convention was made, and to promote the despatch of business.

"2. The claimants have had the three months prescribed by our rules for the taking of their testimony; and over and above that, a period of from four and a half to thirteen months, varying with the dates at which their memorials were filed. If we now allow them till the 30th day of June in which to take the testimony and have it filed in the office of the commission, we certainly give them a large share of the remaining time. We allow them till the 30th day June to take and file all the testimony and evidence, and on that day their time must expire; and no evidence or testimony can be taken or filed after that date except upon leave first granted by the commission for special reasons.

"3. The time for taking testimony by the respective governments will commence in all cases on the 1st of July. Before that date testimony on behalf of the governments can be taken in cases in which the claimants have closed taking their testimony; and in any case upon application to the commission and good cause thereof.

"The months of July, August, and September are in the hot season—a period unfavorable to the taking of testimony. It is difficult to secure the attendance of witnesses, counsel, and commissioners at that time. We think the request of the United States counsel to extend the time for taking testimony beyond the three months is reasonable. We therefore extend the time for taking testimony on the part of the two governments, defendants, to the 10th day of November. By that day all their testimony and evidence must be taken and filed in the office of the commission, and after that date none can be taken and filed except upon leave first granted for special reasons.

"4. After the 10th of November, if application be made by the claimants or the governments for further time to take rebutting or other proofs, such applications must be made immediately, so that the testimony can be taken and closed and all the evidence be filed within thirty days.

"5. It is obvious that this distribution of time leaves but a very short period for the commissioners to examine all the evidence in all the cases

and to properly decide them and complete the work of the commission, especially if the large mass of cases be left to accumulate and to remain undisposed of till December.

"To avoid such accumulation we call the attention of counsel to the present condition of the business, with the hope that they will immediately present their briefs in all those cases in which the testimony is closed on both sides. There are about thirty such cases, and we shall direct them to be called this morning in order to ascertain whether they may not be got ready for hearing and decision in a few days.

"6. There are about 153 cases in which the claimants have closed the taking of their testimony. In these cases the United States counsel can now proceed to take testimony. In many cases we hope testimony has already been taken. If these cases could be closed by the 1st of July and then submitted to us for decision, it would prevent the accumulation of business towards the end of the term of the commission and greatly promote the disposal of business.

"It will be perceived that this order takes the place of section 'a' of the 14th rule, as to the taking of evidence.

"Under this order the claimants in case No. 293, *Gilleau v. U. S.*; No. 403, *Sahuc v. U. S.*; No. 571, *Bassett v. U. S.*, can have till June 30th to take and file their testimony."

April 28, 1883, the commission published the following orders:

"That hereafter all questions arising upon demurrer shall be heard upon the final hearing upon the merits and not otherwise."

"It is ordered that hereafter, in issuing commissions, the secretaries will insert a proviso that by order of the commissioners no testimony shall be taken by the commissioners after the 26th day of May unless a special order therefor is granted by the commission;

"And that unless it appears on the docket that claimant has already taken and filed depositions no commission shall issue and no testimony shall be taken in such case without a special order therefor.

It is also ordered that where commissions have already been issued the secretaries shall immediately give notice to the commissioners that they are not permitted to take any testimony after May 26th unless a special order of the commission in such case be granted after this 28th April 1883."

"By the order of November 20, 1882, the taking of testimony on the part of the United States was limited to the 3rd of February 1883, and the taking of testimony in rebuttal by the claimants to the 10th of March 1883.

"On the 20th of February 1883, a stipulation in writing was entered into by the counsel of the two governments that in certain specified cases, being about 150, testimony on the part of the defense and testimony in rebuttal by claimants might be taken on or before 31st of March, and testimony in reply to the rebutting testimony might be taken by the United States to April 20.

"This stipulation of counsel was presented to the commission and approved.

"By its provisions the taking of testimony was to cease in all cases on the 20th of April, as in all other cases, except those in the stipulation, it was to cease on the 10th of March.

"Upon the call of the docket at the last meeting it appeared that the counsel on both sides had wholly disregarded these orders, and in plain violation of them had proceeded to take testimony, and are now taking testimony in a large number of cases, without leave of the commission, without any stipulation in writing filed by the secretaries, without any entry upon our records of what they were doing or wished to do; in short, upon the mere verbal understanding of counsel.

"The effect of this is to substitute for the rules and orders of the commission the verbal understanding of counsel, so that neither the secretaries nor the commissioners can tell what is the condition of any case upon the docket, as these verbal understandings of counsel may be alleged to be operative and to take all cases away from the operation of our rules.

"Another effect is to accumulate a great mass of unfinished business at the close of the time for taking testimony without leaving it in the power of the commission to regulate and bring it into order or to discriminate between the diligent and the negligent, or to so limit or extend the times of taking testimony as to secure necessary and truthful evidence and defeat what may be false or fraudulent.

"It is alleged on behalf of counsel that the taking of testimony by mutual consent of counsel greatly facilitates their work. This is undoubtedly true as to the times and places of taking testimony, and at an earlier period of the commission was, or might have been, very useful. But such consent could have been had, and such work done, under the rules as well as in violation of them. The counsel presented their agreement in writing in 150 cases, and it was approved. If they wished for a similar extension in other cases they should have applied for it. If they wished for further time in the cases named in the stipulation or any of them, they should have asked for the extension and shown their reasons for their request.

"It is further said that to cut off the claimants and the defense from taking testimony in the cases where they have relied on these verbal understandings might work great hardship and injustice by depriving them of evidence which they otherwise would have taken, and which is material.

"We do not doubt but that the counsel in proceeding under these verbal understandings have acted with the intent to speed the work of taking testimony, and that to order them to be stopped instantly and to have no testimony received that may be taken under them might work injustice. But the practice will eventually produce so much disorder and mischief that it is necessary to put an end to it as soon as possible.

"It is therefore ordered that upon the call of the docket the counsel state in each case as called whether there is at this time a verbal understanding as to the taking of testimony, and whether they wish to have testimony taken under a verbal understanding up to May 26th, and the cases being thus ascertained the time for so taking testimony will be extended in such cases to Saturday, the 26th day of May next, but no new understandings or agreements may be made hereafter to extend the time beyond May 26th.

"In all other cases the time for taking testimony has already expired by our rules, and no testimony will be permitted to be taken or filed, unless upon the call of the docket a special order is made extending the time.

Nor will any documentary evidence be allowed to be filed by the secretaries in any case until leave therefore has been granted by special order of the commission.

"In any case an application in writing may be filed to extend the time of taking testimony or to file documentary evidence, but it must be sustained by affidavit showing good cause, and stating what is the expected evidence; and the commission will thereupon make such order as they deem right."

The commission on July 3, 1883, then made the following orders:

"The following general rules are adopted, and they apply to the cases in which briefs have been ordered on July 2nd and 3rd, and hereafter to all cases in which briefs may be ordered:

"1. If the counsel for the claimant, or the counsel for the French republic, in cases against the United States and the counsel for claimant or the counsel for the United States in cases against France, do not file the opening briefs by the time required, they will be held to have waived their right in such cases to file both their opening brief and their brief in reply to the brief of the adverse counsel.

"2. The omission of counsel to file the opening brief shall not prejudice the right of the opposing counsel to file a brief; but his right to file a brief must be exercised within the time limited for the brief in reply. If the counsel of France or of the United States does not file his brief in reply by the time limited in the case, his right to file such brief will be held to be waived.

"3. If the counsel for the French republic or for the United States desire to be heard orally in any case, they will respectively file a notice in writing that they require to be heard orally in such case with the secretaries, within three days after the time fixed by our order for the filing of the closing brief of the claimant in such case.

"4. The secretaries will immediately give notice to the president of the commission of such notices in writing to be heard orally. They will also keep a list of all the cases in which such notices in writing are filed, with the dates when filed.

"5. The secretaries will not receive or file any briefs unless they are presented to them to be filed within the times prescribed by our orders.

"6. The secretaries will forward to the commission the cases and the records in which no notices in writing for oral hearings are filed, as soon as the times for filing such notices have expired.

"The cases will then be regarded as submitted to us finally for decision."

Mr. Boutwell, counsel for the United States, issued to special counsel of the United States the following instructions in regard to the taking of testimony:

"FRENCH AND AMERICAN CLAIMS COMMISSION,

Washington, D. C., April 13, 1881.

"To counsel retained on the part of the United States to attend the examination of witnesses:

"The instructions to counsel can, at this time, be only of a general character. You are desired, in each case, to see that the testimony is taken

with regard to all of the several aspects which it may assume when passed upon by officers governed either by the principles of international, civil, or common law, and for that purpose to see that all the facts attending the loss complained of are fully brought out. The primary and jurisdictional questions are citizenship, neutrality, the place and time when the property was destroyed, and the persons by whom it was destroyed. The claimant must have been a French citizen at the time of the loss complained of, in January 1880, when the treaty was concluded, and since. To prove such citizenship, it should be shown that the claimant's parents were French citizens, and you will endeavor to ascertain whether they remained such during his minority, for a transfer of allegiance by them before he became of age would probably carry the claimant's citizenship to the country of his parents' adoption. If the claimant be a woman, marriage to a foreigner will probably be held to carry her citizenship to her husband's country. Various other acts are held by the laws of France to divest a citizen of that country of all right to protection, and are points worthy of attention and investigation. Such are, the ownership of slaves or any participation in slave traffic, with certain exceptions not now pertinent, and service in any army or office under a foreign government without assent of the Government of France. In this connection it may be well to ascertain whether the claimant is in this country with *animo manendi*, and for this purpose to inquire the reason of his coming, his past and present occupation, and whether he is or has been the owner of land. Of course naturalization divests him of his character of a French citizen; and proof that the claimant has voted or held office, or otherwise has exercised any right of citizenship in any country other than France, should be sought.

"The claimant should show that he was not in the service of the enemies of the United States, and did not give them voluntary aid and comfort between April 13, 1861, and August 20, 1866. The line of cross-examination and proof on this point will be apparent to you. You will follow the claimant in his various movements during this time with reasonable particularity, in order to discover whether he ever served in any way against the United States, or voluntarily aided the so-called insurgents, either by subscribing to their loans, supplying or quartering their troops, or in any one of the numerous manners which will suggest themselves to you, or be indicated by the course of the examination. See also that his residence during this period is shown.

"The place where the loss occurred should be fixed with precision, as well as the time when it occurred, both to avoid fraud and to enable the agent and counsel of the United States to institute further investigations as to the claim; and in this connection it will be well to discover whether the place was within the lines of the so-called insurgents, or in their possession, or whether it was contested ground.

"The damage must have been inflicted by the *authorities* (civil or military) of the United States, and this point should be constantly borne in mind. The counsel on the part of the United States may contend that damage inflicted by marauders, or by private soldiers acting on their own responsibility and without orders from their superior officers, does not constitute a cause of action within the treaty; and this principle may be urged as to all other inferior servants of the government occupying positions

analogous to that of private soldiers in the army, and acting without orders from the *authorities* of the government. It is believed that much of the property destroyed was burned or appropriated by the enemies of the United States or their sympathizers, either to prevent it from falling into the hands of the United States or from other motives. You will endeavor to ascertain in each case whether the loss complained of was not inflicted by these persons. It will be remembered that in 1862 orders were given to destroy tobacco and cotton rather than to allow it to fall into the hands of the United States, and it has been reported that many planters set fire to their own cotton, while others left the task to official incendiaries. The property was often taken to certain repositories in the woods or elsewhere, there secreted, and when its discovery seemed imminent, burned or otherwise destroyed by the owner or his agents. It is understood that deposits of cotton bought in the interior for French houses were sold upon a stipulation by the buyer not to bring it into the market or ship it without the consent of the producer, who, with the buyer's consent, reserved the right to destroy it.

"These points will probably suggest to you others which it will be well to investigate, and which tend to show that the loss complained of was not inflicted by the authorities of the United States, but was either caused by acts of unauthorized pillage or by the enemies of the United States, or in their aid.

"Claims arising from injuries caused by bombardment of the towns of the enemy, or in other ordinary operations of war, such as the passage of armies or the erection of fortifications; claims for property available to the enemy for military purposes and intentionally destroyed in enemy's country to weaken them; claims for property incidentally involved in the destruction of public stores, works, and means of transportation of the enemy; claims for timber felled to deprive the enemy of cover; claims for property alleged to have been wantonly and without military necessity destroyed in enemy's country, are thought by the counsel on the part of the United States not to be valid. In short, it may be urged that no claim should be sustained which arises out of lawful acts of war committed in territory not actually reclaimed and in the possession of the United States, or from acts which were the ordinary results incident to the march of an invading army in a hostile territory, with no proof of appropriation by the United States.

"As the commission have not yet decided upon the measure by which damages will be computed, you are requested to take very full testimony on this point, so that the facts may be present to decide each case, without delay, upon the doctrine which shall hereafter be laid down. It is impossible to give specific instructions as to each case, but a probable claim may be supposed, for illustration simply, which may aid you in your duties. For example: Claim for cattle seized. At the time of seizure it was impossible to send the cattle to any market or to sell them. Had it been possible to sell them at that time, an exorbitant price would have been obtained. When it became possible to send them to a market, the price immediately fell. Under these circumstances it is advised that testimony be taken which shall show the impossibility of getting the cattle to a market or selling them at the time of seizure, and how long that state of affairs continued; the average prices at the usual market for a

reasonable time previous to the interruption of the trade, and for a reasonable time after it was resumed; the cost of transportation and of keeping the cattle; the general expenses of selling them, and any other details which may occur to counsel as a proper set-off against the gross price at a sale.

"You will also inquire whether the claimant has ever presented his claim to any court or other authority of either government; and if so, discover, if possible, what action was taken on it.

"After concluding the examination in any case you are requested to send, without delay, to the agent and counsel on the part of the United States a concise report of the testimony taken, with any remarks you may deem it advisable to make.

"Your attention is called to subdivision *d* of Rule XIV., of which you will avail yourself without further instructions, should you deem it proper to do so. You will also notice subdivisions *e*, *f*, *g*, and *h* of that rule.

"As the time is limited within which all cases before this commission shall be decided, you are requested to facilitate the counsel for claimant in taking testimony, as far as you can do so without injury to the interests of the United States. For that purpose, after legal notice has been given in Washington and you have been instructed to attend the examination on behalf of this government in any case, you may, if you think proper and are requested to do so, agree upon a day to take the testimony different from that named in the notice, and agree generally with opposing counsel as to adjournments and other matters of detail which may arise in the progress of the examination before the commissioner.

"It is perhaps unnecessary to state in conclusion that you are to use your best efforts to prevent the commissioners from being imposed upon by fraudulent or exaggerated claims, or by claims over which they have no jurisdiction.

"GEO. S. BOUTWELL,

"Agent and Counsel on the part of the United States.

"JOHN DAVIS,

"Ass't Counsel, &c."

The mixed commission under the convention between the United States and Venezuela, of December 5, 1885, adopted the following rules:

The Venezuelan Commission, Convention of 1885.

"Rules of the Commission for the Settlement of Claims under the Convention of December 5, 1885, between the United States of America and the United States of Venezuela.

"I. The claims shall be entered in a docket, provided for the purpose, in the order of their presentation recognized in Article II. of the convention, and shall be numbered consecutively beginning with the claim first presented, as No. 1. The style in each case shall be:

"....., claimant,

"No., against

"The United States of Venezuela.

"II. There shall be filed in each case (if not already done), on or before the first Monday in October 1889, a petition setting forth in plain and

concise terms, and without repetition, the facts constituting the grounds of the claim and relied on as entitling the claimant to relief under the convention; but the commission, for cause shown, may extend the time for the filing of such petition.

"III. If the claim be on account of alleged loss or damage as to a number of articles, kinds, or items of property, the amount of loss or damage on account of each, exclusive of interest, must be stated; and in all cases claims for interest must be separately specified, with the rate demanded and time covered. If the claim, or any part thereof, is alleged to have arisen from acts upon the high seas, the names of the vessels concerned, the part taken by each, with the names of the commanding officers, and in the service of what governments respectively engaged, with proper dates and localities, must be stated.

"IV. If any transfer of a claim, or any part thereof, has occurred, the petition must state how, when, by what means, for what consideration, and to and by whom the same has been made.

"V. The petition must also state whether any claimant, directly or indirectly, or any other person heretofore entitled or claiming to be entitled to the claim, or any part thereof, ever received any, and if so what sum of money for or on account of such claim or part thereof, and when and from whom the same was received, and whether the claim, or any part thereof, was ever presented to any tribunal other than to the former mixed commission, and if so what disposition was made thereof by such tribunal.

"VI. Where the claim is for the property taken, lost, or injured, for which any voucher, receipt, memorandum, or other writing was given, a copy thereof must be attached to the petition, or reason assigned for not doing so; if not attached, the names of the parties to it and its substance must be given.

"VII. The petition must conclude with a distinct statement of the amount due the claimant for each item of loss or damage and the interest claimed thereon, the aggregate amount claimed, the sum paid thereon if any, and the balance for which judgment is asked.

"VIII. The petition shall be verified by the oath or affirmation of the claimant, or by one of the several claimants, or, if a corporation or joint-stock company, by a principal officer thereof, before some officer authorized by the laws of the place to administer oaths; or, in case of the absence from the United States of such claimant or officer, the same may be verified by a duly authorized agent or attorney.

"IX. A petition may be amended at any time before final hearing upon leave granted by the commission.

"X. It shall not be necessary for the United States of Venezuela in any case to deny the allegations of the petition or the validity of any claim. But a general denial thereof shall be entered of record by the secretary, as of course, and thereby all the material allegations of the petition shall be considered as put in issue, and the claimant shall be required to establish them by legal and sufficient evidence. An answer to a petition may be filed, in which case such order will be made respecting further pleadings in the case as may be deemed proper. A demurrer general or special may be interposed to any petition or answer.

"XI. No evidence or information in the nature thereof will be received, except such as shall be furnished by or through the respective governments.

"XII. Additional testimony may be taken in the form of deposition. The party desiring to take it shall give ten days' notice thereof, stating particularly the place and time of taking the same, the names and residences of the witnesses intended to be examined, and the subject of the examination. The adverse party may appear and cross-examine. After the deposition has been completed pursuant to such notice the adverse party may take the testimony of other witnesses in that vicinity, giving twenty-four hours' notice thereof to the opposing party, his attorney or agent, with a list of the witnesses proposed to be examined. And the same officer shall take the testimony of such witnesses as in continuation of such deposition. Each witness shall state whether he is concerned in the claim in controversy, and if so how, and whether he is related in business or otherwise to the claimant.

"Any officer authorized to administer oaths by the law of the place may take such deposition. He shall first swear (or affirm) the witness to tell the truth, the whole truth, and nothing but the truth relative to the cause in which he is about to testify. He shall then write the questions desired, following each with the answer of the witness thereto, giving in every instance the exact words of the latter. If the attorney or agent of either party make any suggestion to the witness under examination as to his answer, the officer shall note the suggestion in the deposition. As soon as completed the witness shall subscribe his deposition and write his name on the margin of each sheet containing any part of it.

"The officer shall give the style of the case in the caption of the deposition and note the time and place of taking the same, together with the names of the attorneys or agents appearing for the several parties. At the conclusion of the deposition he shall certify over his official signature and seal (if he have one) that the witnesses were duly sworn (or affirmed) as required in this rule before being examined; that he wrote the questions and the answers which they severally gave thereto; saw them sign the deposition, and that it was taken at the time and place specified in the caption. When the deposition shall have been completed and authenticated as aforesaid he shall forthwith inclose the same in an envelope or packet, on which, after being duly sealed, he shall indorse the title of the case and the names of the witnesses examined, and, having addressed the same to the commission at Washington, D. C., deposit it in the proper post-office duly stamped. When received by the commission it may be opened by the secretary at the request of either party.

"XIII. The commission may at any time specially authorize testimony to be taken upon written interrogatories or otherwise, and may also, on motion or of its own accord, order any claimant or witness to appear personally before it for examination or cross-examination. Leading questions must not be put to a witness by the party calling him, and the officer who takes a deposition, while noting any objection of counsel to any question or answer, shall not pass upon the same, but shall record the question or answer as if unobjected to.

"XIV. On motion, any testimony or matter that is improper, irrelevant, immaterial, or scandalous shall be stricken from the record.

"XV. The rules of evidence as to the competency, relevancy, and effect of the same shall be determined by the commission with reference to the

convention under which it is created, the laws of the two nations, the public law, and these rules.

"XVI. When an original paper on file in the archives of either government can not conveniently be withdrawn a duly certified copy may be received in evidence in lieu thereof.

"XVII. The docket will be called on the first Monday of October 1889, and the cases taken up for consideration in their order. If a case be not ready for hearing when called, it will be passed to the heel of the docket, unless, for cause shown, other disposition be made thereof. Like calls and disposition of cases will be made at stated times.

"The order and mode of procedure which obtain in courts of justice of both countries will be observed in proceedings before the commission so far as practicable and consistent with the convention and these rules.

"XVIII. The secretary shall keep a record of the proceedings of the commission in a book provided for the purpose for each day of its session, which shall be read at its next meeting, and if no objection be made, or when corrected if correction be needed, it shall be approved and subscribed by the chairman of the commission and countersubscribed by the secretary.

"He shall keep a notice book, in which entries may be made by the counsel for either government, and when made shall be notice to the opposing counsel and all concerned.

"He shall provide a book of printed forms, under the direction of the commission, in which shall be recorded its several awards or decisions signed by the commissioners concurring therein.

"He shall be the custodian of the papers, documents, and books of the commission, under its direction, and shall keep the same safe and in methodical order.

"Upon each paper received by the commission he shall indorse the date of receipt and enter a minute thereof in the docket in the proper case, and he shall make brief memoranda in such docket under the proper case of all orders of the commission, with appropriate dates respecting such case. While affording every reasonable opportunity and facility to parties and their counsel to inspect and make extracts from papers and records, he shall permit none to be withdrawn from the files of the commission or taken from its office, except by its direction duly entered of record.

"XIX. The docket, minutes of proceedings, and record of awards or decisions shall be kept in duplicate, both in English and Spanish, one of which shall be delivered to each government at the close of the commission."

October 21, 1889, Little, commissioner, for the commission, delivered the following opinion on an application for a modification of the foregoing rules:

"1. Several suggestions have been urged, *arguendo*, upon our attention, by counsel representing various claimants, touching the jurisdiction, powers, and duties of the commission under the convention, with a view to a modification of the rules hertofore promulgated, to conform to the suggestions, should the latter be concurred in.

"It is urged that the present commission was created to review the awards of the former one, and not to consider and pass upon claims submitted as *res novæ*, and that certain presumptions favorable to former

awardees result. Other considerations, involving a construction of the treaty in some particulars, are presented.

"The propositions so urged are not, in our opinion, proper subject-matter for rules of procedure. We have not, therefore, deemed it necessary to enter upon their examination with a view of reaching a conclusion as to their soundness. They may call for solution in the several cases to be heard but not generally when no claim in particular is under consideration. The questions presented may affect substantial private interests, and the parties concerned may have the right to be heard as to them. They can not, therefore, be settled by general rules.

"Obviously, we would not be warranted in carrying into the rules anything that might operate to forestall or preclude a party from urging whatever may seem to him, according to the treaty, proper matter for consideration, when his claim or contention is under hearing. Should he then go beyond the limits of proper inquiry, or misconceive the jurisdiction of the commission, correction can be made, if necessary.

"2. It is also urged that the commission is bound to consider and determine every claim submitted to it under the treaty, whether represented or not, and whether any petition has been filed as to it, or not.

"We do not care, in advance, to express an opinion on this point. It may be observed, however, that there is nothing to the contrary expressed in the rules. It may also be remarked that nobody is bound to do an impossible thing.

"Claimants would do well to bear in mind that the time for the transaction of the business committed to the commission is limited, and that their assistance is needed to render certain its completion within that time. We think the commission has the authority, *ex necessitate*, to make and enforce such reasonable rules as will insure every claimant an opportunity, at least, within the designated period to have his claim heard and determined with such deliberation as a just regard for the rights of all concerned may demand.

"The rules relating to petitions and their contents seem to us to be such as will operate to this end. If any claimant be unwilling to conform to them, and the commission in consequence be so delayed in its work as that his case shall not be concluded when the commission expires, we trust the fault may not be ours.

"3. There were other matters discussed, but we fail to see in them any cause for modifying the rules.

"Should change or addition be deemed desirable hereafter, the way will be open.

"In this connection, and as tending to clearness of understanding in respect of some matters referred to by counsel, we announce, subject to modification, that—

"Each claim referred to in article two of the convention and submitted to the commission will be taken up under the rules and heard and considered, primarily, at least, as an entirety or unit.

"When the finding therein is against Venezuela, and several persons show, by petition or petitions, themselves to be 'claimants' in respect thereto, within the meaning of the treaty, or to have 'vested rights' under article nine thereof, the questions raised, so far as they fall within the jurisdiction of the commission, will then be determined."

Chilean Commission, Convention of 1892. The commission under the convention between the United States and Chile of August 7, 1892, adopted the following rules:

"Rules of the Commission for the Settlement of Claims under the Convention of August 7, 1892, between the United States of America and the Republic of Chile.

"I. The claims shall be entered in the docket provided for the purpose in their order of presentation, and shall be numbered consecutively, beginning with the claim first presented as number one. The style of each case shall be:

_____, claimant,
No. —, against
The Republic of Chile:
or
_____, claimant,
No. —, against
The United States.

"II. The claimant shall file in the office of the commission, at any time before the ninth day of December 1893, a memorial setting forth in plain and concise terms, and without repetition, the facts constituting the grounds of the claim and relied on as entitling the claimant to relief under the convention, filing also therewith all documents in his possession and at his command; but the commission, for good cause shown, may extend the time for filing such memorial.

"III. a. This memorial shall state the name and present residence of the claimant, and the place of his residence at the time when the acts complained of occurred;

"b. Also whether the claimant is at the time he files his memorial a citizen of Chile or of the United States, by birth or naturalization, and whether he was such when the claim originated;

"c. Also a clear and detailed statement of the cause of action—that is to say, the amount claimed, the place and date of the acts from which it originated, the kind, quantity, and value of the property destroyed or injured, the kind of money in which the damage is estimated, and all the facts and circumstances in regard to the loss or damage for which indemnity is asked; and also, if known to the claimant, the name, rank, or employment of the persons committing the acts complained of.

"d. All claims for interest shall be separately stated, including the rate demanded and the time covered.

"e. If the claim or any part thereof is alleged to have arisen from acts upon the high seas, the names of the vessels concerned, the part taken by each, with the names of the commanding officers, if known, and in the service of what governments respectively engaged, with proper dates and localities, must be stated.

"f. If any transfer of the claim or any part thereof has occurred, the memorial must state how, when, by what means, for what consideration, and to and by whom the same has been made.

"g. If the claim is for property taken, lost, or injured, for which any voucher, receipt, memorandum, or any writing was given, a copy thereof

addressed the same to the commission at Washington, D. C., deposit it in the proper post-office duly stamped. When received by the commission it may be opened by the secretaries at the request of either party.

"XIII. The commission may at any time specially authorize testimony to be taken upon written interrogatories or otherwise, and may also, on motion or of its own accord, authorize any claimant or witness to appear personally before it for examination or cross-examination. Leading questions must not be put to a witness by the party calling him, and the officer who takes a deposition, while noting any objection of counsel to any question or answer, shall not pass upon the same, but shall record the question or answer as if unobjected to.

"XIV. On motion any testimony or matter that is improper, irrelevant, immaterial, or scandalous shall be stricken from the record.

"XV. The rules of evidence as to the competency, relevancy, and effect of the same shall be determined by the commission, with reference to the convention under which it is created, the laws of the two nations, the public law, and these rules.

"XVI. When an original paper on file in the archives of either government can not conveniently be withdrawn a duly certified copy may be received in evidence in lieu thereof. Public official documents, laws and decrees, published by authority of either government, may be received in evidence, subject to objection as to relevancy, without further authentication.

"XVII. Motions, demurrers, and written arguments shall be in the English language. Memorials shall be in English and Spanish. All depositions which may be taken outside of the United States under these rules shall be taken in the language which the witness ordinarily uses, and if in any language other than the English, the testimony shall be accompanied by a faithful translation into English. All documentary evidence shall be submitted in the original language in which it is written, and if in Spanish, shall be accompanied by a faithful translation into English.

"XVIII. The claimant shall file with his original memorial at least twenty copies thereof printed in English and twenty in Spanish. All pleadings and arguments and briefs of the agents and counsel of the respective governments shall be printed by the commission, together with such other documents as in their judgment may be necessary.

"XIX. The commission may, upon reasonable cause being shown, extend the time for pleading, argument, or taking evidence in any case.

"XX. The order and mode of procedure which obtain in courts of justice of both countries will be observed in proceedings before the commission so far as practicable and consistent with the convention and these rules.

"XXI. The secretaries shall keep a record of the proceedings of the commission in a book provided for the purpose for each day of its session, which shall be read at its next meeting, and, if no objection be made, or when corrected if correction be needed, it shall be approved and subscribed by the president of the commission and countersubscribed by the secretaries.

"They shall keep a notice book, in which entries may be made by the counsel for either government, and when made shall be notice to the opposing counsel and all concerned.

"They shall provide a book of printed forms, under the direction of the commission, in which shall be recorded its several awards or decisions signed by the commissioners concurring therein.

"They shall be the custodians of the papers, documents, and the books of the commission, under its direction, and shall keep the same safe and in methodical order.

"Upon each paper received by the commission they shall indorse the date of receipt and enter a minute thereof in the docket in the proper case, and they shall make brief memoranda in such docket under the proper case of all orders of the commission, with appropriate dates respecting such case. While affording every reasonable opportunity and facility to parties and their counsel to inspect and make extracts from papers and records, they shall permit none to be withdrawn from the files of the commission or taken from its office, except by its direction duly entered of record.

"XXII. The docket, minutes of proceedings, and record of awards or decisions shall be kept in duplicate, both in English and Spanish, one of which shall be delivered to each government at the close of the commission."

We give below the rules adopted by three Paraguayan Commission-commissions, which were organized for the purpose of deciding upon single claims.

The commission organized under the convention between the United States and Paraguay of February 4, 1859, for the purpose of deciding upon the claim of the United States and Paraguay Navigation Company, adopted the following rules:

"RULE I.—*Limitation of time.*

"The commission is organized on this 22nd day of June 1860; and its session is limited by the convention to a period not exceeding three months, now commencing.

"RULE II.—*Jurisdiction.*

"The duty imposed upon it, is to investigate and adjust and determine the amount of the claims of the 'United States and Paraguay Navigation Company,' against the Republic of Paraguay.

"RULE III.—*Order of proceeding.*

"In view of the limited term within which this duty must be discharged, the claims of the said company will be formally presented to the commission in writing, together with a brief or abstract of the separate heads of claim and of the nature of the respective proofs, on or before the 25th day of June inst. A reasonable term will then be assigned within which a similar statement on the part of the republic of Paraguay will be presented. The points in controversy being thus ascertained, the proofs in support of the claim will be presented within a term which will be specified by the commission. After which, the counter proof will be presented within a term to be specified in like manner. If a proper case for

rebutting proof shall then be exhibited, an opportunity to adduce the same will be allowed, after which the case will be submitted finally, on printed arguments.

"RULE IV.—Evidence.

"In the nature of the case it is not possible to prescribe absolute rules as to the forms and instruments of evidence. All the documents and papers relative to the matters in controversy, which are in the archives of the State Department, will be laid before the commission, and will be considered, together with all official papers of either government, and all depositions or other proofs whatsoever, heretofore existing, which may be tendered by the parties; the weight and sufficiency of all which will be determined by the commission, in conformity with the principles of the public law. In all instances where it may be practicable, an opportunity will be afforded, if seasonably applied for, to cross-examine witnesses who may have been examined *ex parte* as to controverted facts; and all depositions taken after the promulgation of these rules, must be upon reasonable notice to the opposite party through the counsel representing them respectively before the commission."

*The Hudson's Bay
Commission.*

The commission organized under the convention between the United States and Great Britain of July 1, 1863, for the purpose of adjudicating the claims of the Hudson's Bay and Puget's Sound Agricultural Companies, adopted the following rules:

"I. The Hudson's Bay and Puget's Sound Agricultural Companies, whether for themselves, or on behalf of any British subjects having claims upon the United States, which are provided for by the treaty between Her Britannic Majesty and the United States, concluded July 1, 1863, will file memorials of the same with the clerks of the commissioners in the city of Washington. Every memorial so filed must be addressed to the commissioners and be printed, and must set forth particularly the facts and circumstances from which the right to prefer such claims is derived, and the considerations on which such claim is founded.

"II. All motions addressed to the commissioners must be made in writing and filed with the clerks.

"III. Counsel will be heard orally, on printed briefs filed, setting forth the points of law and fact relied upon by them respectively.

"IV. All testimony unless otherwise specially ordered shall be in writing, and upon oath or affirmation duly administered according to the laws of the place where the same shall be taken, by a person competent by such laws to take depositions, and all witnesses produced by either party shall be subject to cross-examination by the other, who shall have reasonable delay for that purpose.

"Evidence may also be taken by the commission on the motion of either party under such regulations as shall from time to time be prescribed by the commissioners. Documentary proofs shall be authenticated by proper certificates or the oath of a witness, or otherwise as the commissioners may order in special cases.

"V. One of the clerks will be in attendance daily at the office of the commissioners in Washington, which until further orders is established

at No. 355 H street North, to receive and file all documents addressed to the commissioners.

"VI. Orders for the adjournment of the meetings of the commissioners from time to time, and all other orders except as to the appointment of the arbitrator or umpire, and the decision upon claims, may be made by the joint written direction of the commissioners, filed with the clerks."

January 11, 1865, the following additional rule was adopted:

"VII. All depositions are to be filed with the clerks from time to time as they are taken. They are to be printed under the direction of the clerks or either of them as they are from time to time received, in the form and manner in which these rules and regulations are printed. They are to be paged in double series, the one to contain all the depositions and documentary evidence on the part of the claimants, the other on the part of the United States. Of the documentary evidence, only those portions need be printed which are designated as material for that purpose by either of the counsel.

"Other documents may be referred to by an abstract of the date and other descriptive particulars, sufficient to identify the document, and disclose its nature in general. The number of copies to be printed is two hundred and fifty.

"No printed copies are to be given out by the clerks except three to each counsel, without the special direction of the commissioners."

April 11, 1865, the commissioners made the following order:

"Ordered, That rule No. VI. be so amended as to read as follows:

"Orders for the adjournment of the meetings of the commissioners from time to time, and all further orders, except as to the decision upon claims, may be made by the joint written direction of the commissioners, filed with the clerks."

May 11, 1867, the commissioners ordered that the concluding paragraph of Rule VII. be so amended as to read "except not exceeding ten to each counsel and two to each commissioner."

The commissioners adopted the following special order in regard to the taking of testimony:

"It is ordered on the motion of the counsel for the Hudson's Bay Company, and of the United States of America, that an order or commission be issued for taking evidence as well on the part of the Hudson's Bay Company as of the United States of America, in the State of California, State of Oregon, Washington Territory and Vancouver's Island; that such order or commission be addressed to any judge or clerk of a court of record, United States court commissioner, justice of the peace or notary public; that the witnesses produced by either party be examined and cross-examined viva voce after reasonable notice to either party; that all objections to evidence and other questions of law or practice be reserved and that the evidence with all the documents and papers with a report of all such objections be returned before the honorable the commissioners with all convenient diligence.

"ALEXANDER S. JOHNSON, U. S. Commr.
"JOHN ROSE, Commr."

A similar order *mutatis mutandis* was issued in the case of the Puget's Sound Agricultural Company.

The commission under the convention between the United States and Venezuela of January 19, 1891, for the settlement of the claim of the Venezuela Steam Transportation Company, adopted the following rules:

"Rules and Regulations Relative to the Transaction of Business before the Commission.

"UNITED STATES AND VENEZUELAN CLAIMS COMMISSION,

"No. 2 Lafayette place, Washington, D. C.

"I. Within twenty days from the date of the first meeting of the full commission the agent of the United States of America will file with the commission a statement, in English and Spanish, giving the nature of the claim and the amount of indemnity demanded, to the end that the commission may be advised of the matters to be submitted to it for decision; and within ten days thereafter the agent of the United States of Venezuela may submit in English and Spanish a reply thereto.

"II. The evidence in support of or in opposition to the claim shall comprise—

"1. The diplomatic correspondence between the two governments.

"2. Oral testimony of witnesses examined in open session of the commission.

"3. Depositions of witnesses taken on interrogatories or before an officer authorized to take testimony.

"4. Duly certified copies of papers, records, and documents which are competent evidence.

"III. Depositions taken within the jurisdiction of the United States of America or the United States of Venezuela shall be regularly taken before an officer of such class as shall be designated by the commission or agreed upon by the agents of the two governments. Depositions taken in foreign countries shall be taken before any consul or diplomatic agent of either government.

"IV. The commission may at any time within the period limited by the convention, on the application of either government, issue a special commission for the taking of depositions. The commission may also, in its discretion, order any claimant or witness to personally appear before it for examination or cross-examination.

"V. The secretary of the commission shall keep the following books of record:

"1. A docket, upon which he shall enter the claim as soon as filed, specifying briefly the grounds and nature thereof.

"2. Daily minutes of the proceedings of the commission, each day's entry to be read at the opening of the succeeding session, and, if approved by the commission, signed by the president and attested by the secretary.

"3. A notice book, in which entries may be made and subscribed by the agent of either government. All entries so made shall constitute notice to the opposing agent.

"4. A book in which shall be recorded the opinions of the commissioners

and the final award, such opinions and award to be signed by the commissioners concurring therein.

"The above-mentioned docket, minutes of proceedings, and book of opinions and awards shall be kept in English and Spanish, one copy of which shall be transmitted to each government at the termination of the commission.

"The secretary shall have charge of all books and papers of the commission, none of which shall be withdrawn from the files without permission of the secretary, or taken out of the commission room without an order of the commission.

"VI. Either government, through its agent, may submit to the commission a certified copy of the diplomatic correspondence between the two governments, mentioned in the fourth article of the convention, including the various inclosures therein referred to, and such certified copy shall be received and considered by the commission as having the same weight and effect as the original communications and inclosures. But the commission may request either government, through its agent, to produce the original of any communication or inclosure included in said diplomatic correspondence for inspection, and such original papers shall be returned to the government producing them.

"VII. A copy of any original paper, document, or record in the archives of either government, or in any of its legations or consulates in foreign parts, not included in the aforesaid diplomatic correspondence, when certified by the head of the department or office in which such paper, document, or record is kept, shall be received in evidence by the commission (if, in its opinion, such copy is otherwise admissible), provided that the certification of such copy shall be authenticated under seal of the department of State of the United States of America, or under seal of the ministry of foreign relations of the United States of Venezuela, as the case may be.

"VIII. The agent of the United States of America shall, on or before the fifteenth day of February 1895, file at least ten printed copies of a brief of the facts and authorities on which he relies. If the agent of the United States of Venezuela desires to file a brief on behalf of his government, he shall serve the agent of the United States of America with at least three printed copies of the same on or before the first day of March 1895, and the agent of the United States of America shall have until the tenth day of March 1895 to file a printed reply-brief, if he so desires."

2. AUTHORITY TO PRESENT CLAIMS.

Authority of Administrators. "As to the right of administrators of deceased British claimants to recover without proof of the nationality of such administrators or of legatees or distributees of the deceased.

"No. 109.—Charles M. Smith, later John C. Ferris, administrator, No. 212, r. The United States.

"Agnes Pollock, later J. B. Halley, administratrix, No. 205, r. The United States.

"Charles M. Smith, a minor, filed his claim on the 24th of February 1872. He claimed compensation for property destroyed, carried off, and occupied

by the armies of the United States, at Athens, Alabama, during the war. The said property belonged to his father, John Donohue Smith, who died on the 9th of April 1870. He prosecuted the claim as heir at law and distributee of the said J. B. Smith, deceased, through J. R. Dillin, his attorney, empowered by J. C. Ferris, the administrator of the said Smith, deceased.

"The United States agent on the 9th of March 1872 filed a motion to dismiss the claim on the ground that the memorialist, being a minor, could not prosecute the claim in person or by attorney, but must proceed by guardian or next friend, and that the said claim should be prosecuted in the name of the administrator of the said J. D. Smith, deceased.

"On the 19th of March 1872 the case was dismissed by the commissioners, and on the next day the same claim was filed again in the name of J. C. Ferris, administrator of the estate of the deceased, J. D. Smith. Shortly after the filing of the new memorial the defense filed another demurrer on the following grounds:

"1. That neither the claimant, administrator, nor his alleged *cestui que* trust, C. M. Smith, was alleged to be a British subject.

"2. That it appeared that J. D. Smith died prior to the conclusion of the treaty of Washington, and that said claim ever since was not a claim of a subject of Her Britannic Majesty upon the United States, but was a claim of a citizen of the United States.

"Agnes Pollock, the petitioner in the second claim to be reported under this head, filed her memorial on the 20th of March 1872 as widow of James Pollock, deceased, claiming compensation for property carried off by the United States armies in Itawamba County, Mississippi, in the years 1862, 1863, and 1864, belonging to said James Pollock. Both man and wife were British subjects by birth.

"On the 3d of May 1872 the United States agent demurred to the memorial on the ground that it showed no title in the claimant to said property, or to any claim for the avails thereof; and on the 17th of June of the same year, and before said demurrer had been acted on by the commissioners, a new memorial was filed, putting the claim in the name of James B. Halley, administrator of the estate of James Pollock, deceased.

"J. B. Halley described himself as of Tishomingo County, Mississippi.

"On the 2d of July 1872 the defense filed a motion to dismiss this latter memorial because it had been filed after the expiration of the six months allowed by the treaty for the filing of memorials from the time of the first meeting of the commission; on the same day a demurrer to the claim was also filed by the defense, which was almost identical with the one filed in the case of J. C. Ferris, above cited.

"In the arguments filed by the United States agent in the support of these demurrers he held:

"1. That in the absence of any allegations to the contrary, the claimants, and all persons interested in the estate of the deceased, are to be taken as not being British subjects, and no claim can be prosecuted for the benefit of American citizens according to the twelfth article of the treaty.

"2. That a person who had been a British subject at the time of the injury complained of, but had become a naturalized United States citizen before presenting his claim, had no standing before the commission.

"3. That if a British subject had assigned his claim absolutely to a person of another country, the assignee could not prosecute the same, at least in his own name.

"4. That a sole legatee, made likewise a sole executor by will of a British subject, if an American citizen, could have no standing before the tribunal.

"5. That it was only on behalf of Her Majesty's subjects, and while they remained such subjects, that Her Majesty's government assumed to intervene.

"6. That it was evident that in case of involuntary transfer of title by death and operation of law, the rule must be the same.

"Her Majesty's counsel in his brief stated:

"1. That Charles Smith, the beneficiary in the case of J. C. Ferris, administrator, No. 212, was the son of John D. Smith, a British subject, and was therefore also a subject of Her Britannic Majesty.

"2. That the United States counsel would no doubt contend that children born in the United States of British parents were citizens of the United States as well as British subjects, and could have no benefit under the treaty; but supposing that the fact of birth alone gave them American nationality, that fact would not deprive them of their rights as British subjects under the laws of Great Britain, and the treaties made by that power; nor could the United States impress upon infant heirs the character of American citizens to the extent and for the sole purpose of shutting them out from the benefits of the treaty of Washington.

"3. That the twelfth article of said treaty was intended to provide for all claims in their character British, and in respect of which there was a right or duty on the part of the British Government to obtain redress; and that it was sufficient that the claim itself in its nature and all its essential attributes was a British claim, as treated by recognized principles of international law.

"4. That by the laws of the United States, their consuls in foreign countries (if the laws of such countries permit) were bound to collect the personal property of American citizens dying there, in the absence of any legal representative; to collect and pay debts due to them or by them, and to settle their estates, and to remit the balance to the Treasury of the United States. This is done irrespective of the nationalities of the legatees or distributees of the deceased.

"5. That manifest injustice would be done, if the commissioners deemed it necessary that all the beneficiaries of a claim be British subjects, and Her Majesty's counsel cites several cases as illustrations of how such injustice would be committed.

"6. That any award made in the name of an administrator would be paid to him, and would have to be distributed by him under the orders of an authorized tribunal, which would utterly disregard all questions of nationality.

"7. That the nationality of an administrator is unimportant and not at all material to the commission."

The commissioners overruled the demurrers and gave the following decision:

"No. 205, James B. Halley, administrator; No. 212, John C. Ferris, administrator, v. The United States.

"These demurrers are overruled; the majority of the commissioners being of opinion that where the claim is prosecuted by an administrator in respect of injury to property of an intestate who was exclusively a

British subject, and the beneficiaries are British subjects as well as American citizens, the claim may be prosecuted for their benefit.

"The commissioners are all of opinion that the particular nationality of the administrator does not affect the question."

From the first part of this decision Mr. Frazer, United States commissioner, dissented, as follows:

"By the very words of the treaty (article 12) the claim must be, first, for an act done to the 'person or property of' a British subject; second, it must be made 'on the part of' a British subject. Distinctly, then, these two things must concur to give us jurisdiction. This is too plain to admit of controversy. The treaty is the language of both governments, and must be construed to effectuate not the intent of *one* only, but of *both*. If any of its terms have one sense in Great Britain and another in the United States by reason of their respective laws, neither of these senses can fairly be taken; another, though limited, sense must be sought, common to both countries. There is such a restricted sense of the language employed here. In Alexander's case I expressed myself on this branch of the present question. One born in the United States of British parents residing here would be protected by the United States as fully as any American against wrongs from other countries, Great Britain probably not excepted. And Great Britain would not, as against the United States, intervene in his behalf, though she would claim him as her subject, and hold him to accountability as such if found bearing arms against her. And if born here of British parents during a temporary sojourn, but afterwards domiciled in England and never residing here, the United States would practically treat him as not an American, refusing to intervene in his behalf against any other government, though she, too, would hold him to accountability as a citizen if found in arms against her. And so of persons born in Great Britain of American parents. The treaty is the product of diplomacy, providing this international tribunal for the amicable settlement of claims concerning which each power could lawfully claim redress as it saw fit, not of claims for which it would have no right to claim redress.

"Alexander's case was a little different. He had estates and a domicile in both countries; was born in the United States of British parents domiciled here, but claiming only British nationality. This would be an interpretation of the treaty which would maintain our jurisdiction in all cases in which the complaining government would, by international law, have been at liberty to demand redress. It would settle all such cases, and thus effectuate the purpose of the treaty which was to terminate our diplomatic differences. The principles above stated, it seems to me, apply quite as fully where the person beneficially interested in the claim made before us is of both nationalities as where the person originally injured, being also of both nationalities, is still living and makes claim. To entertain the claim in either case is to assume that each government has by the treaty recognized its responsibility to the other for injuries done to those who are by its laws its own citizens or subjects. This construction, it seems to me, is utterly inadmissible. I can not possibly bring myself to believe that either government intended any such thing."¹

¹ Am. and Br. Claims Com., treaty of May 8, 1871, Howard's Report, 15; Hale's Report, 20.

Pierre S. Wiltz, public administrator for the parish of Orleans, Louisiana, presented to the commission under the treaty between the United States and France of January 15, 1880, a memorial in which he averred that he was the duly appointed administrator of the succession of **Leon R. Delrieu**, a citizen of France, who died in New Orleans in 1879; that Delrieu had a claim against the United States for the destruction of his property and for an imprisonment of thirty-three days by the authorities of the United States in 1862; and that the beneficial owners of the claim were Delrieu's "creditors and heirs." To this memorial counsel for the United States demurred on the ground that it did not aver "that the alleged beneficial owners of said claim are or ever were citizens of France."

In support of this demurrer counsel for the United States contended that the jurisdiction of the commission was limited to claims by citizens of France; that while it was not essential that the citizenship of Wiltz should be averred or proved, his right to prosecute the case of the persons whom he professed to represent depended upon their citizenship in France; that as Delrieu was not living the 15th day of January 1880, when the treaty was ratified, its provisions could have no effect upon him personally nor upon any claim he might then have had against the United States, except so far as such claim had descended by operation of law to his heirs or legatees, who were themselves at the date of the treaty citizens of France; that as to creditors, whether they were French or American citizens, they were legally incapable of appearing before the commission as claimants; that previously to the ratification of the treaty there was no claim on behalf of Delrieu that could be enforced; that it was by and through the provisions of the treaty that the claim had a legal existence; that if Delrieu's surviving heirs were French citizens they would have the same standing before the commission that Delrieu himself would have had if living, but that if they were American citizens, or if, in the absence of heirs of blood, his property should descend by operation of law to the State of Louisiana, the treaty did not give to his heirs or to the State of Louisiana a standing before the commission, as they were not citizens of France.

In support of this position counsel for the United States called attention to the proceedings of the British and American mixed commission in the case of **William G. Ford**, administrator, in which the commission allowed the claim as and

for the interest of Mary G. Barker, who was a legatee under the will of G. J. Robinson, the decedent and original claimant, and rejected the claims of two American citizens, who were also legatees under the same will; and to the case of Mrs. Grayson, No. 291, before the same commission. Mrs. Grayson claimed as administratrix of the estate of John J. Cowley, her former husband, who was when living, a British subject. After the death of Cowley she intermarried with one Grayson, an American citizen. The commission disallowed her claim so far as it was prosecuted in her own right, although she, as well as Cowley, was a British subject by birth.

Special counsel on the part of the claimant submitted three propositions in support of the memorial:

"1. That Leon R. Delrieu was the original owner of the property described.

"2. That he was a French citizen at the time his property and person were seized.

"3. That the acts were committed within the jurisdiction of the United States by the military authorities of the United States and during the period prescribed in the treaty."

He also referred to the first rule of the commission, which said: "If a claimant be dead, his executor or administrator or the legal representative of the estate must appear, unless it is shown that there are no creditors, and that the estate is settled." He maintained that the claim possessed a twofold character; that while it was based on an injury to a French citizen, it also involved a wrong which the French Government was bound to see redressed, and in that light became national in its character; that the death of the claimant, while it changed the *personnel* of the action, neither lessened the obligation of the United States to remedy the wrong inflicted upon a French citizen, nor changed the relations and duties of the French Government. He further contended that the commission had no right to consider what disposition might be made of an award, this being a matter which must be left to the government prosecuting the claim and to the courts. The attention of the commission was directed to the case of *James B. Halley v. The United States*, No. 205, before the American and British claims commission, and eleven other cases. Counsel gave the following version of the decision of the commissioners in the case of Halley: "When the claim is presented by an administrator in respect of injury to the

property of an intestate, who, while living, was a British subject, and the beneficiaries are British as well as American subjects, the claim may be presented for their benefit, and the nationality of the administrator does not affect the question." It was contended by counsel for the claimant that "the name of the claimant, or of the administrator or representative, is used to define the claim and adjust the amount to be paid for the wrongs committed against his person or property, but for all other purposes the claim is national, is presented by the government on behalf of the claimant, and the sums awarded, if any, are to be paid to it; hence it can make no difference who prosecutes the claim of a French citizen—one who was French at the time the wrong was done within the terms of the treaty."

At the hearing, counsel for the French Government contended that the day the damage was done the claim arose; that it was then a *chose in action*, although it could not be enforced. Quoting the first article of the treaty, he maintained that the remedy provided for was in its nature retroactive. The treaty did not refer to "claims that shall arise," but spoke of "claims that have arisen from such a day to such a day. Therefore, by the action of the treaty, the claims to-day are presumed to have been perfect as early as the day the damage was suffered; the *chose in action* is to-day presumed to have been complete and perfect the day the injury was suffered." "First, the injuries are suffered by a Frenchman; second, they are suffered at a certain date; third, the right to recover is a right solemnly proclaimed by both parties. On the other hand, the jurisdiction of this commission is perfect, and the retroaction of the effect of that jurisdiction is plainly set forth in the convention of January 15, 1880." Counsel for France also referred to the case of *Phelps v. McDonald*. McDonald, a British subject, had been engaged in business in the United States, and was a bankrupt under the laws of the United States. He was the owner of a claim against the Government of the United States which he had obtained by purchase from his assignee. An award was made to McDonald, and the Supreme Court held that the moneys belonged to his creditors. Several other cases were cited by the counsel for the Republic of France, and, among others, Agnes Crook McLeane, administratrix (*Alabama Claims Court*, p. 112), Charles M. Smith and Agnes Pollock (*British and American Claims Commission*, Howard's

Report, p. 15); also Elizabeth Sherman's case (p. 69 of the same report); and, in conclusion, he stated that, as a matter of fact, awards made by international commissions were paid by one government to another.

The majority of the commission, Baron de Arinos and Mr. Aldis, rendered the following decision :

WASHINGTON, *January 19, 1882.*

"Leon R. Delrieu, a French citizen, died at New Orleans, April 15th, 1879. He was the original owner of this claim. He was a French citizen both at the time he suffered the loss and at the time he died.

"Pierre S. Wiltz, of New Orleans, files this claim as the duly appointed administrator of Delrieu. He states in the memorial that the present beneficial owners of the claim are the creditors and heirs of said Delrieu, 'who are legally represented by your memorialist.'

"He does not state that the creditors and heirs of Delrieu, or any of them, are French citizens.

"The counsel of the United States demurs on the ground 'that it does not appear from the memorial that the alleged beneficial owners of the claim are, or ever were, citizens of France.' He claims that this commission has no jurisdiction of a claim unless at least some one of the beneficial owners is a French citizen. He admits that the nationality of the administrator is of no account, for he has no beneficial interest and merely represents the real claimants.

"The counsel of France claims that as Delrieu was a French citizen at the time he suffered the loss, and so continued up to the time of his death, the administrator of his estate has the right to present and recover for the claim although none of his creditors and heirs are French citizens.

"This is a question of jurisdiction.

"In deciding it we must be governed by the language and meaning of the convention.

"We think it was not enough that the deceased was a French citizen when he suffered the loss and when he died, and that his administrator presents the claim. It should further appear that the real and beneficial claimants, who will ultimately receive the amount that may be allowed, are French citizens; and they must appear and present their claims. This appears to us to be the plain meaning of the first and second articles of the convention. They do not, in our judgment, admit of any other construction.

"We do not think it necessary, at this time, to make any further statement of the reasons for this decision.

"The demurrer is therefore sustained, and the claim is disallowed."

Besides concurring in the decision of the commission, Mr. Aldis filed an opinion in which he maintained the following views:

"I. The convention which created this commission determines its jurisdiction. * * *

"Articles I. and II. describe the claims of which we have jurisdiction.

"ART. I. Claims against the United States are described as follows: 'All claims on the part of corporations, companies, or private individuals, citizens of France, upon the Government of the United States, arising out of acts committed against the persons or property of citizens of France not in the service of the enemies of the United States, or voluntarily giving aid or comfort to the same, by the civil or military authorities of the Government of the United States,' etc., 'shall be referred to three commissioners,' etc.

"By this article two things are plainly required as to citizenship—1st, that the 'private individuals' who are claimants must be French citizens; and 2d, that the acts out of which the claim arises must have been committed against the persons or property of French citizens not in the service of the Confederacy, or voluntarily giving aid or comfort to the same.

"Art. II. provides that 'the commission shall examine and decide all claims of the aforesaid character presented to them by the citizens of either country,' etc. This plainly means that the person who presents the claim—that is, the real claimant—must be a citizen of the country through whose agent he makes claim. * * *

"It speaks in the present; it means those who now present the claim and who are now French citizens. It does not say who now are 'or have been' French citizens. It does not say 'French citizens or the heirs of deceased citizens of France.' * * *

"One who was once a citizen, but whose citizenship has been ended by death, who no longer owes allegiance or can render service to the state, and who can no longer receive protection from the state, would not in ordinary language be described as a 'private individual'—'a citizen' who is to 'present his claim.' Delrien, as a private individual, has ceased to exist. He can have, can present no claim. At his death it passed to his heirs. He can no longer be a citizen. His allegiance ended with his life. He does not even present the claim by this administrator; for the administrator in his memorial says the 'present beneficial owners are the creditors and heirs of Delrien, who are legally represented by your memorialist.' * * *

"The force of the words used in the second article—'the commission shall decide all claims of the aforesaid character *presented* to them by the citizens of either country'—as indicating that the real claimants who present them must be citizens is sought to be avoided by saying that the words were 'accidentally used' by Mr. Evarts. Their force is too potent and significant to admit of such an explanation, and few public men are more notable than the gentleman referred to for selecting words not 'by accident' but with intent to express the exact meaning. The words used show that the real and living persons are meant. * * * France has no pecuniary interest in the award. She asks pecuniary compensation, not for herself, but as reparation for the wrong done her citizens.

"It is urged that the claim belongs to the estate of the deceased, and that if the deceased was a citizen of France that is enough. In reality 'the estate of the deceased' is only another form of expression for 'the heirs of the deceased claimant.' Upon the death of the ancestor the claim descends to the heirs (subject to the debts of creditors, but none are here shown), who then become the owners of the claim—the real claimants—and who are 'private individuals,' not 'une entité impersonnelle.' They do not appear before us as claimants, probably because they are not French citizens and can not take the oath required by our rules that they are French citizens. Hence they seek to evade the provisions of the convention requiring the claimants to be French citizens by putting forward an administrator as claimant, who, because he is not a real claimant, but only a mere representative of others, need not be a French citizen nor make oath that he is. * * *

"It is in the nature of all judicial proceedings that, so far as possible, the real parties whose rights are to be investigated and who will be bound by the judgments rendered shall appear and be made parties. Especially should this be so when the very right to recover depends, as it does here, upon two facts which are personal to the claimants, viz, French citizenship and neutrality—facts which can not be investigated until the real claimants are known. * * *

"II. The reason of the case, as well as the terms of the convention, requires that the claimants should be French citizens. French citizens owe France allegiance and service in peace and war, and in return are entitled to her protection. But American, British, German, or other foreign citizens do not owe France allegiance and can not claim her protection. She will not interfere in their behalf, but leaves them to the protection of their own governments. Especially France ought not to and will not interfere in behalf of American citizens against their own government. That would justly be regarded as offensive to the dignity and honor of the United States. * * *

"III. The precedents all sustain this decision.

"The claims of British subjects against the United States, which the British and American Claims Commission was established to adjust, were of the same character as the claims of French citizens which this commission is to settle. Hence the treaty which created that commission served as the model of this, and the articles of that treaty and of this convention are almost uniformly the same, both in substance and language. On the point of citizenship they are the same. Hence, decisions of that commission are of great value for our instruction and guidance. The decision of that commission in the case of Mrs. Grayson (No. 291, Hale's Report, p. 19) is directly in point to sustain the decision we now make. * * * We can hardly suppose that this decision, then a recent one, was unknown to the learned Secretary of State and the able and accomplished French minister, who negotiated this convention. * * * If it be true, as stated in the brief for Roman, that this decision of the British and American Claims Commission is 'against public law, justice, and equity, and has been shown to be in practice unjust, inequitable, and utterly vain and futile,' it seems as if it would have attracted the attention of the gentlemen who drew up the convention, and that they would

have inserted some article in it to guard against such a decision in the future. We think the decision was right; that the precedent is a good one, and ought to be followed.

"We are not aware that any precedent can be found in the judgments of any international commission sustaining the doctrine that the citizenship of a deceased claimant is sufficient when the real claimants are not citizens. The case of *Comegys v. Vasse* has been much pressed as an authority for this doctrine, but the question that arises here did not arise in that case. Vasse and his assignees were alive, and the international court had full jurisdiction. * * * The questions in that case were not as to what facts were necessary to give the international commission jurisdiction, but, 1st, whether the award, being to the assignees, was conclusive against Vasse; and, 2d, whether the claim under the bankrupt laws passed to the assignees. * * * The passage cited from Judge Story's opinion was a mere '*obiter dictum*,' true in that case, but not correct if Vasse had been dead and the question had arisen whether his heirs or assignees, not being American citizens, could present the claim and give the commission jurisdiction. * * * In this connection, it is proper for us to say that no question as to the ultimate distribution of the fund among those who may claim it by conflicting titles can arise before us. We inquire as to who the claimants are, and whether they are French citizens only so far as it is necessary to give us jurisdiction, and in the decision we here make there is nothing that conflicts in the least with the decision of *Comegys v. Vasse*. When jurisdiction is established, then the award is given to the claimants, as they are entitled to it according to the evidence.

"IV. If the statements in the memorial are sufficient, then it need only be proved that Delrieu was a French citizen and did not aid the Confederacy to entitle the heirs to the award. They need not prove that they were neutral. It is enough that Delrieu was. These real claimants, though in the service of the Confederacy during the whole four years of the war, will receive compensation, while the claims of all other French claimants would be defeated by such facts.

"But it is when we consider the real claimants as American citizens that the unreasonableness of the doctrine is most apparent.

"Suppose, when this convention was being framed, that the French Government had said, 'We wish that American citizens, who are the heirs of deceased French citizens, shall have the same right to an allowance for the claims of the deceased that French citizens have,' the American Government would have replied, 'No;' and for two reasons. 1st. We take care of and protect the rights of American citizens, and it is not for any foreign government to interfere in their behalf against us. 2d. The rule as to them and their conduct and obligations to the government is very different from that of French citizens. French citizens were bound only to be neutral, and they did their whole duty if they remained strictly neutral. But American citizens were bound to be loyal to the government—to actively aid it when called upon. Neutrality was not enough for them; and their claims can not be allowed on the proof of neutrality, as those of French citizens are.

"But it is upon the plain language of the convention that we rest this decision. We allude to the reason of the case, the precedents of the

British and American claims commission, and the unreasonable results to follow from a contrary rule only as strengthening the conclusion which we draw from the text of the convention."

In a dissenting opinion M. de Geofroy placed much stress on the case of *Comegys v. Vasse*.¹ After quoting from that case he said:

"L'administrateur représentant le mort et l'héritage, non les héritiers, il est donc superflu de rechercher, ainsi que le fait mon collègue, si ces héritiers sont ou ne sont pas des citoyens français et de discuter sur la question de notre juridiction.

"Notre juridiction dans le cas présent est parfaite et sur la personne et sur la chose, car nous avons devant nous les deux conditions demandées par mon collègue:

"1°. La réclamation d'un citoyen français.

"2°. Une réclamation pour des actes commis contre la personne ou la propriété d'un citoyen français n'ayant pas été au service de la Confédération ou lui ayant donné aide et support.

"Qui est ce citoyen français? C'est Delrieu, qui n'a jamais cessé de l'être et qu'on n'accuse pas d'avoir servi ou aidé la Confédération. C'est lui Delrieu, le défunt, qui a souffert; la réclamation est sienne; ne l'appelle-t-on pas l' "original owner"? Nous n'avons pas besoin d'autres parties pour prendre connaissance de la cause.

"Les Conseils de France ont établi deux points principaux dans cette affaire Wiltz-Delrieu et dans celle de Sigismund Roman, qui est à peu près identique:

"1°. Une réclamation naît du jour où le préjudice a été causé et elle appartient en propriété à la personne qui a subi le dommage; par conséquent, si cette personne meurt, elle entre dans la succession et fait partie des valeurs à recouvrer de cette succession.

"2°. C'est par les mains du Gouvernement de ce propriétaire originel ou primitif de la réclamation que celle-ci est présentée; il s'en suit que le Gouvernement de la République Française a qualité pour faire valoir les droits posthumes d'un de ses citoyens défunt.

"Les Conseils des Etats Unis se fondant sur une interprétation judaïque du Traité de 1880 ne veulent considérer que les ayants droit ('beneficiaries') actuels de la réclamation.

"Ils allèguent que la réclamation ne date que du jour de la signature du Traité; que c'est le Traité qui la crée; que la mort du réclamant détruit la réclamation et libère le Gouvernement contre lequel elle est élevée.

"Mon collègue des Etats-Unis, trop prudent pour reproduire ces propositions véritablement extraordinaires, n'en adopte pas moins les conséquences pour créer une théorie toute nouvelle, celle de la double nationalité de la réclamation.

"Cette nécessité de la double nationalité dont, soit dit en passant, on ne parlait pas d'abord et qui semble avoir été découverte dans le cours de la discussion, je ne la vois nulle part articulée dans le Traité. C'est par une induction forcée et en rattachant les unes aux autres des phrases inco-

¹ *Supra*, 1154.

hentes du Traité qu'on lui donne aujourd'hui un corps. Si une condition aussi importante, et je puis dire fondamentale, avait été dans la pensée des négociateurs du Traité, ceux-ci n'eussent pas manqué de la formuler en termes exprès et distincts.

"La citation d'une décision de la Commission Anglaise dans un cas analogue d'administrateur n'est pas concluante. Il eut fallu rappeler en même temps que cette décision a été universellement et justement attaquée et n'a pas fait précédent dans cette Commission.

"Vainement aussi a-ton prétendu établir une similitude avec le cas de l'Archevêque Perché; les deux cas sont tout à fait différents. Mgr. Perché réclamant primitif avait volontairement abdiqué son droit. La République Française n'avait plus à le protéger. Feu Delrieu lui, n'a jamais abdiqué le sien. Dès le début il l'avait remis entre les mains de son Gouvernement; il y est resté durant sa vie, il y est resté après sa mort. Aucun acte ne l'en a retiré et rien n'a délié le Gouvernement Français du devoir de le soutenir.

"Il n'est pas plus admissible de prétendre que du moment que Delrieu est mort son allégiance a cessé. Elle a cessé si l'on veut, naturellement, mais les droits acquis en vertu de cette allégiance et qui en découlent ne sont point morts ni par conséquent la réclamation.

"L'allégation que la réclamation n'est point un droit transmis par héritage, que c'est un droit qui ne prend naissance que du jour de la signature du Traité du 15 janvier 1880, et aux termes de ce Traité seulement en faveur de citoyens français, n'est pas davantage soutenable.

"Si la réclamation d'un mort ne fait pas partie de sa succession, pour quoi avoir admis dans le Règlement qu'elle serait présentée par l'administrateur?

"Si elle ne date que du 15 janvier 1880, pourquoi une fois reconnue juste, lui attribuerait-on des intérêts à partir du jour où le dommage a été commis?

"La vérité est que la réclamation date du jour où le dommage a été commis. Ce jour-là les Etats-Unis ont contracté une dette envers Delrieu. M. Seward dans ses notes, le Président Lincoln dans son message l'ont reconnu. Ce droit créé en faveur de Delrieu est resté en suspens pendant 15 ou 20 ans, non par la faute de son possesseur, ni par aucun renoncement de sa part, ni par aucune prescription; mais il n'a pas pour cela été diminué d'un atome; ni les délais ni la mort n'ont pu le détruire. Il sommeillait intact sous la sauvegarde du Gouvernement Français. C'était comme une lettre de change endossée par la France et restée en portefeuille; Delrieu en mourant a pu la transmettre en toute confiance à ses héritiers, comme on transmet une créance à recouvrer, certain qu'un jour viendrait où elle serait présentée et qu'il y serait fait honneur.

"Le jour est venu. Le traité du 15 janvier en instituant le tribunal chargé de rendre justice a fourni à la créance de Delrieu contre les Etats-Unis le moyen de se produire; nous n'avons qu'à l'examiner; si elle est valable, si les faits sur lesquels est fondée la réclamation sont prouvés; s'il y a lieu à indemnité, c'est à la France qu'elle doit être payée, au crédit de la réclamation 'in favor of the claim.'

"Ce produit de l'indemnité sera ensuite joint à la masse des autres biens de la succession pour être distribué aux héritiers ou aux créanciers, dans la proportion que le juge ordinaire seul est appelé à déterminer.

"La distribution ne nous regarde pas. Elle est essentiellement du ressort des tribunaux. Nous ne sommes pas un tribunal de droit commun, ni un syndicat chargé de faire à chacun sa part. Nous sommes appelés, je le répète, à décider s'il y a, ou n'y a pas lieu à indemnité et, celle-ci accordée, la répartition n'est pas notre affaire; nous n'avons pas qualité pour en distribuer le montant aux héritiers, pas plus qu'aux créanciers, ni vérifier l'emploi qui sera fait de la somme.

"Mais, dit-on, pourquoi la République Française s'ingérerait-elle de protéger des gens qui ne lui appartiennent plus et des intérêts qui ne sont plus les siens?

"A cela on répond en répétant que ces intérêts et ces intéressés elle ne peut pas les suivre; les ayants droit aujourd'hui étrangers, peuvent redevenir demain français; les créances sont transmissibles. Un exemple d'ailleurs suffira à démontrer que la théorie américaine, sous couleur d'exclure seulement les intérêts étrangers, atteint et exclut en même temps les intérêts français.

"Qu'on suppose dans une réclamation une juste indemnité de \$100,000 et \$50,000 de dettes, 4 héritiers, dont un seul resté français et 3 devenus américains. Conformément à l'opinion de mon collègue nous ne devons donner à l'administrateur pour ce seul héritier français, que le quart, c'est-à-dire \$25,000; mais aussitôt viendront les créanciers, quelle que soit leur nationalité, qui poursuivront l'administrateur en paiement de la totalité des \$50,000 dus; puis les cohéritiers américains lesquels, en dépit de l'exclusion que nous aurons cru devoir prononcer contre eux, auront recours contre l'administrateur et réclameront leur part de l'héritage que les tribunaux ne pourront refuser de leur adjuger, en sorte que l'héritier resté français non seulement n'aura pas son quart, mais sera exposé à payer ce qu'il n'aura pas reçu et que l'unique résultat sera de faire profiter le gouvernement américain des $\frac{3}{4}$ abandonnés. Ce n'est évidemment pas la ce que les deux gouvernements ont voulu dire dans le Traité. Le seul moyen de ne pas arriver à des conséquences aussi monstrueuses, de rester dans l'intention du Traité, j'ajouterai dans la justice et le bon sens, c'est de payer au mort, par l'entremise de l'administrateur, ce qui eût été payé à sa personne s'il était vivant, ou, dans le cas où l'on croirait absolument devoir faire une distinction entre les héritiers, d'attribuer au seul resté français et jugé digne, la totalité produite de la réclamation.

"En résumé: dans mon opinion, c'est le dommage causé qui a créé le droit du réclamant; par conséquent la réclamation date du jour du dommage causé et non du jour de la signature du Traité.

"Le Traité n'a pas créé la réclamation, il a seulement créé pour elle le moyen de se produire efficacement.

"La réclamation ne meurt point avec le réclamant et la mort de celui-ci ne dégage pas les Etats-Unis; la réclamation survit, elle est constituée moralement sur le mort pourvu que celui-ci n'ait pas personnellement aliéné son droit et, en fait, elle est personnifiée dans l'administrateur, non dans les héritiers qui ne sont admis à prouver leur capacité qu'après règlement de la succession par l'administrateur et devant les tribunaux ordinaires et non devant nous.

"Nous sommes incompétents à faire la répartition, comme le reconnaît très bien M. le juge Aldis lui-même lorsqu'il dit: 'No question as to ulti-

mate distribution of the fund among those who may claim it by conflicting titles can arise before us,' etc.; rien dans le *Traité* ne nous investit de ce droit; c'est cependant à cela, que nous serions forcément amenés si nous considérons dans cette affaire la personne des héritiers au lieu de ne considérer que celle du mort et son hoirie.

"Comme considération générale enfin, ce n'est pas la faute du Gouvernement Français si, depuis 20 ans, une partie des réclamants a disparu par la mort et le Gouvernement des Etats-Unis ne saurait être admis à bénéficier de sa négligence et du retard qu'il a mis à rendre justice, sans quoi un gouvernement pourrait presque toujours, en ajournant pendant 20 ou 30 années un règlement de réclamations, se débarrasser de la plupart, ce qui est inadmissible.

"Je repousse donc le demurrer."

After the decision sustaining the demurrer of counsel for the United States was rendered, the commission, upon the motion of counsel for France, made January 19, 1882, suspended so much of the decision as disallowed the claim, and gave the memorialist twenty days within which to show the interests of French citizens. Wiltz, on January 28, 1882, submitted what was called a "reply to the demurrer," in which he set forth that certain persons, citizens of France, were the heirs and beneficial owners of the claim described in the memorial. Counsel for the United States thereupon objected to the further consideration of the case (1) on the ground that as it had been decided that the facts stated in the memorial did not give the commission jurisdiction, and, consequently, that he had no standing before the commission upon his memorial, neither he, nor counsel for France in his behalf, could make any motion which involved the validity of the memorial; (2) on the ground that, even if any allowance could be made, the paper submitted by Wiltz did not authorize him to act for the persons whom it presented as the heirs of Delrien and beneficial owners of the claim; and (3) on the ground that as, when the motion to suspend the decision was made, the time for filing memorials under the treaty had expired, it was not competent for the commission to permit any amendment or grant any motion which, by operating to revive the memorial and give Wiltz a standing before the commission, would be equivalent to the allowance of a new memorial.

Counsel for France, on the other hand, contended that the paper filed January 28, 1882, was a compliance with the decision of the commission, and was not to be considered as an amendment of the memorial. He also relied upon a stipulation between counsel to the effect that, upon the reassembling

of the commission in the autumn of 1881, briefs would be submitted on demurrers in typical cases deemed important by counsel for either government.

The position taken by counsel for the United States was sustained by a majority of the commission in a decision filed January 31, 1882, in these words:

"Before the French and American Claims Commission, upon the motion of the counsel for France to suspend the order disallowing the claim and permit the 'reply to the demurrer' of the administrator, stating that there are two heirs of the deceased Delrieu living in France, who are French citizens, and for whom he wishes to appear, to be filed, and for the administrator to appear for them—

"It is ordered, That the motion be denied and the amendment, or 'reply to the demurrer,' by which the administrator appears for the two heirs instead of their appearing for themselves, is rejected, and the decision of the commission that the claim of the administrator be disallowed is confirmed."

Mr. Boutwell, in his report, says:

"The proceedings in the case of Wiltz, and the decision of the majority of the commission, justify the following conclusions:

"1. That in case of the death of a claimant it was competent for his legal representative to appear and prosecute the claim, and that without reference to the nationality of the representative.

"2. In order that jurisdiction should be taken by the commission it was necessary that the memorial should set forth as facts (1) that the decedent was at the time the loss occurred or the injury was sustained a citizen of the country prosecuting the claim; (2) that the heirs or legatees who would receive the benefits of any award that might be made were also citizens of the same country at the time the treaty was ratified, and (3) that the memorialist was duly authorized to appear in behalf of the beneficiaries."

In 1864 Mrs. Clemencia Romero de Willet, widow of William E. Willet, a citizen of the United States, presented, in her own behalf and "in representation of her minor children, Guillermo, Adriono, Neivet, Clemencia, and Dolores Willet, had in marriage with the North American citizen," William E. Willet, a petition to the United States minister at Caracas, praying his intervention in respect of a claim against Venezuela for wrongs done to her late husband. Subsequently Mrs. Willet, as administratrix of her deceased husband, presented the claim to the commission under the convention between the United States and Venezuela of 1866, and received an

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award, the certificates of which she afterward sold and transferred to two other persons, apparently citizens of the United States, by whom claims were presented to the commission under the convention between the United States and Venezuela of December 5, 1885. The office of this commission being, among other things, to reexamine on the merits claims presented to the former commission, it held that the "main question" to be considered was "whether the original claimant, Mrs. Willet [who did not appear before the new commission as a claimant], as the representative of her husband, had a claim against the government" of Venezuela which it was within the jurisdiction of the commission to adjudicate. On this question Findlay, commissioner, delivering the opinion of the commission, said :

"The papers show that her husband was a citizen of the United States, domiciled in Venezuela. She was a native of Venezuela; was married in that country; all her children were born there; and she appears never to have been in the United States, either before or during her marriage, or since her widowhood. Nor does it appear that any of the children have changed or attempted to change their domicil of origin. * * *

"It has been contended with great force by the learned counsel for Venezuela that Mrs. Willet was not a citizen of the United States of North America when the claim was presented to the Caracas commission in 1868; that her children, whom she represented as guardian, were not then, nor are they now, citizens of the United States, nor is she now a citizen of the United States.

"On the contrary, it is alleged that both she and they were citizens of the United States of Venezuela when she presented her claim in behalf of herself and for them before the old commission, and that that status so far from being changed or impaired has been confirmed, if possible, by continuous residence in that country ever since, during which interval of time the children, then minors, have attained to full age and maturity.

"It must be admitted that the law is not very clear or satisfactory upon any question of citizenship, when by that term a political and not a mere civil status is meant to be described, involving a conflict of jurisdiction between two sovereignties, each laying claim to the subject of the controversy. * * * It is perfectly clear that as far as the enjoyment of any rights in the United States of America is concerned, alien women married to citizens, and their offspring, become citizens of the United States *ipso facto*, by the marriage itself, as fully as if they had been born or naturalized in the country. (R. S. U. S., sec. 1994; *Kelley v. Owen*, 7 Wall., 497; *U. S. v. Kellar*, 11 Biss., 314; *Kane v. McCarthy*, 63 N. C., 299; *U. S. v. Corova*, 15 Opin. A. G., 117; *Ware v. Wisner*, 4 McCrary, 66; *Talbot v.*

Johnson, 3 Dal., 133; *Leonard v. Grant*, 6 Saw., 609.) So the act of 7 and 8 Victoria, ch. 66, sec. 16, of which the act of the United States of 10th of February 1855, codified in section 1994, R. S., is substantially a copy, has been construed by the courts of Great Britain as converting an alien woman married to a British subject into a British subject herself, as fully as if she had been born such, or had been naturalized by an act of Parliament. (*Reg. v. Manning*, 2 Carr. & Kir., 886 (61 Eng. C. L.); *Burton v. Burton*, 1 Keys, 350.) Indeed, this construction was carried so far as to hold that an alien woman married to a citizen of the United States, who had become such by naturalization, and who, on his death, afterward married an alien domiciled, but not naturalized in the United States, had acquired by the first marriage a status which qualified her to prosecute a claim against the United States as a citizen thereof, for injury done to her property during the interval covered by her second marriage. 'It was the intention of Congress,' says the opinion, 'to bestow upon her a permanent status of citizenship defeasible only as in the case of other persons.' (*S. F. Phillips*, Sol. Gen., 15 Opin. A. G., 600, case of *Mrs. De Ambrogia*.)

"It will be observed in all these cases, however, that the right sought to be enforced, or the responsibility established, concerned matters wholly within the undisputed jurisdiction of the sovereignty creating the status, and that terms are used in most of the cases which, perhaps, would have been more satisfactory had they been restrained by express qualifications in the first instance, instead of leaving that duty to be performed by necessary implication afterwards. In the last case cited, for instance, if *Mrs. De Ambrogia* had been by birth a citizen of Venezuela, and had by virtue of her acquired status as a citizen of the United States of America sought to enforce a claim against the Government of Venezuela, the question would at once have occurred whether it was competent for the United States to create a status of citizenship, the use to be made of which was to enforce a claim against another sovereignty claiming the natural allegiance of the claimant herself, and with this question prominently before the mind, a distinction would have been taken, perhaps, between a mere municipal or civil status with a limited internal operation, and a political status with an extraterritorial operation and effect.

"Persons made citizens by this act, born abroad and residing abroad, subject to the obligation to bear arms either in wars of defense or offense, at the call of the sovereignty within whose jurisdiction they reside, without question on the part of the sovereignty to which they owe what may be called the artificial status of citizenship, can not in the nature of things be citizens of the United States as fully as if they had been born in that country, unless it can be held that a native citizen of the United States is subject to any foreign jurisdiction that may have the opportunity to seize and impress him into its

military service. The point, however, is more speculative than real in this case, because it is very clear that whatever may be the status of Mrs. Willet or of her children with respect to their citizenship of the United States, whether full or limited, there can be no doubt whatever, that her husband and their father was a citizen at the time the injury in this case occurred, and continued to hold a claim against the Government of Venezuela until he died intestate in 1862. This being the case, Mrs. Willet claimed before the old commission as administratrix and clearly had the right to represent a claim of a citizen of the United States, whatever may have been her own personal status. The functions of an executor and administrator are very much the same; one represents the testator by virtue of his will, the other an intestate by virtue of the law. To appoint an executor is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who has an action against the testator's debtors. (Williams' Ex., 1, pp. 226.) 'The executor,' says Lord Coke, 'doth more actually represent the person of the testator than the heir doth the person of the ancestor, for if a man bindeth himself, his executors are bound though they be not named, but so it is not of the heir,' and this is true, also, he says, of the administrator. (Co. Lit., p. 2009.) Elsewhere he says that the administrator stands in *loco parentis* with same powers as executor by statute of 31 Ed., 111-2, Blacks., p. 510. (Hensloe's Case, 9 Rep., p. 40.)

"It has been held in England that an alien may be executor, and it has even been questioned whether an alien enemy may not act as such because the effects to be distributed are not his but another's. (1 Williams, pp. 229-30; see also Oliver Wendell Holmes, jr., the Common Law, Lecture X, on successions *inter vivos*.)"

Estate of William E. Willet v. Venezuela, No. 21, United States and Venezuela Claims Commission, convention of December 5, 1885. In accordance with the views expressed in the opinion, an award was made in favor of the claimants.

In the case of *Leonardo Peck v. Venezuela*, No. 45, Little, commissioner, for the commission, delivered the following opinion:

"Leonardo Peck, a citizen of the United States, lived the greater part of his life at Maturin, Venezuela. There he accumulated property and raised a family. His children, however, were born out of wedlock. They and their mother were natives of Venezuela, never having been in the United States, so far as appears. While on a visit to his old home at Syracuse, New York, he died, October 31, 1860. It seems he left a will, though the paper sent us purporting to be its translation and probate is of a very unsatisfactory character. It has incongruities of date, and is apparently fragmentary. We do not feel justified in basing any property rights upon it.

"The claim is for stock taken from Peck's farms near Maturin by military forces in 1859, 1860, and 1861, and is asserted by the executor of his

will and also by his two sons. The total value of the stock taken, including interest, was asserted to be, in 1864, 23,181.75 pesos.

"This was supported by the depositions of twelve witnesses examined in the presence of and cross-examined by a representative of the government, who fully corroborated the statements of the executor, Fabricio Aponte, to the effect that the property named was taken at the times indicated from the farms (*sitios*) of Peck by the military forces of the government, and that it was worth as to all the animals the price stated.

"Señor Esteves, of the Department of Public Credit, allowed, September 28, 1864, the entire amount of this claim except as to interest, to wit: 18,545.50 pesos. The interest was excluded by the act, as stated by him, under which the application for allowance was made.

"The value of the property taken before Peck's death was 12,450.50 pesos. This was all that was due him, and all, therefore, that passed to his legal representative as such. The rest of the claim pertained to his children and their mother, and can not be considered by us; for they were not citizens of the United States, and have, consequently, no standing here under the treaty.

"Under the holding in the Willett case, No. 21, the executor is entitled, as the legal representative of Peck, to claim here the amount due his estate, he having presented the claim to the American legation at Caracas for its intercession as early as 1864.

"We think the interest should begin at the date of allowance by the Venezuela Government, September 28, 1864, as prior interest seems to have been prohibited by law, and very reasonably so. A government in such cases may not, for obvious reasons, be required to pay interest while such a claim is withheld.

"The entry may therefore be for 12,450.50 pesos, with 5 per cent interest from September 28, 1864, to September 2, 1890, inclusive, less payments already made, expressed in gold coin of the United States, counting the peso at 75 cents."

Henry Meiggs, a native-born citizen of the United States, died in 1877, leaving a will by which he created a board of directors, of which Charles Watson, a British subject, was president, to carry out certain contracts with the Peruvian Government. In May 1878 the heirs of Meiggs conveyed to Watson certain of the former's railway contracts, by the terms of which the approval of the Peruvian Government was necessary to effect the transfer of the rights and properties involved. This approval was given in September 1881. Meanwhile, however, in March 1880, while the property was in Watson's control as the representative of Meiggs, deceased, the Chilean forces landed at Mollendo, Peru, took possession of the undefended terminus of the railway there, and destroyed the stations, buildings, cars, locomotives, and other property belonging to the railway. For indemnity for these acts of destruction Watson filed, as executor of Meiggs, a claim to the amount of \$278,205.84.

The agent of Chile demurred to the claim on the ground that all the rights and property in question had been transferred to Watson, a British subject, and that the commission therefore had no jurisdiction of the case.

The agent of the United States replied that the memorial showed that Watson presented the claim in his representative capacity under the will of Meiggs, and that the property was in his control and possession as such representative at the time of its destruction. He further pointed out that Watson had presented the claim to the Anglo-Chilean commission at Santiago, and that it was dismissed by that tribunal, the agent of Chile then contending that Watson did not at the time, when the property was destroyed, hold it in his own right.

The commission sustained the demurrer, saying:

"The demurrer is sustained and leave granted to the memorialist, if he shall be so advised, to amend the memorial by stating his present residence and the place of his residence at the time when the acts complained of occurred; also stating, in accordance with the provisions of Article III, *b*, of the rules of the commission, the names of the heirs of Henry Meiggs now living, their places of residence and citizenship, and also that the claimant is duly authorized to present this claim on their behalf.

"It is further ordered that the amendment to the memorial herein authorized shall be made within two months."

Charles Watson, as executor of Henry Meiggs, v. Chile, No. 15, United States and Chilean Claims Commission, convention of August 7, 1892, Shield's Report, 80.

Mr. Goode dissented on the ground that the deed of the heirs of Meiggs to Watson of 1878 was inoperative and void till approved by the Peruvian Government, and that when the property was destroyed it belonged to the estate of Meiggs, deceased.

The claim was subsequently dismissed, Watson having failed to amend his memorial in accordance with the commission's decision.

3. EVIDENCE.

By the agreement between the United States and Spain of February 12, 1871, it was provided that each government should appoint an arbitrator, and that the two arbitrators should name an umpire, who should "decide all questions upon which they shall be unable to agree." It was also provided that the arbitrators should, before proceeding with the hearing and decision of any case, make rules as to the presentation and proof of claims, and that any disagreement with reference to

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Evidence before
the Umpire.

such rules should be decided by the umpire. Under these provisions rules were duly made and published.

In three cases before the commission the following question arose: The claimants, having filed their memorials, proceeded to file their proofs; they were granted such additional time for that purpose as they thought fit to ask, and their cases were closed on notice which they voluntarily gave. Spain then filed her evidence, and the cases on her part were regularly closed. On the cases thus before them the arbitrators differed in opinion; and they duly certified to the umpire the questions on which they were unable to agree, together with the memorials, proofs and briefs filed by the respective parties. In one of the cases (Delgado, No. 12) the umpire gave the following opinion:

"1. It is my opinion that Spain does not produce sufficient evidence to traverse the naturalization of the claimant; therefore, that the claimant has the right to be held as an American citizen.

"2. The papers on record in the case do not furnish a sufficient basis of estimate to make a fair evaluation of the claimant's property at the time it was seized, and as long as satisfactory evidence on the point is not furnished to the umpire he must abstain from answering the second question which was put to him by the commission."

. In the two other cases the umpire said:

"I can not find in the documents of record in the cases sufficient proofs on the following points:

"1. When if any act of seizure of the sloop *Champion* by the Spanish authorities took place.

"2. If the pilot went on board of the sloop *Champion* at the request of the captain, or without that request and by order of the Spanish Government.

"3. The exact date when the ship sank.

"Therefore I return the cases to the commission, suggesting the propriety of taking further evidence."

In view of the defects thus pointed out in the claimants' proofs, the advocate for the United States made a motion before the commission, "asking leave to produce further evidence in these cases, in pursuance of the umpire's opinion," and for this purpose he asked for an extension of ninety days in each case.

The advocate for Spain, while admitting that "this commission would have the power to correct an error or omission, either formal or material, in any case after it had been sent by them to the umpire, or that the umpire, noticing any apparent

error or omission in the case as received by him, might ask of the commissioners whether what he noticed *was* an error or omission, and be informed in accordance with the fact," contended that as to the determination of the present questions the commission was *functus officio*; that it had "done all that the agreement and its own rules made in pursuance thereof," directed it or gave it power to do; that the commissioners could not "correct, modify, or enlarge the case sent to the umpire," nor had the umpire "power to request or direct such a proceeding."

The advocate for the United States addressed an official letter to the commissioners, in which he cited generally the practice of the Mexican commission, under the treaty of July 4, 1868, and particularly its proceedings in the cases of Keller and Wenkler (*supra*, vol. 1, p. 1355).

The advocate for Spain stated that he was informed that it was not the general practice in the Mexican commission to furnish additional evidence to the umpire, and that the cases cited were exceptions. But, however this might be, he maintained that the treaty of July 4, 1868, materially differed, in its provisions as to the umpire, from the agreement of February 12, 1871, the provisions of the former being that the commissioners, if they should "fail to agree in opinion *on any individual claim*," should "*call to their assistance the umpire*," and that the "umpire, after having examined the evidence adduced for and against the claim, and after having heard, if required, one person each side * * * and consulted with the commissioners," should "decide thereupon finally and without appeal."

The motion of the advocate for the United States in the cases now under consideration was argued orally and submitted to the commission. The commissioners differed in opinion and submitted the questions to the umpire. The umpire decided that the motion should be overruled, and the commissioners so ordered.

M. Bartholdi, umpire, cases of *José G. Delgado*, No 12; *W. W. Cor*, assignee, No. 109, and *W. W. Cor*, No. 110: Spau. Com. (1871), April 22, 1876.

"The papers in this case consist: 1. Of a petition in which Seth Driggs states that Benjamin Goodrich, a citizen of the United States of America, was established in business at Carúpano, Venezuela, in the month of September 1835, when said place was

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taken and ransacked by the revolutionary troops under the direction of Commandant Pedro Carujo; that Goodrich's store, having been entered by the same troops, was plundered of all its contents; that thereby Goodrich lost all he possessed (about six hundred dollars in goods of his own, besides his personal effects), and having been reduced to extreme poverty, at last died miserably at Laguayra; that all the misfortunes of Goodrich were attributable solely to the outrage of which he had been made a victim at Carúpano by soldiers wearing the national uniform of Venezuela; and he (Driggs) therefore claimed in behalf of three grandchildren, minors, named Daniel, Lucy, and Adell Dibble, that Goodrich had left in orphanage, absolutely destitute of fortune, the moderate sum of six thousand pesos as a just compensation for the losses that their grandfather had suffered. 2. Of an affidavit made before the United States legation at Caracas on the 23d of April 1868, in which said Driggs declares that he had intimately known Benjamin Goodrich, with whom he had kept up commercial relations; that he had been at Goodrich's establishment at Carúpano one week before the above-mentioned outrage was committed; that he was acquainted with said fact, and considered the sum of six thousand pesos as a poor remuneration for the damage Goodrich had thereby sustained; and that Daniel, Lucy, and Adell Dibble were the only surviving heirs of the said Goodrich.

"There is no evidence at all in support of this claim. The petitioner himself is not a legal but a voluntary representative for the so-called minor heirs of Goodrich. Therefore we disallow it."

Andrade, commissioner, for the commission; *Seth Driggs, for the minor heirs of Goodrich, v. Venezuela*, United States and Venezuela Claims Commission, convention of December 5, 1897.

Ex parte Proofs: "The respondent government has denied all the facts upon which the claim is based.
Murphy's Case.

Nevertheless the claimants closed the case without taking any testimony, thinking either that their claim was sufficiently proved by their own allegations or by the documents accompanying their memorial.

"The respondent government in its brief avers, first, that the affidavits accompanying the memorial can not be admitted as legal evidence either in view of the provisions of the laws of the United States and Chile regarding the value of that

kind of proof or in view of the prescriptions of the rules adopted by the commission. Those affidavits are *ex parte* evidence, which, by the customs of all nations, are only useful for basing a diplomatic intervention, but they are of no value in the determination of the validity of a claim, nor are they admitted as competent by any court.

"The defense has raised a question of principle to determine whether *ex parte* proofs are admissible by the commission.

"To decide this point we must consider the provisions governing the premises.

"The convention of Santiago of the 7th of August 1892, from which this commission derives its authority, contains in Article V. the provision following: 'The commissioners shall investigate and decide said claims in such order and in such manner as they may think proper, but upon such evidence or information only as shall be furnished by or on behalf of the respective governments. *They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective governments in support of or in answer to any claim, and to hear, if required, one person on each side*, whom it shall be competent for each government to name as its counsel or agent to present and support claims on its behalf, on each and every separate claim.'

"And in Article VIII.: 'It shall be competent in each case for the said commissioners to decide whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this convention.'

"The commission on its part has established the following rules of procedure, which were communicated to all persons having interests to uphold before this commission:

"ART. 7. It shall not be necessary for the defendant government in any case to deny the allegations of the petition or the validity of any claim; but a general denial thereof shall be entered of record by the secretaries as of course, and thereby all the material allegations of the petition shall be considered as put in issue, and the claimant shall be required to establish them by legal and sufficient evidence.

"ART. 15. The rules of evidence as to the competency, relevancy, and effect of the same shall be determined by the commission with reference to the convention under which it is created, the laws of the two nations, the public law, and these rules.'

"The foregoing provisions of the convention of Santiago and of the rules of the commission do not suffice to determine conclusively whether or not *ex parte* proofs or affidavits are admissible by the commission. We must rely upon an indirect interpretation of these rules, especially rule 15, which establishes that the rules of evidence 'shall be determined by the commission,' with reference to the convention itself, the laws of the two nations, the public law, and the rules of this commission.

"Since these rules do not contain any provision relative to the admission of affidavits, it is therefore on the existing laws of Chile and of the United States, and on the authorities on international law, that the respondent bases its objection to the production of affidavits as legal and sufficient evidence. It is therefore necessary to examine those legal prescriptions and the decisions of other tribunals of arbitration, and to compare them with the provisions of the convention of Santiago.

"The Chilean law is in these words: 'It is not sufficient that the witnesses be competent for their declaration to have weight in a trial. It is necessary that in their examination all the formalities established by the law shall be observed to give authority and credit to their testimony. These formalities are: Judicial authorization; notice to the opposite party, the swearing of the witnesses, and the opportunity of the examination.'" (J. Bernardo Lira, *Prontuario de los juicios*, law 23d, tit. XVI., Part 3.)

"The laws of the United States seem to be in accordance with those of Chile. The Revised Statutes, chapter 17 on Evidence, is in these terms:

" 'The deposition may be taken before any judge of any court of the United States. * * * Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition.'

"See Greenleaf, vol. 1, chap. 3, § 446, page 541. See also: Foster Federal Practice, 2d edition, page 1267, and vol. 1, page 502. See Greenleaf, referring to depositions, in his work on Evidence, section 321, page 414.

"See Best on the Laws of Evidence, page 85; Wharton, Law of Evidence, section 177.

"But the laws of the States of the Union contain similar provisions: See articles 872, 873, 875, 881, 882, 899, of the Code of Procedure of the State of New York.

"See articles 425, 426, 430, 434, of the Code of Procedure of the State of Louisiana. See article 2033 of the Code of Procedure of the State of California.

"The same is the case respecting the laws of organization of the special tribunal of the United States known by the name of Court of Claims.

"See United States Revised Statutes, chapter 21. The Court of Claims and the rules of procedure adopted by that court, and the decisions of the same. The United States Court of Claims, vol. 21, page 54.

"All the preceding provisions and citations seem to establish, without a doubt, this rule: That *ex parte* affidavits are objectionable as evidence in accordance with the laws of Chile, the federal laws of the United States, and the laws of the States of the Union which have been already quoted.

"Lastly, the respondent government has referred to decisions rendered in conformity with international law, and it appears from investigations we have made in that connection that the Franco-American commission sitting in Washington from 1881 to 1884, followed the same principle. (See Vol. 4, page 117, case 33.)

"Without ignoring the force of such arguments, we believe that the character and nature of this kind of international tribunals is not irreconcilable with a broader construction of the means of investigation that might present themselves. Cases may arise in which because of the date of the occurrence, the impossibility of the party to summon the other party when taking the testimony, and because of the death in the course of time of the witnesses, it may be impossible to present them for cross-examination by the respondent party. When such circumstances arise it seems equitable not to reject this kind of evidence as entirely null and invalid. Without losing sight of the little weight or lack thereof attached by the most advanced legislations to this kind of evidence, we must on our part take them into consideration not as evidence but only as elements which in certain cases may contribute to a limited extent, collateral or secondary, to confirm or strengthen a conviction appearing to be based on proofs of a more conclusive character.

"We are of opinion that this interpretation is more in conformity with the true intent of the aforesaid convention, and it realizes the purpose of its mission, 'to settle and adjust amicably the claims made by the citizens of either country.' We judge that the commission very properly stands—as in other acts of its arbitral jurisdiction—upon the formal rules of procedure in use in the ordinary courts of justice, without overlooking the fundamental principles of said courts and their means of arriving at the elucidation of truth and administering justice. Acting thus, we also conform to article VIII. of the convention, which says: 'It shall be competent in each case for the said commissioners to decide whether any claim has, or has not, been duly made, prepared, or laid before them, either wholly or to any and what extent, according to the true intent and meaning of this convention.'

"This provision, taken with rule 15, leaves the commission at liberty to take affidavits into consideration and to attribute to them a limited value or no value whatever, according to circumstances. Thus it may give them a certain relative importance or deny them all value, especially when the parties have had opportunity to furnish better evidence and have neglected to do so, or when they have had opportunity to conform to the rules established by this commission for the validity of the proofs, and they have failed to observe them.

"The respondent government, in the second place, raises the following point: That going into the intrinsic merits of the depositions, no act from which the liability of the respondent government can be drawn is asserted in a precise and concrete manner, there existing *prima facie* a presumption, according to the claimant's very statement of facts, that the offenses complained of, if they occurred, were committed by parties other than the Chilean soldiers.

"Let us examine, now, the complaint and documents adduced by the memorialist.

"Elizabeth C. Murphy, in her memorial, No. 36, claims from the Government of Chile, in her own name, and in that of her children, the sum of \$17,122.50, American gold, which she estimates, including interest at the rate of 6 per cent, to be the value of utensils, books, and furniture of her house, of which she was deprived by Chilean soldiers in 1881.

"The claimant alleges that she is an American citizen, as was also her husband, John A. Murphy, who died in Lima on

the 21st of September 1886, and as are also her seven children, of which the three youngest were born in Peru.

"She also states that her husband, with his family, left the United States in 1870 and went to Peru, where, later on, he was entrusted with the management of a country property called Melgarejo, situated nine miles from Lima.

"She states further that on the 9th of January 1881 John A. Murphy, being alone in his house, she and her children having gone to Lima on the approach of the Chilean forces, Chilean soldiers forming part of a reconnoitering party that had appeared on that day in the valley of Manchay, some distance from the Melgarejo estate, commanded by an officer, violently entered into his house, fired a shot at him, took a few articles, and made him prisoner, accusing him first of having rendered personal services as engineer in the works of defense of Peru and afterwards of being a spy to the Peruvian Government, charges which he denied.

"That he was kept as a prisoner until the Chilean forces entered Lima, where they set him at liberty.

"That he then came back to Melgarejo, and there discovered that his furniture, trunks with his family clothing, books, engineering instruments, etc., had disappeared, and that the Chilean soldiers had taken all he possessed.

"In support of the claim she submits the following documents:

"1. A certificate dated the 27th of July 1880, issued by the United States minister in Lima, in which the latter declares that John A. Murphy, wife, and five children had come before the legation and had proven that they were citizens of the United States.

"2. A communication, dated 20th of June 1881, sent by the said John A. Murphy to the minister of the United States in Lima, informing him that he claims from the Government of Chile the sum of \$9,539, being the amount of the inventory made in November 1880 of the articles he possessed in his house on the estate of Melgarejo, with interest on that sum from the 9th of January 1881, plus \$5,000 for the personal injuries and damages to which he had been subjected.

"3. The inventory of said articles signed by Murphy and two witnesses, J. C. Anderson and A. M. Leon. This document is accompanied by a certificate of the secretary of the legation of the United States, dated the 10th of January 1891,

in which this officer states that on that day appeared before him A. M. Leon and declared under oath that the foregoing inventory had been made by himself, Anderson, and Murphy, at the request of the last named; that the values therein stated are genuine, and that the signature with his name therein appearing was authentic.

"4. A certificate, dated 21st of September 1888, in which the commander of the ship *Nipsic*, of the United States Navy, avers as true the fact of John A. Murphy having been taken prisoner near Ate by the Chilean forces and retained as such till after the battles of Chorillos and Miraflores, when he was released to go to Lima.

"5. A certificate of the death of John A. Murphy, showing that he died on the 21st of September 1886.

"6. An affidavit made by James Faulkner, distiller by occupation, dated the 12th of December 1890, before the consul of the United States in Lima, at the request of Mrs. John A. Murphy, and in which the affiant alleges that he has lived since 1872 in the port of Callao; that he was present at the marriage of the aforesaid lady to John A. Murphy in Brooklyn, on the 18th of December 1856; that the former had his house in Lima elegantly furnished; that in 1880 he was employed by Mr. Henry Prevost on the estate of Melgarejo, where he took all his furniture and where he resided with his family, and, finally, that the said family was left entirely without means after the war of 1881.

"7. An affidavit made at the request of the claimant before the consul of the United States in Lima by Maria Fiesta, a married Peruvian, on the 9th of December 1890, in which the former stated that she resided at Melgarejo until the year 1881; that in 1880 she was a friend of the family of John A. Murphy, and that she saw the elegant furniture that said family had brought from Lima; that the affiant went to Lima at the approach of the Chilean forces, and that a short time afterwards Mrs. Murphy and her children followed her, leaving at the estate all they possessed, with the exception of some necessary articles.

"8. Another affidavit, made at the request of the claimant, on the 7th of December 1890, before the secretary of the legation of the United States in Lima by Jacob Backus, a merchant, citizen of the United States, in which he testifies that he has had friendly relations with the claimant's family, and

that being in the United States in 1871 he knew there that some time before John A. Murphy had married the claimant in this country.

"9. Another affidavit, made also before the same secretary of the United States in Lima, on the 7th of December 1890, at the request of the claimant, by Charles F. Davis, an American citizen, a merchant, in which he affirms that he knew John A. Murphy and Elizabeth C. Harker, and has always believed them to be married.

"10. An affidavit, made at the request of the claimant in the manner aforesaid, on December 7, 1890, by Henry Oppenheimer, an American citizen, merchant, residing in Lima, in which he states that he knows that the claimant, Elizabeth C. Harker, married John A. Murphy in Brooklyn in 1856; that the affiant sold to John A. Murphy fine and expensive engineering implements; that in 1880 Murphy took his family to Melgarejo, together with the valuable furniture he possessed, and that everything the claimant owned in his house was taken by the Chilean soldiers.

"11. Another affidavit, taken on the 17th of December 1890, before the secretary of the legation of the United States in Lima, at the request of the claimant, by Henry S. Prevost, in which the latter says that he is an American citizen, a merchant, residing in Lima; that he has known John A. Murphy and Elizabeth C. Harker, and believed them legitimately married; that in November 1880 the affiant employed John A. Murphy to represent him at his estate at Melgarejo, and that the latter, a few days afterward, took his family and furniture to the said estate, where the family resided until the last days of December 1880 or until the beginning of January 1881; that the affiant thinks that all the articles of furniture taken to Melgarejo remained there on the 9th of January 1881, when a party of Chilean soldiers arrived at the aforesaid house, where he had in view a paper with the signature and seal of the United States legation to show that the sugar cane on the estate belonged to a neutral, as was the affiant; that the affiant knows that the claimant, after the date mentioned, was dispossessed of everything she had.

"12. There then appears a memorial presented by the claimant to the legation of the United States in Lima on the 14th of January 1891.

"13. A declaration of the claimant made at the legation of

the United States in Lima on the 25th of August 1893, in which it is stated that it is impossible for her to obtain the affidavit of S. C. Anderson, because the latter is deceased, and indicates the names and residences of her children.

"14. Another affidavit, made in the same manner, by J. H. Johnston, C. T. Davis, and Robert Wardsworth, American citizens, affirming that they have known John A. Murphy and his wife as citizens of the United States, and that they have never lost their rights of citizenship.

"15. Finally, a power of attorney, in which the claimant appoints Heber J. May, of the city of Washington, as agent and attorney to represent her in the matters relating to this claim.

"An examination of the documents or affidavits to which we refer enables us to establish:

"First. That the acts upon which this claim is based were committed on the 9th of January 1881, and that John A. Murphy was released, after a detention of seven days, on the 16th of January, after the taking of Lima by the Chileans.

"Second. That although the estate of Melgarejo is only 9 miles distant from Lima, John A. Murphy addressed himself five months later to the United States legation in Peru, through a letter dated the 20th of June 1881, which does not even state the place where it was written.

"Third. That in this letter, to which an inventory of his property is attached, although he claims from the Chilean Government the sum of \$9,539 in gold for robbery of his property on the 9th of January 1881, he does not state by whom that robbery was committed.

"Fourth. That in the same letter, referring to the inventory of his property, he offers the testimony of witnesses which he may hereafter produce in support of his claim, and that until his death he never completed his claim nor produced any testimony of any nature whatever.

"Fifth. That the inventory attached to that letter was made on the 20th of November 1880, and not sworn to in the United States legation at Lima by the witness A. Mathieu Leon, until the 10th of January 1891.

"Sixth. That none of the affidavits mentioned, not even that made by Leon at the United States legation, assert that, between the date on which the inventory was made and that of the alleged robbery, all or a part of the property had not been carried away from said estate.

"Seventh. That Murphy, who lived more than five years after the alleged robbery, has himself stated, in a paper said to have been written by him, that at the time of the arrest the Chilean soldiers took away all the things mentioned in the inventory.

"Eighth. That, without insisting on the evident overvaluing of the articles mentioned in said inventory, it seems incredible that Murphy, whose death did not take place until 1886, should have entirely neglected to make any claim whatever when the property which he alleges was taken from him constituted his whole fortune.

"Ninth. That in the absence of documents furnished by Murphy himself it becomes necessary to examine the proofs produced by his widow, with respect to their form, contents, and dates.

"Tenth. As to the date on which they were drawn, with the exception of the affidavit furnished by the commander of the *Nipsic*, which was made in September 1883—that is to say, seven years and a half after the facts complained of took place—all the others were drawn 'at the request of Mrs. John A. Murphy,' between the 7th of December 1890, and the 17th of January 1891—that is to say, ten years after the alleged offense.

"Eleventh. That according to these affidavits none of the affiants witnessed the alleged facts; that it does not appear in any of said declarations that all the things mentioned in the inventory of the 20th of November 1880, were still in the estate on the 9th of January 1881; that none of the witnesses pretend having been present at the estate of Melgarejo during the robbery or after the same. Oppenheimer is the only witness who says *he knows*, others saying *they think they know*, that the objects referred to were at Melgarejo. Oppenheimer did not witness the acts, and he can not explain in what way the facts alleged by him came to his knowledge, and he gives no details nor does he mention any circumstance which may lend probability to his statement.

"In view of the foregoing statements, and considering—

"That, from the careful examination made of all and each of the documents furnished by the widow of John A. Murphy, it appears that all of them are *ex parte* proofs, furnished ten years after the alleged offense occurred, and that without having given due notice to the respondent government, thus depriving the latter of the opportunity to witness the swearing

and examination of the witnesses and of the legitimate privileges of cross-examining them;

"And that the claimant, in view of the formal denial of all the facts filed by the respondent government, could have taken advantage of the time given by the rules of the commission to give legal force to the evidence presented and complete her proofs, and it does not appear that she has made any efforts in that direction;

"We are of opinion that the documents produced are entirely insufficient to prove the liability of the military authorities of Chile, and in consequence the claim of Elizabeth C. Murphy against the Republic of Chile is disallowed."

Opinion of Messrs. Claparède and Gana, commissioners, *Elizabeth C. Murphy v. Chile*, No. 36, United States and Chilean Claims Commission, convention of August 7, 1892.

Mr. Goode, the United States commissioner, read the **Mr. Goode's Dissent-** following dissenting opinion:

ing Opinion.

"I am unable to concur with the majority of the commission in the conclusion they have reached in this case.

"The claim is made by the widow and children of John A. Murphy for losses and damages to certain household property and other articles at Melgarejo plantation, near Lima, Peru, by the Chilean forces on the 9th of January 1881. It is true the claim is sustained only by certain documentary evidence and *ex parte* affidavits, but it seems to me that these are sufficient in the absence of any rebutting testimony. The fifth article of the convention under which we have been organized provides that we 'shall be bound to receive and consider all written documents or statements which may be presented by or on behalf of the respective governments in support of or in answer to any claim.'

"This is a mandatory provision. It forms a part of the law of our creation, and we are bound to obey it. Why shall we be required to receive and consider these statements if no evidential value is to be given to them? It certainly could not be the purpose of the convention to impose upon us an obligation and at the same time deprive it of any legal effect. As I understand our rule 15, adopted for the government of the commission, it is in perfect accord with the requirements of article 5 of the convention, already quoted. That rule reads as follows:

"The rules of evidence as to the competency, relevancy, and effect of the same shall be determined by the commission, with reference to the convention under which it is created, the laws of the two nations, the public law, and these rules.'

"In determining any question that may arise as to the competency, relevancy, or effect of evidence we must have reference first of all to the convention. If, under the convention, the evidence is competent we are not permitted to go further and inquire what would be the rule under the laws of the two nations or the public law. The authority of the convention under which we act is paramount.

"The statements upon which the claimants rely were made and sworn to before Richard R. Neill, United States secretary of legation at Lima,

Peru, in accordance with section 1750 of the Revised Statutes of the United States.

"It appears from the documentary evidence submitted to us that on the 20th of June 1881, John A. Murphy claimed from the Government of Chile, through Hon. Isaac P. Christiancy, envoy extraordinary and minister plenipotentiary of the United States to Peru, \$9,539, for the robbery of his property on the 9th of January 1881, at the house of the estate known by the name of Melgarejo, owned by Henry Prevost, a citizen of the United States, while he was in his employ at that estate as engineer, and had the precaution to have the United States flag hoisted over the house and the placards issued by the legation pasted on its doors. It appears also that on the 20th of November 1880, an inventory of the effects in the said house at Melgarejo, belonging to the said Murphy, was taken by the said J. A. Murphy, J. C. Anderson, and A. M. Leon, and that on the 10th of January 1891, the said A. M. Leon made oath in due form that the said inventory was signed by the said Murphy and the said Anderson and himself, and that the articles therein named were priced by them at their true value.

"Commander Dennis W. Mullin, of the United States Navy, makes affidavit on the 21st of September 1888, that John A. Murphy was taken prisoner a few miles from Lima by the Chilean forces under the command of General Baquedano, about the end of December 1880, or the beginning of January 1881, and taken to Lima, where he was held a prisoner and was compelled to accompany General Baquedano in his march from Lurin to his position in front of the Peruvian defenses, and was in several battles subsequently fought, being finally allowed to go to Lima under a flag of truce, where he joined his family.

"James Faulkner makes affidavit that John A. Murphy was a civil engineer; that he resigned his place in the United States Treasury Department and went to Peru; that in Lima he had his house elegantly furnished; that in the year 1880 he was employed by Mr. Henry Prevost at the estate Melgarejo, where he took his furniture, and where he resided with his family, and finally that said family was left entirely destitute after the war of 1881.

"Mrs. Maria Fiesta makes affidavit that she resided on the estate Melgarejo previous to the year 1881; that in the year 1880 she became acquainted with the family of John A. Murphy, when they resided on said estate; that she had occasion to see the elegant furniture and chattels brought from Lima by the said family; that when deponent left the said estate at the approach of the Chilean army she fled to Lima, leaving there all she possessed, and which was afterward taken by the Chilean soldiery; that very shortly after deponent arrived at Lima the wife and children of Mr. John A. Murphy also arrived there, having left at said estate all they possessed except a few necessary articles.

"Mr. Henry S. Prevost makes affidavit that in the month of November 1880 he employed John A. Murphy as civil engineer to represent him at the estate Melgarejo, a sugar plantation near Lima; that a few days after the last-mentioned date said Murphy took his family, furniture, chattels, etc., to the house of said estate, where they resided up to the last days of December 1880, or the first days of January 1881, said Murphy remaining in custody of said estate in fulfillment of his obligation; that deponent believes every piece of furniture, etc., taken by Murphy to said house was

in it on the 9th of January 1881, when a party of the Chilean army arrived at the above-named estate, and that he knows that Murphy was left destitute of everything he possessed after the date last mentioned.

"Mr. Henry Oppenheimer makes oath that when John A. Murphy arrived at Peru in 1870 deponent sold to him very good and costly engineering instruments; that he knows in the year 1880 John A. Murphy was employed at the estate Melgarejo and resided at said estate with his family up to the first days of January 1881, where he took his valuable furniture, and in fact all that he and his family possessed; that everything claimant had at said estate on the 9th of January 1881, was taken by Chilean soldiery, and that claimant was left entirely destitute.

"It would have been more satisfactory if claimant's testimony had been taken in the form of deposition, after due notice and opportunity to defendant to cross-examine the witnesses; but, as already stated, I do not feel at liberty to discard it altogether. As it is competent testimony under the rules, and is entirely uncontradicted, I think its legal effect must be considered to establish the claim. However just may be the criticism upon some of the affidavits as being too vague and indefinite in their character, I think there can be no reasonable doubt, in view of all the testimony, that on the 9th of January 1881, John A. Murphy was wrongfully taken prisoner by the Chilean forces; that he was carried away from his home by coercion and under duress, and that as a direct consequence of this illegal and wrongful capture his property was taken or destroyed.

"Under these circumstances I submit that his widow and children are entitled to receive fair compensation for their losses from the respondent government."

In the case of *John L. Thorndike v. Chile*, No. 6, the **Ex parte Proofs**: commission rendered the following decision:

Thorndike's Case. "John L. Thorndike in his memorial No. 6, claims from the Government of Chile the sum of £39,169 0s. 8d., which he itemizes as follows:

"For properties and materials damaged and destroyed by the Chilean forces in Mollendo	£21,950 7 0
"For interest upon said sum at the rate of 6 per cent per year from the 13th of March 1880 until the 9th of April 1894	17,218 13 8

"The claimant alleges that he is an American citizen, and that he was engaged as a subcontractor in the building of the railway of Mollendo, Arequipa, Puno, and Cuzco, and that, as such contractor, he owned considerable property in Mollendo, such as a brass foundry, houses, machinery, stations, telegraphic office, and materials intended for the construction of the said railroad line.

"He further states that on the 9th of March 1880, Chilean forces were disembarked at said port of Mollendo and took possession of the city until the 13th of the said month; and that during that time they destroyed and damaged the property and materials to which reference has been made.

"To prove the said facts, the claimant has filed the following documents:

"(a) A copy of a protest that he made on the 15th of June 1880, before the British vice-consul at Mollendo;

"(b) A list or inventory, subscribed by the claimant, of the properties and materials destroyed and damaged by the Chilean forces;

"(c) Another protest made by Mr. José Manuel Braun before the British vice-consul at Mollendo, dated the 31st of March 1880, in the name of and representing Mr. John L. Thorndike;

"(d) A copy of a note dated in Lima on the 10th of June 1884, and addressed to the Secretary of State by the chargé d'affaires *ad interim* of the United States, inclosing a copy of a letter from Mr. Thorndike, and also one of the protests and the inventory to which reference has been made;

"(e) A certificate dated 21st of June 1893, in which the secretary of the United States legation in Lima certifies to the fact that it appears from the archives that the aforesaid communication and documents were sent to the Secretary of State;

"(f) A declaration made by J. T. Robilliard, Pedro Yahnsen, Luis Champin, and R. Turner, before the consular agent of the United States in Mollendo on the 26th of May 1893, stating that among the property destroyed in the port of Mollendo considerable belonged to Mr. John L. Thorndike;

"(g) Another declaration made in Lima before the secretary of the United States legation by J. M. Van Buren and William Booth on the 20th of July 1893, in which they say that they have known Mr. John L. Thorndike for several years; that they know he was the owner of some of the property destroyed by the Chilean forces in Mollendo, and that they consider the sum of 140,952.8 soles, named by the claimant, to be a just estimate of the value of those properties;

"(h) Another declaration made in the same manner by Victor Sanchez Benavides and T. B. Leiding on the 21st of July 1893, in which they corroborate in similar terms the foregoing statement;

"(i) Another declaration made on the 19th and 20th of July 1893, before the secretary of the United States legation by Mariano Nicolas Valcárcel, José Manuel Braun, Daniel H. B. Davis, and Jacob Backus, in which they aver that they have known Mr. John L. Thorndike for more than twenty years, and that during all that time he has not done any act that might reflect on his neutrality;

"(j) A sworn declaration by Robert D. Huntington made in Malone, New York, on the 27th of September 1893, in which he states that he knows Mr. John L. Thorndike personally; that he knows that he was born in the city of Malone on the 21st of September 1834, and that he knows he is at present a citizen of the United States.

"The agent of the Government of Chile asks that the claim be dismissed because the nationality of the claimant and the accuracy of the facts alleged by him do not appear duly proven.

"The majority of the commission, after having examined the papers and documents presented by the claimant, considers that they lack sufficient legal weight to warrant a decision against the respondent.

"It appears, in fact, that none of the testimony presented by the claimant, of itself vague and undeterminate, was taken after notice to the agent of the respondent, thus depriving him of the legitimate right to witness the

administering of the oath and the declarations of the witnesses, and at the same time to cross-examine them.

"It does not appear, either, that the memorialist has made any efforts to produce his testimony in accordance with the rules of procedure established by this commission. Nor has he produced any testimony of the Peruvian authorities in Mollendo, who certainly would have been willing to establish by a public document or by a certificate the facts complained of and the damage the claimant might have suffered.

"In view of the foregoing considerations, the commission, by a majority of votes, the Honorable Commissioner Goode dissenting, declares that the claim of John L. Thorndike against the republic of Chile be, and it is hereby, dismissed."

John L. Thorndike v. Chile, No. 6, United States and Chilean Claims Commission, convention of August 7, 1892, opinions, 171.

Mr. Shields, in his report, p. 54, says: "In view of the decision in the Murphy case, which held that affidavits coming from the State Department under the treaty and rules were admissible, the judgment in this case must have gone on the ground that the evidence was insufficient to establish the claim."

CHAPTER. LII.

POWER OF ARBITRATORS TO DETERMINE QUESTIONS AS TO THEIR OWN JURISDICTION.

The mixed commissions organized under Articles VI. and VII. of the treaty between the United States and Great Britain of November 19, 1794, respectively possessed the power to award compensation to claimants who could not obtain it "in the ordinary course of justice." The history of these commissions is detailed elsewhere.¹ Before each of them the question was raised as to the power of the commissioners to determine their own jurisdiction. In the commission under Article VI., which sat at Philadelphia, the American commissioners, who were in the minority, claimed the right to secede from the board and, by destroying a quorum under the treaty, prevent the rendition of awards in cases which they believed to be outside of the commission's jurisdiction. In other words, they denied the right of the board to determine its own jurisdiction in respect of the claims presented to it for decision. At London, under Article VII., the case was reversed. Under this article the British commissioners happened to be in the minority, and they made the same pretensions as the American commissioners under Article VI. Under the latter article, the question never was settled. The American commissioners having by their secession suspended the proceedings of the board, the two governments eventually agreed upon the payment of a lump sum in satisfaction of the claims; and the board ceased to exist.

Under Article VII. the British Government ultimately declined to sustain its commissioners, and left it to the board to determine its jurisdiction in respect of the cases before it, as they arose for decision. The question first arose under this

¹ *Supra*, vol. 1, Chapters IX. and X.

article in the case of the *Betsey*, Furlong, master, in which the British commissioners denied the jurisdiction of the board on the ground that the lords commissioners of appeal had rendered a decision in the case, and that this decision must be considered as final. The American commissioners, Messrs. Gore and Pinkney, and the fifth commissioner, Mr. Trumbull, who also was an American, maintained the opposite view. The British commissioners, in order to prevent a decision of the question, withdrew, thus denying to the board the power to determine its own jurisdiction. While the point was under discussion Messrs. Gore and Pinkney filed opinions, which are given below.

“It is said by Doctor Nicholl and Mr. Anstey *Opinion of Mr. Gore.* that the Board is not competent to decide on its own jurisdiction. That, when a complaint is preferred, and an averment made by the Agent of the Government that the case, on which such complaint is founded, is not within the Jurisdiction of the Board, or a doubt arises as to its jurisdiction in the minds of two of the Commissioners, those two being the Commissioners named by one government, the board must refer this question to both the contracting Parties; or obtain the consent of that from whom compensation is claimed, before it can proceed in the examination. That if, on a complaint, the Commissioners named by his Britannic Majesty should be of opinion that the board is not competent to entertain the Cause, and those named by the United States should be of a different opinion, and the fifth should concur with the latter, the British Commissioners will be free to secede from the board, so as to prevent a decision on any other question in the case. A power to decide whether a Claim preferred to this board is within its Jurisdiction, appears to me inherent in its very Constitution, and indispensably necessary to the discharge of any of its duties.

“That a board should be constituted with powers to conclude the contracting Parties, both as to the Justice of the Claim and the amount of Money to be paid in Compensation thereof, and should have no power to decide whether the Subject matter of Complaint be submitted to it, is with me so palpable a contradiction, that the disrespect which, in my judgment, such a position reflects on the high contracting Parties, and the attempt to support the reverse by argument, or other authority than the Instrument itself, can be apol-

ogized for only by the very sincere esteem I entertain for those who make the objection.

"The 6th & 7th articles of the Treaty, under which this Board sits, communicate the authority it possesses, describe the subjects which are embraced by its powers, and the Duties which are imposed on the Commissioners, as well as the Obligations on the contracting Parties.

"The first and third Sections of the 7th article, in stating the Complaints of the Citizens of the United States and of the Subjects of his Britannic Majesty, define the objects which are within the arbitration and decision of the board.

"The Complaints of the Citizens of the United States are founded on cases of illegal or irregular capture or Condemnation, to which such Circumstances are attached as may prevent the Complainant from receiving compensation in the ordinary course of Judicial proceedings.

"To have named every case, even if known to the Parties, was liable to various objections:

"From the want of knowledge of the Particular Cases, how many and what would be satisfied in the ordinary course of Justice it was impossible to have determined, even in those where injury had been actually done at the moment of negotiation. But the respective Governments, with a candor very honorable to their character, admitted that acts might be then committing, and might be committed, at a future day, from which loss or damage would accrue to their respective Citizens and Subjects.

"These being within their contemplation, tho' not within their knowledge, were expressly brought within the remedy.

"If the contracting Parties had ever entertained an idea of a future reference to themselves, to ascertain the cases that should be submitted to this board, in making any rule, other than that contained in the article, by which the Cases contemplated should be determined to be within the Submission, it is hardly possible to conceive that they should have omitted to mention such reference, or such other rule, at a time when they were speaking of future events, the extent or precise Circumstances of which could not be foreseen. Indeed if the Parties had intended such future reference, that intention would have been fulfilled by a Promise that, when cases of this sort could be specified, they would agree on such and submit them by name.

"They adopted a different course, and it may be fairly inferred that they intended to describe the cases with such precision that Men of common understanding might distinctly comprehend their meaning, confiding in the integrity and intelligence of those whom they should appoint to execute their intention, for the necessary disposition and capacity to determine truly what were the cases thus described.

"I thought it advisable to take this general view of the subject, that it might appear from what the Parties had omitted to do, as well as from what they had done, that no such want of authority, no such reference as the objection supposes necessary, could have been within their intention.

"The Subject shall now undergo a more particular consideration, in the course of which such rules shall be stated as I trust cannot be contested, and from which it is clear to my Judgment that the board not only has authority to determine whether a Complaint preferred is within its jurisdiction, but that to examine and decide such question is an indispensable duty imposed on the Commissioners by the trust they have accepted.

"The 7th article, together with the 6th, which is referred to by the 7th, declares the authorities and Duties of the Commissioners—the number and relation of the Commissioners to the contracting Parties—necessary to their organization, and the validity of their acts—viz':

"Three of the said Commissioners shall constitute a Board, and shall have power to do any act appertaining to the said Commission, provided one of the Commissioners named on each side, and the fifth Commissioner shall be present; and all decisions shall be made by a majority of the voices of the Commissioners then present.'

"They shall decide the Claims in Question, according to the merits of the several Cases, and to justice equity and the Laws of Nations. The award of the said Commissioners or any such three of them as aforesaid shall be final and conclusive both as to the justice of the Claim, and the amount of the Sum to be paid to the Claimant.'

"The Subject matter in each claim must be a capture or condemnation of the property of a Citizen of the United States, under colour of authority or Commission from his Britannic Majesty; and capture of the property of his Majesty's Subjects within the Limits & Jurisdiction of the United States, and brought into the Ports of the same, or taken by vessels originally armed in Ports of the said States. This is the

description of Cases which the two Nations in express terms submit to the Arbitration and decision of the Commissioners; and to all such Cases, and to do any act respecting them as stated in the article, is the power and authority of the Board conclusively extended.

“Every Subject and Citizen having a Claim within the description, and under the circumstances, for which this article provides a remedy, has a right and interest in its Provisions, indefeasible by the act of either Government separately; and, in my belief, indefeasible by their joint act without a fair indemnity to the Individual. If the Claim States a Case to be of this description, it states a Case on the face of it cognizable by us; if the facts alleged to bring it within the description are contested, the Commissioners should put the party to prove them. If he fails, as it would not appear to the Commissioners to be a case submitted, it would be dismissed of course. Such has been the State of two Complaints preferred to this Board, and each Government has a right to expect a similar decision under like circumstances. But if the Individual who has now become a Party to the Contract, as well as a party in the complaint, makes out his case, he has an equal right to expect an examination whether other circumstances apply which entitle him to the award of the Board. That Board could never be denominated impartial or just, that did not see with equal eye the Party that claimed, and the Party that resisted. The opinion of either ought not, and I trust would not be, a law to the Commissioners. The opinion of the one ought to weigh as much and no more than the opinion of the other; and it would be thought strange if the Complainant should state that, as, in his opinion, the Case was within the Jurisdiction of the Commissioners, the Board was estopped from saying it was not. A Submission at the control of either party, would be no submission worth the Paper on which it was written—a description of Cases, liable to the effectual obstruction of the Party to make compensation, would be worse than no description. The opinion of the Government, or of the Complainant, cannot alter the true meaning of the Agreement. Cases within the description are not the less so, because one of the Parties to the contract thinks they are not.

“An application to the two Governments, to admit cases to the cognizance of the Board that are not described in the

article, would be an application for a new submission, new Powers, and a new Commission. This might be expedient for aught I know, but it would be totally extraneous from and independent of this Contract. The consent of either Government, that the Commissioners might examine and decide cases not within the article, would derive no force from the present Treaty, and would not make such more or less within the meaning.

“Let us go back to the Powers of the Board. It has power to do any act appertaining to the Commission. Is determining whether a Case, stated in the Complaint, be within the description confided to the commissioners, an act appertaining to the Commission?

“With equal propriety it might be asked, whether reading or hearing a Complaint, on the part of the Commissioners, or preferring it on the part of the Claimant appertained to the Commission, or was necessary to the examination and decision.

“When a Complaint is brought before the Commissioners, the Board must take for granted that it is within their Competency, or refer it to some other tribunal to determine the question. The former could not be that diligent and careful examination directed, and might work great injustice; for the latter there is no permission, much less authority, in the Treaty; neither is there any other tribunal or person authorized to make this determination. The Commissioners then are bound to compare this Case with the description in the article, examine and decide whether it is conformable to that rule, the one expressly agreed on, by the Contracting Parties.

“This is the first act that presents itself to the mind, when a Memorial is preferred; it is the prerequisite to every other act, to the due exercise of every other authority, to the Conscientious discharge of every other duty. Power is also given to such three Commissioners, they constituting a Board, to decide the Claims in question according to the merits of the several cases, to justice, equity and the Law of Nations.

“To decide on the justice of the claim, it is absolutely necessary to decide whether it is a case described in the article. It is the first quality to be sought for in the examination. To say that power is given to decide on the justice of the Claim, and according to all the merits of the Case, and yet no Power to decide or examine if the Claim has any justice, any merit even sufficient to be the Subject of Consideration, is to offer in terms a substance, in truth a phantom.

"It would be a delusion of the grossest kind to the Complainant who has a just claim. The article admits the possible justice of the Claim, and very gravely says to him, provided you cannot obtain compensation in the ordinary course of Judicial proceedings, and your Claim is supported by its own merits, by justice, equity and the Laws of Nations, Commissioners will examine and decide on your Case and award you adequate Compensation, which the Government has by a Solemn Contract bound itself to pay you. But then, Sir, after the Complaint is preferred, the Commissioners cannot hold connasance of it, without consent of that Party from whom you seek compensation. You cannot enter our doors; the key by which alone you can gain admission is held by the Party of whom you Complain.

"In common life and in Common Affairs this would be called a mockery of Justice. That the Parties to this Contract are two great and respectable nations will not alter the sentence. Justice is impartial, whoever are the Parties, or whatever the objects, and her decrees are the same on the conduct of all, the many and the few, the helpless individual or the powerful nation.

"According to my comprehension, the power to decide is given explicitly to the Board; but, as there is a difference of opinion on this subject, I will quote some authorities on the doctrine of implication, and tacit grants derived from, tho' not expressly included in, the terms of the Contract.

"Vattel, 2nd Book, 156, 234th Secⁿ. 'All that is included in the nature of certain acts, on which an agreement is made, is tacitly comprehended in the Convention: or, in other words, everything, without which, hat is agreed upon, cannot take place, is tacitly granted.'

"What is agreed upon in this article? That the Board *shall decide the Claims* in question, their justice and amount. How can they decide the Claims in question without examining and deciding whether or not it be a Claim in question?

"Vattel, 2-B, 17-C, 282^d Secⁿ. 'Every interpretation that leads to an absurdity, ought to be rejected, or in other words we should not give to any piece a sense from which follows anything absurd; but interpret it in such manner as to avoid absurdity. As it cannot be presumed, that any one desires what is absurd, it cannot be supposed, that he who Speaks, has intended that his words should be understood in a manner, from which an absurdity follows; neither is it allowable to presume that he sports with a serious act, for what is shameful and unlawful is not to be presumed. We call absurd

not only what is physically impossible, but what is morally so, that is what is so contrary to reason that it cannot be attributed to a man in his right senses.'

"To my mind there can be no greater absurdity than to conceive that these two Nations appointed Commissioners with power to examine and decide Claims; prescribed the rules by which they were to examine them; authorized them for this purpose to receive books, papers and testimony, examine persons on oath, award sums of money and solemnly pledged their faith to each other, that the award should be final and conclusive, both as to the justice of the Claim and to the amount of the sum to be paid, and yet gave them no power to decide whether there was any Claim in question.

"This objection supposes that two wise and upright Men, two enlightened nations, gravely stipulated for the redress of what were considered important injuries, marked out the rules by which any loss, resulting from such injuries, should be adjusted, and promised adequate compensation therefor; and, to carry this Provision into effect, appointed a Court, in its construction as independent of the Parties, and as impartial, as human imperfection will admit; but at the same time left it to the Party, against whom a Claim was to be preferred, to decide whether a single step should be taken to rectify the Complaint, to examine the claim, or make a decision thereon; agreed that satisfaction should be made in the precise sum, and at the exact moment, awarded, but admitted that the Party bound to make the payment should have it at all times in his discretion, and without breach of faith, to prevent any award being made.

"Will any man, in his right mind, say that two wise and enlightened Statesmen, who are an honor to their respective countries, whose probity and intelligence may be imitated but cannot be excelled—that two illustrious Nations, who justly consider morality, candor & uprightness as the source of individual happiness, the grand cement of political order, and the most substantial basis of national excellence,—will, I say, any man in his right mind, pronounce such men and such nations to be in their senses, when they make so weak, so unmeaning a contract, one so vain, and so delusive to those for whose benefit the article was pretended to be made?

"The interpretation which renders a treaty null and without effect cannot be admitted. It ought to be interpreted in such manner as it may have its effect, and not be found vain and illusive.'—2 Vattel, C. 7, Sect. 283.

"The objection is that wherever a doubt is raised by the Party against whom the Claim is made, the Commissioners cannot proceed to examine, &c., &c. This Treaty, the Parties declare, is 'to terminate their differences, in such a manner, as without reference to the merits of their respective Complaints and pretensions, may be the least calculated to produce mutual satisfaction and good understanding.'

"The Provisions of the 7th article are understood to be a full satisfaction for all Complaints of loss from capture, &c.; the term in which Complaints may be received is limited to two years. The contracting Parties make no stipulation for agreeing, in any other mode, what Claims are properly cognizable by this Board—neither is there any rule by which the cases are to be defined, unless the description herein given is sufficient, and the Commissioners authorized to decide whether they are within that description. A Party on whom a Claim is made has only to suggest a doubt, which may be rightfully done in every case, refrain from making any other description of the Cases, (and to do this he is under no obligation,) and the article is rendered null.

"It is a contradiction in terms to say that a measure adopted shall terminate all differences, and yet that the very measure presupposes a new negotiation on what are their differences. The Declaration of the Parties to terminate all their differences without reference to their respective merits and pretensions, can hardly be rendered consistent with a determination, in one or both the Parties, not to submit a Case to the Arbitration agreed on, without a reference to itself to decide on the merit and pretension of such Complaint, prior to its being the subject of that arbitration. Neither can that *manner* be expected to produce mutual satisfaction and good understanding which submits entirely to the will of the Party from whom compensation is claimed, whether the complaint shall ever be heard by the Tribunal appointed to award such compensation. It is submitted whether the Declarations made in the Preamble to this Treaty, as well as the proposed objects of it, are not rendered absolutely null by a construction of the 7th article which subjects all its provisions to the will of any one Party.

"It may be said that, altho' this total defeat of the article is possible in theory, it never can be true in practice. The following statement of Complaints preferred to the Board and the answers will shew that this construction should be resisted, not

only because such interpretation ought never to be admitted as may destroy a Contract, but that, in the present instance, if this objection is persisted in, the article is in fact null and illusive.

“Complaints have been preferred in cases where the Lords have decreed condemnation of vessel & cargo—where they have restored the vessel, but denied freight and expenses—where part of the cargo has been condemned and part restored—where they have restored vessel & cargo, but refused costs and damages—where they have restored vessel and cargo and refused costs and damages to the Claimant and condemned him to pay costs of the Captor—where the Party moved to their Lordships to admit an appeal from a Decree of Condemnation, which Motion was rejected.

“The Agent on the Part of the British Government objects to the Jurisdiction of this board, in all these cases, because of the Decree of the Lords Commissioners, which, according to him, concludes all Parties and all interests. Complaints have likewise been preferred in cases where condemnations have been decreed in the High Court of Admiralty, and in the Courts of Vice Admiralty, and no appeals made—and where appeals have been made, and are yet depending before the Lords of Appeal—in cases where the Party appealed, but abandoned his appeal, on the Lords declaring that in such cases they should decree against the Claimants. To all these cases, the agent replies that adequate compensation can be obtained in the ordinary course of Judicial Proceedings—that the Lords are competent to grant it—that it will be there obtained, if due, or has not been lost by wilful neglect and omission. These cases, with their answers, appear to me to embrace every description that can be contemplated under the article. The Commissioners on the Part of the United States requested the agent for the American Complainants to bring forward Memorials of all the different classes of cases, that, if possible, one might be found which the Board should be thought competent to examine. He nor they could think of none other—the question has been frequently made at the Board and no other class can be brought forward. The Objection that the Board is incompetent to decide whether these cases, or any of them, are within the description submitted, arrests and stops all proceedings and in fact renders the article null and illusive.

"I have endeavoured to prove that the Board has power to decide whether, on a Complaint preferred, it is within their Jurisdiction.

"I shall now attempt to shew that the Commissioners are under an indispensable obligation to do this, on every Complaint.

"Whenever a man has accepted a trust, he is bound to perform the Duties of it, and, to ascertain what those Duties are, he must refer to the act under which his Trust is held.

"The Commissioners are to search for their Duties in the 6th & 7th articles of the Treaty of Amity &c. It will there be found that a Citizen of the United States, or a Subject of the King of England, has a right to bring forward certain claims. A right in the Complainant to prefer his claim, implies a duty in the Commissioners to examine and decide upon it. The Complainants have an Interest in the Provisions of the Treaty, and it is expressly agreed that the Commissioners *shall* decide their Claims; and to enforce this obligation the more solemnly, an oath has been imposed and taken by the Commissioners in the words following, viz:

"'Honestly, Diligently, impartially to examine and to the best of their Judgment, according to justice, equity and the Laws of Nations, decide all such Complaints, as under the said articles should be preferred to them.'

"How can this duty be complied with, this oath be satisfied, if, when a Complaint is preferred to the Commissioners, they refuse to examine it? Surely they cannot be said to examine the Complaint *diligently* and *Carefully*, who refuse to examine it at all.

"Can they satisfy that part of the Oath in which they swore to examine the Complaint *impartially*, who, upon a suggestion of either Party, refuse to examine the Complaint, until they have the consent of that Party? Further, the Commissioners have sworn 'to decide *all such* complaints, after an honest, diligent and impartial examination, according to the best of their Judgment, to justice, equity and the Laws of Nations.'

"It is inconceivable to me that this part of the Oath should be complied with, by saying that the obligation to decide was satisfied by refusing to examine. This objection was first started at the board; its novelty not less than its nature excited my surprise. Among all the evil and fanciful things that have been conjured up, by the Enemies of this Treaty,

against the utility of its provisions, I never heard one so totally subversive of all that justice which was the primary object of the negotiation, and of the most important benefits that were contemplated by its friends.

"I have considered it with all the candor and diligence that my mind is capable of. To this I was bound by the great respect I feel for those who make the objection, and by the most solemn ties of honor and conscience, and by the equal obligations of duty to both nations; for, altho' I am a citizen of but one, I am constituted a Judge for both. Each nation has the same, and no greater, right to demand of me fidelity and diligence in the examination, exactness and justice of the Decision.

"Under such impressions I have made this inquiry, and the result has been that the Commissioners are not only competent but indispensibly bound to decide on every Complaint that is preferred to them, whether or not it be within the meaning and remedy of the article, and that this decision is to be made, like all others, by a majority of voices, provided the fifth Commissioner and one named by each Nation be present. The consequences of a different construction have been stated, as I see and feel them; and sure I am that if the Gentlemen, who now favor the objection, view all or any of these consequences, resulting from their interpretation, the objection will be abandoned.

"I had thought of taking one other view of the subject, which at first seemed to be in the contemplation of one Gentleman, viz, that a decision on the question of Jurisdiction must be made by the unanimous vote of the five Commissioners; but, on reflection, this appears unnecessary, for, if it ever be a question before the Commissioners, it must be decided by a majority of the voices, under the proviso aforesaid, that being the manner, and the only manner, pointed out for a decision of all questions.

"A reference to the journal of the Board will shew that the construction I have given of the article has been sanctioned by its own practice.

"The case of ——— Wilson was brought by Memorial before the Commissioners, and decided by the Board not to be within its Jurisdiction.

"The Case of the *Friendship*, Tuttle, came before the Board by a Memorial from Mr. Bayard; this Memorial was answered

by Mr. Gostling, on behalf of the British Govt. The cause is detained at the prayer of the Memorialist, that the party may bring himself within the provisions of the article, by the Proof of certain allegations. It may be justly implied that, if the Party makes out such Proof, it will be within the competency of the Board to examine all other merits of his Case, otherwise not.

The third Case, is that of the *Hope*, West, Master. The King's agent replied to the Memorial, that it was not one of the Cases described in the article, and so not within the Jurisdiction of the Board.

The Memorialist was directed to make answer, and the Board appointed a day to take the Case into consideration. Four Commissioners attended—the question raised by Mr. Gostling was maturely considered, and this was the only question before the Board. The Memorial, with the answer and replication, were read, the Commissioners went into an examination of what was alleged by both parties, and, finding that the allegations against the Memorial were supported, it was determined that the case was not within their Jurisdiction. Thence appears the opinion of the Board that it is competent to decide that a Case is not within its Jurisdiction.

“To say that the Board has authority to decide that a Cause is not within its Jurisdiction, and yet no authority to decide that a case is within its jurisdiction, appears to be a contradiction too glaring to be persisted in. That the Commissioners have a right to decide in favor of one Party only—in favor of the Party complained against. but not in favor of the Complainant—cannot be true.

“If, in the course of the reasoning and examination on the Complaint in behalf of the owners of the *Hope*, there had appeared sufficient evidence to induce the Commissioners to entertain the case, will any one say that such decision would not have been equally valid as the decision that was made? The persons being the same, having the same authority, and acting under the same sanctions?

“Would not a denial of this be saying that the Commissioners, under a Power to decide all Questions, had power to decide there was no question; under a Power to decide the Justice of a Claim, they might decide it had no justice; but, when there was a question, that could not be decided; when the claim had justice, the Commissioners were forbidden to express it.

"Under such Construction the Commissioners would be a Board with great and important Powers to decide on their inability to act, but possessing no faculty of Judging or acting, having authority at all times to decide in favor of the Government, but none to decide in favor of Individuals. A board without a single power to effect the sole purpose of its institution, which was to grant relief & compensation, otherwise unattainable, to those who had suffered loss from illegal captures or condemnations.

"We come to the last stage of this business, viz, Supposing the Board to decide a Cause to be within their jurisdiction, which decision in the opinion of the two Gentlemen should not be well founded. Have they a right to secede from the Board, so that no further act can take place on such Case?

"If my Judgment is correct that the Board has Power to decide such question, it must be self-evident that all the Commissioners are bound by the decision, and are under an indispensable obligation not to arrest the proceedings by their absence.

"To refrain from acting, when our duty calls us to act, is as wrong as to act where we have not authority. We owe it to the respective Governments to refuse a decision in cases not submitted to us—we are under equal obligation to decide on those cases that are within the submission. If this reasoning is true, the two Commissioners have no right under such Circumstances to secede, for that would be to suppose a right to omit doing right, or a right to do wrong.

"It may be asked, how is a Nation to avoid being charged with inconveniences that it did not contract to bear, if the Board has the Power of deciding what cases are submitted. The answer is obvious, it is that of the Law of Nations, of the Common Law of England and of common sense—a party is not bound by the Decision of Arbitrators in a case not within the Submission—such decision would be a dead Letter—it would be as no decision. Vattel, 2 Book, Sect 329 says:

'When Sovereigns cannot agree about their Pretensions and yet desire to maintain or to restore peace, they sometimes trust the Decision of their Disputes to arbitrators chosen by common agreement. As soon as the Compromise is concluded the Parties ought to submit to the Sentence of the arbitrators; they have engaged to do this, and the faith of Treaties should be regarded. However if by a Sentence manifestly unjust and contrary to reason the arbitrators have stripped themselves of their quality, their Judgment deserves no attention,

the Parties Submit to it only upon doubtful Questions. Suppose the Arbitrators, in order to repair some offence, condemn a Sovereign State to become subject to the offended; will any sensible man say that this State ought to submit? If the injustice is of small consequence, it should be borne for the sake of peace; and if it is not absolutely evident we ought to support it, as an evil to which we have willingly consented to expose ourselves. For if it were necessary to be convinced of the Justice of a Sentence in order to submit to it, it would be of very little use to take Arbitrators,'

and of much less use to take arbitrators if the Party can at all times interfere and prevent their coming to a Decision.

"It is inconsistent with the faith of Treaties, not to submit to the Sentence of Arbitrators, unless it is manifestly unjust. Is it less inconsistent with such faith to interfere and preclude the Arbitrators from making any sentence, except what may be agreeable to the will of one party?

"It would have been a breach of this Treaty not to have appointed Commissioners.

"Can it be less a breach that Commissioners should refuse to attend the Board, and thus prevent any act being done except in cases where they sanctioned the opinion of the majority by their concurrence? Their attendance was as necessary to the execution of the article, as their appointment.

Gore, commissioner, case of the *Belsey*, Furlong, master: Commission under Article VII. of the treaty between the United States and Great Britain of November 19, 1794.

"The Preamble of the 7th article of the
Opinion of Mr. Pinkney. Treaty states

"that complaints were made by Citizens of the United States that during the Course of the War in which his Majesty is engaged they have sustained considerable Losses & Damages by reason of irregular or illegal Captures or Condemnations of their Vessels & other property under colour of Authority or Commissions from his Majesty, and that from various Circumstances belonging to the said Cases adequate Compensation for the Losses & Damages so sustained cannot now be actually obtained had & received by the ordinary Course of judicial proceedings.'

"The article then stipulates,

"that in all such Cases, where adequate Compensation cannot, for whatever reason, be now actually obtained had & received by the said Citizens of the United States in the ordinary Course of Justice, full & complete Compensation for the

same will be made by the British Govt to the said Complainants.'

"For the purpose of rendering this stipulation effectual the same Article goes on to provide for the appointment of a Tribunal of Reference, to whom the said Complaints shall be preferred & submitted for Examination & Decision, according to their respective merits & to Equity Justice & the Law of Nations; and it declares that the award of this Tribunal shall, in all Cases, be final & conclusive, both as to the Justice of the Claim & the amt. of the sum to be paid to the Claimant.

"This Tribunal has been appointed & organized. A Claim has been preferred to it, a leading Feature of which is that the Capture & Condemnation, of which the Memorialist complains, have on his appeal been sanctioned & confirmed by the Judgment of the highest Judicature in the country in matters of Prize.

"The agent of the Crown has objected that the Treaty gives us no cognizance of such a Claim, because of the affirmance of the original Condemnation by the Sentence of the Lords. The two Commissioners on the part of his Majesty have signified their opinions in favor of this objection; the other three have declared that their opinions are against it.

"In this State of Things (and before any formal Decision of the Question) another objection has been started which goes the extraordinary length of saying, not only that we have no power to entertain the Claim of the Memorialist, but, that we cannot even determine (of ourselves & without consulting the high contracting parties) whether we have such power or not.

"It is upon this last objection that I am now to give my opinion and to state the Reflections which have led me to it.

"I think that we are, *of ourselves* & without consulting the high contracting parties, the proper Judges (at least in the first Instance) of the Nature & Extent of our powers under the 7th Article of the Treaty—or in other words, that it belongs to us & is our indispensable Duty, in the first Instance, to decide in every Case preferred to us, without reference to the contracting parties, *whether the Claim is such a one as the Treaty submits to our Award.*

"In the Consideration of this unlooked for Embarrassment I have, first, endeavoured to discover whether the Treaty gives us power *generally* to determine our own Jurisdiction—and, secondly, if it does, whether it is to be considered as excepting

from the exercise of the general power Cases circumstanced like the present or any other & what Cases.

"1. That the Treaty does give us the power *generally* to determine our own Jurisdiction, or, in more correct Terms, to ascertain for the regulation of our conduct whether a Claim exhibited to the Board falls within the Description of the Complaints referred to us for Enquiry & Determination, would seem to be almost self-evident.

"Without such a power it is extremely obvious that the Authority expressly communicated by the Treaty *to decide the Merits of a Claim and the Amount of Compensation to be awarded* is completely nominal and illusory.

"We cannot *take it for granted* that we have Jurisdiction in any given Case & pass on to the Examination & Decision of Merits and Amount, without stopping to see that we are warranted by the Treaty to entertain the Claim at all; and, on the other hand, it is difficult to conceive to what End we should stop to make an Enquiry, if we are to be blind to the Import of the Terms of Reference contained in the Treaty, and are incompetent to judge, even for the Satisfaction of our own Consciences & the Government of ourselves, whether the Claim preferred is in conformity with the Description of complaints we were appointed to consider & adjust.

"It is too striking to need illustration that the Want of the power in Question would reduce us to a Dilemma from which there would be no escaping and w^d leave the 7th article of the Treaty perfectly lifeless & intrinsically a Nullity.

"On the one Side the Treaty would not enable us to examine whether a Claim is within our Controul or not—and, on the other, our Duty w^d forbid us to decide Merits & Amount without having made this Examination.

"I cannot form an Idea if a Tribunal (especially a Tribunal erected by two great Nations with the acknowledged View of terminating existing Grounds of Difference thro their Instrumentality) so ridiculously feeble and impotent.

"A very slight view of the 7th article of the Treaty will serve to produce a Conviction that (unless it was meant to be a deceitful Nullity, which it w^d be unjust & presumptuous in us to suppose) it intended by its own operation to clothe the Comm^{rs} with active powers—that it did not design to make them dependent for their authority on the mere Results of precarious subsequent Negotiations or the future occasional

Declarations of the contracting parties—that it was calculated to be *in itself* an efficacious definitive arrangement, in which the mutual Will of the two Governments should be fully expressed and under which that will sh^d be acted upon & executed by the Tribunal it creates.

“It defines by large and comprehensive Terms the Complaints to be referred—it directs us with Diligence & Impartiality to examine & decide upon those Complaints. It contains no Intimation that the Contracting parties have not signified their sense explicitly & finally as to the Claims to be submitted, or that this sh^d form a subject for after-adjustment between them as Complaints sh^d be brought before us.

“It does not point out to us any mode (other than by resorting to the Submission in the article itself) by which we shall be made acquainted with our powers—it does not explain to us any means by which we shall become competent to progress in fulfilling the objects of the Commission, if the article itself does not give that Competency—it does not prescribe to us any Standard by which we shall estimate our Duty if the article itself is not that Standard. In short, it purports to be intrinsically adequate to the Accomplishment of its own views without referring to any suppletory Declarations or Contracts as necessary to give it motion & effect. It is a complete operative Provision upon the face of it—and any Construction which tends to deprive it of all internal vigour—and makes it wholly rely for effect upon the event of future diplomatic discussions which it does not stipulate for, or of references to the contracting parties which it does not recognize, is a construction so manifestly repugnant to it that it requires only to be stated in order to be rejected.

“Let us, however, attend to the words of the article a little more particularly.

“It commands us ‘honestly, *diligently*, impartially & carefully to examine &, to the best of our Judgments, according to the Merits of the several Cases and to Equity Justice and the Law of Nations to *decide* all such Complaints as under the said article shall be preferred to us.’ To secure the strict & ready performance of this Command, & to give to it every practicable weight & sanction, it has directed us to swear & we *have* sworn, that we will examine and decide as the article requires.

“It has, I think, been suggested that in all this there is nothing which *totidem verbis* empowers us to ascertain whether

a claim preferred is such a one as we are to examine & decide according to its merits &c.

"Altho I do not believe this suggestion to be well founded (not being satisfied that the conformity of any claim with the description of the subjects referred to us does not constitute an essential part of its *merits*), I am willing to adopt it in its full extent. For, surely, it can be of no Importance that the power to decide our own Jurisdiction is not given by a set of words precisely appropriated to that object, if there are words in the Treaty which *inevitably imply* the grant of such a Power.

"We are called upon by the Treaty to proceed to a certain specified Result, i. e., a *Decision upon Claims Presented to us according to their Merits &c.* We cannot proceed to that result without looking to & determining the nature & bounds of our Cognizance. Who can doubt, then, that we are competent to this incidental enquiry & determination:

"When the *end* is thus positively enjoined, are we to disobey the injunction because every minute step in our progress to that end is not formally & with pedantic exactness separately authorized?

"The Treaty certainly imposes upon us a Duty to decide Cases of some sort & that too *with Diligence*. But what kind of dark and mysterious Duty is that which is admitted to exist with all the force which the most solemn engagement can impart, without its being allowed to him on whom it is imposed to know or ascertain it? Unless we are permitted to interpret the submission in the Treaty & to compare with it complaints preferred to us, our Duty is wholly invisible. It is in the Treaty only that we can find it, and yet there it is imagined we are forbidden to search for it! *Out of the Treaty* we are pressed by no Duty and can have no authority—and yet out of it it is said we are to hunt about for both!

"In stating the manner in which this Board is to proceed the 7th article refers to the sixth. The 6th article says that 'the said Commrs in examining complaints & applications are empowered & required *in pursuance of the true intent & meaning of this article* to take into consideration all claims &c.'

"In considering claims then, the Commrs. under the 6th article (and of course the Commrs. under the 7th article which in this respect refers to the 6th) are to keep in view *the true intent & meaning of the article* & to act accordingly.

"But how can they act *according to the true intent & meaning of the article* if they are not allowed to enquire & judge what that Intent & meaning are?

"I take the words above cited to convey a clear & palpable authority (independt of implication) to consider and decide Jurisdiction.

"I do not know how far it may be satisfactory (and I am sure it is not necessary) to seek in common life for cases with which to compare the present question; but undoubtedly many such analagous cases may be mentioned.

"If a Reference to Arbitrators takes place between Individuals the arbitrators are always in the first Instance the Judges of the Scope of the Submission without any specific Provision to that effect in the instrument of Reference. They are so, not because it is ever expressly stipulated that they shall decide upon their own powers, but because the submission wd be idle & ineffectual if the persons appointed could not undertake to judge what was submitted to them. It is true that if they misconceive the submission and exceed it by their award, their act is void for the excess & will not, for that excess, be enforced by a court of Justice; but still it was never supposed that for this reason they shd decline construing the submission altogether & thus render it inoperative from a too scrupulous apprehension of going beyond it by an erroneous Interpretation of its Import. If, then, in the Case of a Reference to Individuals (which never does give any authority *totidem verbis* to the arbitrators to decide upon the extent of the submission in any way, far less *conclusively*) a power is given *by necessary implication* to consider & ascertain the effect of the submission for the purpose of enabling them to act under it—what reason can be assigned why the Reference contained in the 7th article of the Treaty shall be supposed to give no such power?

"That this is a submission between *Nations* & not between Individuals is no solid ground of distinction—for Nations cannot be presumed, more than Individuals, to intend a Reference merely delusive & void. It cannot be fairly imagined that two Govts who have by a solemn compact submitted certain defined complaints to arbitrament, & have sworn the arbitrators to a diligent & impartial examination and decision of those complaints, and have directed them to examine & decide *in pursuance of the true intent and meaning of the contract of Reference* could design to leave them without authority to proceed

to any examination & decision whatsoever by making them incompetent at the very outset to judge what it was they were to examine and decide. Private persons litigiously disposed may perhaps be suspected of such nugatory views (or rather of such acts without any views at all) but I cannot persuade myself that they ought without the clearest evidence to be attributed to the Gov'ts of G. B. & America.

"Where an act of Parliament gives authority on certain subjects to Commrs., Justices of the peace &c, it was never held to be necessary to insert in the Statute an express provision that the Commrs shd in the first instance examine & judge of the nature & scope of their powers to enable them to execute the declared objects of the Legislature. Does it not always follow that such Commrs &c are to the best of their judgment to ascertain the Intent of Parliament as to the limits of their Jurisdiction and to act accordingly? Doubtless if they misinterpret the Statute & go beyond their powers their act will be set aside by a higher tribunal but it is sufficient for me that *in the first Instance* they they must and do judge for themselves on their own jurisdiction in order to their being in a situation to fulfill the law.

"It will be seen that I am not, here, contending (whatever my opinion may be) for any authority in this Board to determine upon their own powers *conclusively*. It is not necessary to the existence of the authority that its exercise shd be absolutely definitive. The right of any Tribunal to decide its own cognizance is seldom such a one as in its use is final. No court of Justice (unless in the last resort) can give to its Judgment upon Jurisdiction a conclusive quality; and yet it must decide Jurisdiction whensoever the point occurs, leaving the validity of such determination to the revision of those who may be competent to control it if erroneous.

"It is for the high contracting parties in future to adjust with *good faith* the effect of our opinion upon Jurisdiction as manifested in our final award. The effect of our opinion is not of necessity implicated on the present occasion. If it was I would state my thoughts on it explicitly. Whether the Treaty stipulates to make our opinion on Jurisdiction uncontrollable is one question. Whether it gives us the right of pronouncing the opinion in the first Instance and of proceeding upon it, is another. I confine myself to the latter question, because it is sufficiently extensive for the purpose I have in view.

"I argue simply for a power to decide Jurisdiction *as necessary to enable us to reach Merits & Amount*. I think such a power incident to the powers actually & indisputably communicated to us. It is requisite to give ability to do what we are unequivocally commanded to do—to give force to the submission in the treaty and to prevent it from being a dead letter. My opinion upon this subject I have long since stated to be fortified by Vattel 2567, which, having heretofore read and explained I will not quote at large. It is also supported by the conduct of this Board, for we have dismissed several claims upon the sole ground of want of jurisdiction. How did we discover this *want of jurisdiction*, but by examining the Treaty & considering our powers under it? Surely it will not be said that we can judge of the Terms of the Reference for the purpose of *dismissing* complaints, but not for the purpose of entertaining them—and that we are justified in holding out to the claimants the strange & discouraging alternative of *no Decision at all or a decision against them!* The Treaty never could intend that we should perceive our Duty only by halves—that we shd be enabled distinctly to comprehend when to refuse compensation but never when to *grant* it. That we should be authorized to *enquire* what cases were *within* the submission for no other purpose but to ascertain with more accuracy what cases were *out of it*. A stipulation which was designed to be an efficient arrangement for settling in what instances redress *is due* to the party complaining of injury, can never be lessened into a negative arrangement for settling merely in what instances redress *is not due*. It wd have been unspeakably childish to erect a Tribunal like this Board for the sole purpose of *rejecting applications*. If such was its purpose it can only be said that, as it was without Precedent in the past, so it is to be hoped it will never be followed as an example in future. If such was its purpose it is allowable to say that so odd an expedient for deciding complaints with Diligence & Impartiality was never contrived as that which prevents any decision at all unless it be for the defendant.

"My ideas of the 7th article of the Treaty (and I shd hope those of all the Cmmrs.) are very different from this. I have always thought and do still think it a fair & honorable contract, by which the Individual complainant & and the Gov't defendant are placed before this Board upon an equal footing—and I cannot have a doubt that, if we are competent to decide

Jurisdiction agt the Individual, we are equally competent to decide it agt either of the two Governments. It ought not to be imagined for a moment that we will, or rightfully can, say to a claimant—‘We will consider whether your claim is within the Description of Cases submitted to us by the Treaty. *If it is not* we shall not hesitate to dismiss it, *if it is* we will not decide it at all.’ If there could be any question upon such a subject, Vattel, Lib. 2, Ch. 17, Sect. 283 would tell us that a Treaty can never be thus preposterously construed.

“Upon the whole I take it to be undeniable that we have the power *generally* to examine into & determine our own Jurisdiction.

“2. It will then be proper for those, who think they have discovered *exceptions* to this power, to show where those exceptions are to be found or whence they infer them.

“It will not be alleged that they are declared by the Treaty—for the Treaty in this respect is wholly silent. It contains sufficient to give the power but points out no Limitations to which it shall be subject.

“I am averse to contesting the thoughts of others on this occasion in place of stating my own; but on this part of the question there is no other mode of arriving at explicitness.

“It has been supposed that we are incompetent of ourselves & without consulting the high contracting parties to decide the point of Jurisdiction in this case *because it is a doubtful one*—and that it is a *doubtful one* because the two Commrs appointed on the part of His Majesty are of opinion agt the Jurisdiction.¹ So that our Incompetency arises merely from our *want of unanimity on the question*.

“This position need only be contrasted with the clear & pointed language of the Treaty. The Treaty says, ‘Three of the said Commrs shall constitute a Board & *shall have power to do any act appertaining to the Commission* provided that one of the Commrs named on each side & the 5th Commr shall be present—and *all decisions shall be made by the majority of the voices of the Commrs then present.*’

“Such precise terms require no comment.

“Again—I have understood it to be suggested that an objection to our Jurisdiction by one of the Interested or contracting parties deprives us of the power of interpreting the Treaty with a view to that objection.²

¹ Reference is here made to the opinion expressed by Mr. Anstey.

² Reference is here made to the opinion expressed by Dr. Nicholl.

"This suggestion (for I think it was not delivered as a settled opinion) is grounded upon a supposed general maxim 'that whensoever one of the parties to a Treaty raises a doubt upon the construction of it, such doubt can only be explained by the contracting parties themselves.'

"If this maxim does not aim at universality (and I believe it was not thrown out as universally true), I can have no difficulty in admitting it without examining critically into the correctness of its terms. For I know not how it can be urged that this maxim, into whatsoever form it may be moulded, has any possible application to a case *where a Treaty grants a power to others besides the contracting parties to interpret the whole or any part of it.*

"I argue that the Commrs under the 7th article of this Treaty may interpret it, because it *authorizes them to do so* both by necessary implication and by express words.

"Does any one believe that the parties to a treaty may not (let general maxims founded on the independence & equality of sovereigns say what they please) communicate such a power if they think proper?

"Certainly nothing can be plainer than that a Treaty *may* give such an authority—and it is equally plain that this treaty *does* give it.

"There are cases in which even without any grant of the power it may rightfully be exercised *from the nature of the thing* by one who is not a contracting party. A guarantor may unquestionably do so (if called upon by one of the contracting parties complaining of a breach of the Treaty) and yet a guarantor was never held to be himself a contracting party.

"But here the power is incontrovertibly given to us by the terms of the Treaty itself. Neither of the parties to that Treaty has brought the power into question or interfered with or prohibited its exercise. *Another* power has indeed been denied by a subordinate agent of one of the govts; but the authority of which we are now speaking has in no shape been impeached by a Declaration of the doubts of either principals or agents. In a word—the Treaty grants us authority to ascertain its meaning. No circumstances have occurred to make that authority less than the Treaty made it. No Act of Coercion in any respect prevents us from using the authority thus communicated. Why is it, then, that we are not to use it for the purposes for which it was entrusted to us—but are to wait

the event of a Reference to others who do not call upon, far less compel us to make that Reference?

“Even if I could have any Hesitation on this occasion while I consider it as a simple *Power*, I can have none when I recollect it to be a *Duty*. To pretermitt the use of an *authority* may sometimes be justified—but to forbear to discharge a *Duty* which we have sworn to perform *with Diligence & Impartiality* can never be so until Impediments are thrown in our way which we have no ability to surmount or until our *Duty* ceases to exist. That either Govt *may* throw such Impediments in our way or may even exonerate us altogether from our *Duty* by such Infractions of the Treaty as may destroy it, I am fully apprized; but nothing of this kind *has* happened and I am entirely confident *never will*.

“There is not even an objection to the power in Question by either Nation, far less a command to abandon it; and it will, therefore, be well to reflect seriously whether, if we *voluntarily* decline the Exercise of it, our Oath is fulfilled and our *Duty* satisfied.

“We need not be apprehensive of trenching upon the Rights of those who have appointed us (let them be what they may) by the Conduct I am recommending.

“Their right of construing the Treaty will still remain in its full Strength. Our award can have no effect but such as the Treaty and Good Faith shall give to it.

“If we have no power by the Treaty to determine Jurisdiction at all (which nobody I think pretends) the contracting parties will hereafter say so—if we have no power to decide it *in a doubtful case or where the Jurisdiction is questioned by one of the contracting parties*, it will not hereafter be too late to rely upon this ground—if we *have* the power to decide Jurisdiction notwithstanding doubts & objections (as I hold we clearly have), the contracting parties may after our award adjust between themselves, if they think proper, whether we have kept within the limited cognizance marked out to us by the Treaty and, if not, what is to be the Consequence.

“It may be asked (and indeed has been asked) why these possible subjects of discussion may not as well be adjusted at once between the parties to the Treaty.

“If this Question be put to me in reference to my *Duty*, my answer wd be that I have engaged to examine & decide claims preferred to us *diligently*, and that I do not think I comply with that engagement if I *willingly* decline any examination &

decision at all until I can obtain the Rescripts of those whom I am not directed in my Oath to consult, or until negotiations, the end of which I can neither foresee nor influence, shall settle points about which I have no doubt & upon which my conscience requires that I myself shd judge.

"I shd say farther that the Citizens & subjects of the contracting parties have a right under this Treaty to demand our decision without any other delay than such as may be unavoidable—that Procrastination may injure their claims in many respects—and that as there is a possibility of such Injury I have no authority to compel them to run the hazard of its being realized. I shd say further 'that neither one nor the other of the interested or contracting parties has a right to interpret the Treaty at its pleasure,' (Vattel, 227)—that if one of them can by a mere objection to our Jurisdiction which is the result of its own interpretation of the Treaty without the Knowledge or concurrence of the other prevent or even greatly impede the execution of that Treaty in a material respect, viz, *the speedy ascertainment* of the Justice & amount of claims, the party so objecting can in effect singly interpret the Treaty to the prejudice of the other—and that of course no such operation can fairly be given to *an objection to our Jurisdiction* coming from only one of the contracting parties.

"I shd say farther that even if this was a question upon which I thought there was any difficulty, or that the Treaty was liable to the construction put upon it by those who deny our power to decide Jurisdiction as well as to the construction I place upon it in favor of that power, I wd govern myself by this maxim, 'Whatever will suffer no delay ought to be preferred to what may be done at another time.' (Vattel, 253.)

"If the question were put to me in reference to prudential or political motives merely, I shd say that it can hardly be imagined to be advisable to *force* into discussion between the two countries subjects of controversy peculiarly delicate in their nature so recently after they were supposed to be adjusted forever by a compact which proposes in its Preamble to contemplate 'the *termination* of all their differences in such a manner as without reference to the merits of their respective complaints & pretensions may be best calculated to produce mutual satisfaction & good understanding.'

"It is certainly foreign to my trust to enter particularly into considerations of policy on this or any other occasion; but it may not be improper to say in general that if we were even

authorized to press upon the contracting parties, without their seeking it, the revival of the topics embraced by the 7th article of the Treaty & till now believed to have been placed by it beyond the reach of further litigation, we shd not I think as men anxious to perpetuate the friendly disposition of our respective Governments towards each other, be bold enough to venture upon the choice of the present period for that revival.

"We have no such authority, however. The article itself is our law & our guide & for my own share, I will look for none others either now or hereafter.

"Indeed I do not discover that the contracting parties are at all bound to agree upon answers to such interrogatories as we may think proper to put to them, when a majority of the Board are ready to proceed without those answers. Each party has fulfilled the Treaty, so far as relates to us, by enabling us to meet and act *by a Majority of voices* upon their mutual stipulation—and neither has consented to enter into the explanations which the doubts of a minority of the board are under any circumstances supposed to render necessary.

"It shd seem that it wd be no Breach of the Treaty to decline such explanations—and it is certain that it is no breach of it to object to our Jurisdiction. So that an objection to our Jurisdiction, once made, might remain as an eternal obstacle to our enquiries without its being competent to the party injured by the effect we choose to give to it to complain of or act upon it as an infraction upon the Treaty.

"If this strange dilemma were limited to a single case, there wd be nothing very important in it but its principle. But we know the facts to be that our Jurisdiction has been uniformly questioned by the King's agent in every case that has been presented to us, and if he follows up his own ideas manifested by what we have already seen, we must expect that it will be questioned in like manner in every future case.

"Either, then, the present objection is unfounded, or we are ludicrous cyphers & the 7th articles of the Treaty a disgraceful mockery unworthy of those who framed it.

"WM PINKNEY.

"The above is copied from a very hasty sketch drawn up for the purpose of being perused by the B. Commrs but not intended to be put upon the files of the board in its present form.

"W-P."

Pinkney, commissioner, case of the *Betsey*, Furlong, master, article VII., treaty between the United States and Great Britain of November 19, 1794.

After these opinions were filed, the question was referred to Lord Chancellor Loughborough, who, as is shown in the history of the commission, held that the commissioners must necessarily determine whether cases were or were not within their jurisdiction.

The question, however, arose again in 1798, after the lapse of the period prescribed for the filing of claims, in respect of cases which, when the board was asked to decide them, were still pending in the courts of admiralty, and in which it was apparently possible to obtain compensation "in the ordinary course of justice." The board had rendered awards in several cases in which, though a final decision of the lords commissioners of appeal had not been obtained, it clearly appeared that the claimants could not by such a decision obtain the compensation to which, on the principles administered by the board, they were entitled. But where it did not appear that compensation could not be so obtained, and the case was actually pending in the ordinary course of justice, a different question arose. The British commissioners maintained that the board had no jurisdiction to entertain and decide cases in such a situation. The issue was made in the case of the *Sally*, Hayes, master. In this case, which was still pending in the admiralty courts, Mr. Pinkney on June 11, 1798, offered a motion to the effect that it sufficiently appeared that "the claimant could not at the time of concluding the treaty actually obtain, have, and receive in the ordinary course of judicial proceedings adequate compensation," and that the board should "proceed to examine the merits of this claim and determine whether the claimant is entitled to compensation for said loss and damage."

On the 20th of June the British commissioners moved to substitute for this a resolution to the effect that, as proceedings were still pending before the lords commissioners of appeal, where the claimant might in the ordinary course compel the sureties who had given bail to answer the appeal, or the owners of the capturing vessel, or the sureties on granting letters of marque, to carry into effect the sentence of restitution pronounced in the case, it did not sufficiently appear that compensation might not at the time of concluding the treaty and might not still be had in the ordinary course of judicial proceedings; that it was, in the particular case, the more incumbent on the claimant to pursue his remedy against the private parties answerable to him, since it did not sufficiently appear that he had used due diligence to carry into effect the sentence of resti-

tution pronounced in his favor, he not having exhibited before the court any account of the value of the property to be restored, but having elected to await the production in the first instance of the account of sales by the captors; and that the consideration of the merits of the claim should be postponed until it should further appear that compensation could not be obtained in the ordinary course of justice.

This resolution was negatived, and the motion of Mr. Pinkney carried, by a majority of the board.

The British commissioners then directed a declaration to be entered on the journals of the board, that they did not think themselves competent under the words of the treaty or of the commission under which they acted to take any share without the special instruction of the King's ministers in the decision of any cases in which judicial proceedings were still pending in the ordinary course of justice, but that, with a view to obviate all difficulties on the subject, they proposed that a statement should be made by the board to His Majesty's ministers and the American minister, in order that an arrangement might be made by mutual consent. Meanwhile, they declared that they were ready to proceed with cases not subject to the question that had been raised.

On the question involved in the declaration of the British commissioners, Messrs. Gore and Pinkney both filed opinions.

"The British commissioners having declared
Opinion of Mr. Gore. that they do not think themselves competent,

under the words of the treaty, or the commission by which they act, to take any share, without the special instruction of His Majesty's ministers, in the decision of any cases in which the judicial proceedings are still depending in the ordinary course of justice, and having caused that declaration to be placed on the records, renders it expedient that those who entertain a different opinion should state in like manner that opinion, and also the reasons by which it appears to them the construction of the British commissioners is inadmissible.

"This declaration includes two opinions on the powers and duties of the commissioners.

"1st. That the board is not competent to decide on cases in which judicial proceedings are depending in the ordinary course of justice.

"2nd. That in cases where they think themselves incompetent to act they are authorized to decline taking any share in

the proceedings, thereby arresting the progress for an unlimited time, at the will of the party promising to make compensation, the due execution of the article, if not rendering it absolutely null and void. * * *

"To state my sentiments on the second opinion contained in the declaration of the British commissioners, it will be merely necessary to quote the words of the treaty.

"Three of the said commissioners shall constitute a board, and shall have power to do any act appertaining to the said Commission, provided that one of the commissioners named on each side, and the fifth commissioner shall be present, and all decisions shall be made by the majority of the voices of the commissioners then present.'

"Is it an act appertaining to the commission to decide whether a claim preferred to the board under this article be within its provisions: or, whether a material allegation made by the complainant, and denied by the agent of the British Government, be proved or not?

"The answer to both must be in the affirmative, and the inference is clear.

"The duties and powers of the board and the rights of the complainants are expressly defined in the article. The opinion of one of the contracting parties cannot alter them. If the case is provided for in the article, the board can not refrain from acting. If it is not, although one party may consent, the board will have no authority under its present commission. I can not therefore accede to the reference proposed in the declaration for the purposes therein stated.

"However, I request it may be understood that I shall be ready to concur in any manner of transacting the business before the board which shall be most acceptable to the members or to either government, provided such arrangement consist with the duties of the commissioners, according to my understanding of the treaty under which we are appointed."

Gore, commissioner, June 28, 1798, case of the *Sally*, Hayes, master, Article VII., treaty between the United States and Great Britain of November 19, 1794.

Opinion of Mr. Pinkney. "The question proposed in this case, and the decision it has received have drawn from the British commissioners a declaration 'that they do not think themselves competent, *under the words of the treaty, or the commission by which they act, to take any share,*

without the special instructions of the King's ministers, in the decision of any cases in which the judicial proceedings are still depending in the ordinary course of justice.'

"This declaration, which at their instance has been recorded, assumes for its basis, that our powers, as they are to be found in the treaty, do not embrace complaints in which the judicial remedy is yet depending; and further, that a contrary opinion pronounced by the majority of the board, consisting of the two American commissioners and the fifth commissioner, is so far from being obligatory on the minority, consisting of the two British commissioners, that they (the British commissioners) are bound, *without special instructions from one only of the contracting parties*, so to oppose themselves to that opinion as, by retiring from the board, or otherwise impeding its progress, or suspending its functions, to prevent the effect to which the decision of the majority may on such a subject be entitled.

"Upon the points thus involved in this declaration I have already given my opinion; but the course which this transaction has taken makes it proper that I should file the reasons upon which that opinion has been formed.

"Stated in as few words as possible, they are as follows:

"1. The principle that, *in the interpretation of our powers*, the majority of the board can not conclude the minority (upon which I shall first remark) is not a new one.

"It occurred, though perhaps in a different form, was much canvassed, and finally abandoned in the case of the *Betsey*, Furlong. I had supposed that the inadmissible nature of this principle had, on that occasion, been fully understood, and that the principle itself would never be revived. This supposition was evidently authorized by the issue of that claim as well as by the circumstances that marked its progress, and has since been repeatedly confirmed in practice by both the British commissioners. I allude particularly to their conduct in that class of complaints called provision cases.

"When those complaints were preferred to us, the most prominent question to which they gave occasion was whether the judicial remedy had been sufficiently prosecuted according to the intent of the treaty. It was obviously impracticable to determine that question without looking to the extent and quality of our powers, and interpreting the instrument creating them. The British commissioners were of opinion that those complaints were not within our cognizance, because, as they

contended, the judicial experiment, reaching no further than the Court of Admiralty, had not been completely made. Yet they acquiesced in the opinion of the majority, and did not scruple to take all the share that was required of them in the several subsequent steps by which that opinion was made to result in various awards, to the perfection and authentication of which they lent their names. We have not been told, nor can it be pretended, that the revival of this discarded principle can be referred to any reasons bearing peculiarly on the cases which are now to be affected by it, so as to account for that revival at this period more than at another appearing equally to demand it.

"2. It can hardly be denied, or if denied, it is manifestly true, that the board has the power to ascertain, *for the regulation of its own conduct*, whether a complaint preferred to it falls within the description of the complaints committed to it for examination and decision.

"Without such a power, the authority expressly communicated by the treaty *to decide the merits of the claim, and the amount of compensation to be awarded*, would be merely nominal and illusory.

"We are directed by the seventh article to proceed, *with diligence*, to a certain specified end—viz., to determine claims presented to us under that article, according to their merits, and to equity, justice, and the laws of nations. We can not proceed to that end without considering and determining whether the claims so presented to us are within the article or not; of course it is not possible to doubt our competency to this incidental enquiry and determination.

"It is not, however, to be admitted that the treaty does not, *in terminis*, empower us to interpret for ourselves the submission it contains, although it would be of no real importance if it were otherwise. In stating the manner in which this board is to proceed, the seventh article refers to the sixth. The sixth article says that 'the said commissioners in examining complaints and applications are empowered and required, *in pursuance of the true intent and meaning of this article*, to take into consideration all claims,' etc.

"If the words 'in pursuance,' etc. mean anything they mean that the commissioners are to consider the nature and scope of the submission, the quality and size of their powers, and are to act accordingly in the execution of their trust.

"In a word, the board has authority to determine its own jurisdiction.

"3. If the board possesses this authority it will follow inevitably that it may be exercised by a majority of its members present when the board is duly formed, for the treaty, after declaring that three of the commissioners shall constitute a board, and shall have power to do any act appertaining to the said commission, provided that one of the commissioners named on each side, and the fifth commissioner shall be present, proceeds thus "*and all decisions shall be made by the majority of the voices of the commissioners then present.*

"I have indeed heard it suggested that a distinction is to be taken here between decisions upon the scope of our powers and decisions upon the merits of complaints.

"I can not conjecture upon what grounds a distinction can be rested; but I believe it to be plain that there is no warrant for it in the *treaty*, where only I think it material to search for it.

"4. If the board has the power, and if it is proper to be exercised by the majority, then will it also follow that the minority must submit to such exercise, and can not rightfully control or prevent its effect by seceding from the board or otherwise.

"To say that the majority have the power to decide, and yet that this power may be resisted or evaded by the minority, so that it shall wholly depend upon their will, is an incomprehensible solecism. It would be waste of words to argue against so flagrant an absurdity.

"But if the British commissioners can on this occasion rightfully retire from the board to defeat the will of the other commissioners composing the majority, who does not see that they can do so on every other question of jurisdiction; or, to be more explicit, in every case that can occur? And thus, although but a minor portion of a board directed in the instrument of its constitution to act in *all* instances by a majority of voices, render the whole authority and activity of that board dependent upon their individual judgment; not only suspend at their pleasure, but annihilate its functions; not only retard its advances to a result which each member of it has sworn to endeavor with diligence to reach, but raise an insurmountable barrier to the possible attainment of that result.

"Nor is it certain that the evil and the absurdity, if pushed to their utmost, would stop here. It is not clear that it would be open to the United States to complain of such a nullification of the seventh article of the treaty by the two British commissioners, as a breach of that article by the British Government. Let it be supposed, for the sake of illustrating this idea, that we are right, and the British commissioners wrong, in the construction of our powers, but that the British Government does not choose to direct its commissioners to accede to our construction, or to take a *share* in giving efficacy to it by attending to form a board. Could the United States upon the ground of the treaty remonstrate against this to the Government of Great Britain, as any violation of its plighted faith? The British Government might reply to such a remonstrance, that it lost no time in appointing its commissioners in compliance with its undertaking; that those commissioners have the treaty for their guide, and are to be left to decide as that, and their consciences shall dictate; that it is not bound to control them in favor of any class of claimants, or to point out to them what is or is not their duty; that it has done all to which its stipulation engages it, and that it is for the commissioners themselves under the sanction of their official oath to look to and ascertain the scope and complexion of the trust committed to them by the two countries and the manner in which that trust is to be discharged.

"I do not at present perceive that to such a vindication any satisfactory answer could be given, provided the British Government did not by its own interference produce the secession of its commissioners.

"And here it is proper to remark that the declaration of the commissioners is so far from ascribing their imagined incompetency in this and similar cases to any interference on the part of their government, or to any superinduced obstacle whatsoever, that it rests it exclusively on the words of the treaty and the commission by which they act.¹

"I do not doubt the *power*, whatever may be my opinion of the right, of the British Government, to restrain its commissioners from attending the board, or from performing any other act of duty. But it will not admit of a question that such a restraint, if injurious to the other party to the treaty,

¹ "There is nothing restrictive in the Commission; it is coextensive with the treaty. Vide journals."

or to its citizens, would be a clear and unequivocal breach of it, and might be so considered and proceeded upon by the Government of the United States.

"We are not however arrived (and I devoutly hope we never may) at a state of things so much to be deprecated. The threatened secession is announced as the intended act of the *commissioners themselves, the propriety* of which they profess to have deduced from the *terms of the treaty and their commission*.

"In what parts of both or either of these documents they have been able to find the justification of a step so extraordinary in itself and so important as to its possible effects, they have not thought it necessary in any sort to explain; but in declaring they infer their supposed incompetency to take *any share* in our decisions, and of course the necessity of their secession from these sources only, they have sufficiently explained that no share in producing it is to be attributed to their government.

"There can not in fact exist on the part of their government any inducement to such an interposition. For even if our decision in this case on the import of the treaty should ultimately prove to be erroneous, no wrong would be done to the British Government since an award in pursuance of such a decision would be merely void.

"Our determination on the extent of our powers cannot take away or lessen the indefeasible right of the high contracting parties to interpret their own pact when the occasion shall be such as to incline them, and make it proper for them, to exert that right.

"But, on the other hand, a forbearance on our part to determine on our powers so as to place ourselves in a situation to decide the merits of claims, and to fix the amount of compensations, if we shall believe any to be due (according to the command of the treaty, and the tenor of our oath) would reduce the article from which we derive our appointment to a dead letter, leave it without any inherent capacity to operate or become effectual, and make the board rely in every stage of its progress (if indeed it could make any progress at all) upon the occasional instructions of the contracting parties, which neither is obliged to give, or the uncertain event of suppletory negotiations over which we can have no control, and for which the article contains no provision.

“In short, I believe it to be clear that it is the duty of this board to proceed by a majority of voices in the execution of the seventh article of the treaty, according to the estimate which the majority shall make of the true intent and meaning of the article, leaving the validity and effect of their proceedings to the judgment of those by whom they were appointed. And I believe it to be peculiarly evident that no minority of this board can of *right* control or prevent decisions appertaining to the commission by the majority upon any idea of their own incompetency, or the collective incompetency of the board; and further, that any actual want of power in the board or any of its members can not be supplied by the special instructions of *one only of the contracting parties*.”

Pinkney, commissioner, June 26, 1798, case of the *Sally*, Hayes, master, Article VII., treaty between the United States and Great Britain of November 19, 1794.

The question thus again raised was disposed of by an arrangement which was announced to the board by the British commissioners on the 3rd of August 1798.¹

¹ Supra, vol. 1, Chapter X.

CHAPTER LIII.

INTERVENTION.

1. THE RIGHT TO INTERVENE.

Succession Claims: William Cook and others claimed, as citizens
Cook's Case. of the United States, before the mixed commission under the convention between the United States and Great Britain of 1853, £24,000 from the British Government, as the personal property of Frances Mary Shard, a deceased widow. They alleged that decedent, who was a native of Trenton, New Jersey, went at the age of 15 to London, where she married, and where she died in 1819 leaving no surviving relations except the children of her father's sister, who married a man in Trenton, and from whom the claimants alleged descent. It was claimed that the property of Mrs. Shard had gone into the custody of the British Government, to be held in trust for her heirs, and the claimants demanded it as her only surviving relations and next of kin.

Mr. Hannen, the agent of the British Government, contended that the case was not within the jurisdiction of the commission. He said:

"The convention was entered into for the settlement of those claims only upon either government which might properly have been made the subject of diplomatic action or intervention. Had this case ever been presented to the notice of Her Majesty's government by that of the United States previous to this convention being entered into, the obvious answer would have been that it was a matter exclusively within the cognizance of the ordinary courts of law, and that the claimants must establish their rights there in the same way that English subjects would be bound to do under similar circumstances.

"The same answer must be given now that the case is presented to the commissioners. It is not intended to invest them with a supreme power in all cases in which a citizen or subject of the one country might assert a claim against the government

of the other. Their commission does not authorize them to assume the peculiar functions of the courts of either country.

"The universal doctrine now recognized by the common law is, that succession to personal property is governed, exclusively, by the law of the actual domicil of the intestate at the time of his death. (*Story's Conflict of Laws*, sec. 451.)

"It is also well settled by the same authority, section 513, that an estate can not be administered in the absence of a personal representative, and such personal representative in England must obtain his right to represent the estate from the ecclesiastical courts of the country.

"2. It is further contended that the property of Mrs. Shard had never vested in the crown, but was holden by specific agents of the crown, as trustees, answerable in the courts of the country to any rightful administrator who might appear, and that the funds thus holden were, in no proper manner, the funds of the government."

Mr. Thomas, agent on the part of the United States, contended:

"I. That the method of treating similar cases in the English courts was inconclusive as to the question of jurisdiction, and that it was a well-known principle that whenever treaties between nations come into collision with local regulations they entirely override and annul them.

"This case is, in its terms, clearly within the provisions of the treaty of February 8, 1853, and any supposed inconvenience in adjudicating on that class of cases should not be permitted to oust the commissioners of their jurisdiction over them.

"II. Her Majesty's government has an interest in the subject-matter of dispute. The property of Mrs. Shard is now in the hands of the government, and is claimed as the property of the government.

"Formerly the right of ultimate heirship was one of the personal rights of the crown, but this right, with various other rights pertaining to the personal occupant of the crown, has long since been transferred to and vested in the government, or crown, as distinct from the person. This surrender was made by George III., in consideration of a clear yearly revenue settled upon him, to be paid out of the aggregate funds of the government for the support of His Majesty's household. (See act of 1 Geo. III., chap. 12.) Similar provisions have been made on each subsequent accession to the throne, as see 1 Geo. IV., chap. 1; 2 and 3 William IV., chap. 116; 1 and 2 Victoria, chap. 2.

"In this case the Queen, in her private capacity, is wholly uninterested as to what is done with the property now claimed. Her personal income is in no manner increased, diminished, or affected by any disposition which has been or may be hereafter made of it."

The claim was dismissed on the following grounds:

"This case has been ably argued on the question, what are the rights of the crown as to this property, and whether it is a mere personal claim or a claim of the government? The laws settling on the personal representative of the crown, from time to time, a fixed yearly income, on the express relinquishment of the former uncertain and changeable revenues of the crown, seems to place them on the same basis as other revenues.

"The act of 39 and 40 Geo. III. also expressly declares that the representatives of the crown are unable to dispose of, by will or otherwise, any property which comes to them with or in right of the crown. This would seem to set at rest any claim to control over such revenues as personal property.

"There is a question, however, behind this which I regard as fully conclusive of our jurisdiction in this case.

"It may be conceded that the claim comes nominally within the letter of the convention. This, however, does not settle the question of jurisdiction. It is quite clear we may go beyond its terms to the consideration of the various classes of cases embraced in ordinary international controversies; and if any class of claims has not been heretofore regarded as matter of international adjustment, we are not necessarily bound to regard them as included within the provisions of the convention.

"No instance can be found of the interference of government with the question of ordinary heirship and succession of estates in other jurisdictions. They are ever left to local action and jurisdiction of the courts of the countries where situated. There is every reason why it should be so.

"The claim comes before us then in altogether an unwonted position, and we are fully of the opinion that it is not of the class of cases designed to be embraced within the convention, and that we have no jurisdiction over it."

Upham, commissioner, delivering the opinion of the commission, convention between the United States and Great Britain of February 8, 1853, S. Ex. Doc. 103, 34 Cong. 1 sess. 166-169.

Matters of Judicial Cognizance: Case of Medina. The firm of Medina & Sons, composed of Crisanto Medina, Perfecto Medina, and Crisanto Medina, jr., presented to the commission under the convention between the United States and Costa Rica of July 2, 1860, a claim amounting to \$1,000,000, composed of various items of demand against the Government of Costa Rica, including one for the payment, with interest, of two duebills of \$50,000 each; another for losses and damages suffered in their persons and credit up to July 2, 1860, amounting to \$300,000; another for the deprivation of an exclusive right to establish a bank for twenty years, amounting to

\$300,000, and another and subsequent item of \$300,000 for the breaking up of the bank. All these matters had been the subject of litigation in the Costa Rican courts. It appeared that on June 1, 1858, Crisanto Medina obtained for himself and "his associates," from the Costa Rican Government, a charter for a bank, to be called the "National Bank of Costa Rica." Under this charter Crisanto Medina gave to the government the due-bills above referred to. In 1859, however, a revolution took place in Costa Rica; conflicts occurred with the authorities; Medina and his associates became bankrupt and were deprived of their concession, and Crisanto Medina was thrown into prison. All these transactions occurred prior to the naturalization of any of the claimants as citizens of the United States, with one exception. Crisanto Medina was admitted to citizenship of the United States by the court of common pleas of the city of New York, December 31, 1859. Crisanto Medina, jr., was admitted at Boston, March 20, 1860, after the father. The only one whose naturalization antedated the origin of the losses complained of was Perfecto Medina, who was naturalized at Boston February 17, 1858. This was before the date of the charter. But Perfecto Medina did not appear to have been interested in the bank at its inception, or at all, unless, under the name of Medina & Sons, he became one of the assignees of the bankrupt bank on February 21, 1859. The case was elaborately argued, and it was contended, among other things, on the part of Costa Rica, that the cognizance of the claim belonged to the courts of that country rather than to the commission; that the claim was essentially one for the examination and decision of the courts of the country within whose jurisdiction the transactions occurred, and that there had been no such denial of justice as would, under these circumstances, justify diplomatic intervention. On this question the Commander Bertinatti, the umpire of the commission, expressed the following opinion:

"Upon the hypothesis, however, that the claimants had been citizens of the United States, the question to be resolved would not be whether the domicile in a foreign country is by itself sufficient to make them lose such a quality, but rather if such a domicile and a commercial establishment in Costa Rica gave them the quality of *subditus temporaneus*, subject as such to the *lex loci* for all civil purposes, as Kent says, and not entitled to invoke their acquired nationality for the purpose of avoiding the jurisdiction of the country in which they have fixed their residence.

"In order to avoid the ordinary jurisdiction and before having

exhausted all the ordinary means to obtain indemnification for the alleged damages, in behalf of the claimants is invoked the right of protection belonging to every government in favor of its subjects residing abroad. On this point, and with much erudition, the authority of eminent publicists, among whom Phillimore has been quoted, and many cases have been cited in which such a right was exercised by various governments. The number might have been indefinitely extended.

"The fact itself of the convention of July 2d, 1860, between Costa Rica and the United States is an admission of such a right, and the question in this matter is not upon its *existence*, which has never been denied, but rather upon the conditions of its exercise and the limits by which it is circumscribed in the matter of the municipal law of a foreign country and of the application of the same law by the local magistrates.

"It being against the independence as well as the dignity of a nation that a foreign government may interfere either with its legislation or the appointment of magistrates for the administration of justice, the consequence is that in the protection of its subjects residing abroad a government, *in all matters depending upon the judiciary power*, must confine itself to secure for them free access to the local tribunals, besides an *equality of treatment with the natives* according to the conventional law established by treaties.

"Only a formal denial of justice, the dishonesty or *prevarication* of a judge legally proved, 'the case of torture, the denial of the means of defense at the trial, or gross injustice, *in re minime dubia*,' (see opinion of Phillimore in the controversy between the governments of Great Britain and Paraguay) may justify a government in extending further its protection. Any other interference with the internal affairs of a foreign country, when not authorized by a public treaty, must be regarded either as the result of political considerations totally extraneous to the present subject, or as the effect of influences, wrongfully exercised, which have never been approved by publicists, or as the abuse of force, and in neither case could it be accepted as a precedent by the international jurisprudence.

"According to these principles it would be difficult in the present case to establish for the United States a right to interfere in the business questions and lawsuits of the claimants and of the Government of Costa Rica. The grounds upon which they have demanded the protection of the United States do not, in fact, appear to be sufficiently solid."

Convention between the United States and Costa Rica of July 2, 1860, MS. Opinions.

Titles to Land: Anderson v. Thompson's Case. "The Mexican Government can not, in the opinion of the umpire, be made responsible for the difficulty which arose as to the tenure of the lands held by the claimants; that was a matter solely for the judicial tribunals to decide, and if the

attempt to deprive them of their lands was unjust, the losses to which they were subjected were such as any landholder might have been exposed to; nor does the umpire see that the claimants were ejected from their property or that the cultivation of the lands was necessarily interrupted by the legal proceedings."

Thornton, umpire, case of *Fayette Anderson and William Thompson v. Mexico*, No. 333, convention of July 4, 1868, MS. Op. III. 582.

Provision in Contract against Intervention. The North and South American Construction Company, a corporation under the laws of the State of Kentucky, in 1888 entered into a contract with the Government of Chile for the construction and equipment of certain lines of railroad in that country. In 1890 the Chilean Government abrogated the contract, and, taking possession of all the company's works and materials, proceeded to construct the road itself. Of this action the company complained, demanding damages to the amount of £1,303,334 5s. 3d. The Chilean Government demurred to the memorial on grounds which appear below. The majority of the commission, Messrs. Claparède and Goode, overruled the demurrer, delivering the following opinion:

"To claim No. 7 filed by the North and South American Construction Company against the republic of Chile, the respondent government invites this commission to assent to the following propositions:

"1st. That the claimant corporation by its contract with the Government of Chile agreed that in all matters and things relating to the contract the company was to be treated as a citizen of Chile, and that in relation to such things and matters it would neither invoke nor accept the mediation or protection of the United States.

"2d. That it does not appear that the company has attempted to secure its rights under the contract, as those rights are set forth in the memorial, by the aid of the constituted authorities of Chile.

"This is a general demurrer in the usual form to the memorial of the claimant. In stating the grounds of the demurrer the honorable counsel for the respondent government invites attention to Article 18 of the second minor division of the general conditions for the construction of railways in project, of October 16, 1888, under the title 'Concerning the contractors.'

"It is contended in support of the demurrer that for the purposes of executing the contract the claimant abandoned and disavowed its rights of citizenship in the United States; and for its protection and the enjoyment of any remedies to which it might make claim it subjected itself absolutely to the

jurisdiction of Chile. For all the purposes of that contract the North and South American Construction Company expatriated itself. It is a well-settled doctrine that a corporation cannot expatriate itself; it is a creature of the law, and on many occasions it has been acknowledged that it must dwell in the place of its creation.

"If it be true that the claimant has not changed its citizenship, and the reciprocal duties and obligations of allegiance and protection still exist between it and the Government of the United States, the question arises, How far has it abridged or modified the conditions of citizenship by entering into the contract under consideration? In determining this question we should not only examine article 18, but all other provisions of the contract which concern jurisdiction.

"The legal relations between the Government of Chile on the one hand, and the North and South American Construction Company on the other hand, have been regulated by articles 18, 48, and 49 of the general conditions for the construction of railways in project, of October 16, 1888, which are as follows:

"**ARTICLE 18.** The contractor or contractors will be considered for the ends of the contract as Chilean citizens. In consequence they renounce the protection which they might ask of their respective governments, or which these might officiously lend them in support of their pretensions.

"**ARTICLE 48.** Any difficulty or dispute which may occur between any of the resident state engineers and any other engineer, appointed as representative of the contractor, as to the construction of any work, quality of material, and in general in the practical execution of the contract, will be decided by the engineer or engineers the government may name, with appeal to the ministry of industry and public works, who will decide finally.

"**ARTICLE 49.** The difficulties or disputes of any nature which may arise in the interpretation and extension of the contract will be decided summarily and without other appeal by the arbitrating arbitrators named, one by the ministry of industry and public works, another by the Supreme Court of Justice, and the third by the contractor."

"And also by Article 20 of the 'Contract for services North and South American Construction Company and the government,' of October 18, 1888, of which the following is the text:

"**ARTICLE 20.** The difficulties or disagreements of every nature which may arise in the interpretation or execution of the contract will be decided summarily and without appeal by three arbitrating arbitrators named, one by the minister of industry and public works, another by the Supreme Court of Justice, and the third by the contractors."

"This contract obtained the sanction of a law in Chile by an act of the two houses of the Chilean Congress and has been signed by the President of the republic of Chile.

"It is a well settled rule in the construction of a contract that all its provisions shall be taken together and such interpretation given to each provision as will make it consistent with the whole. What, then, is the true intent and meaning of article 18 of the 'General conditions' when taken in connection with articles 48 and 49 of the same condition, and article 20 of the contract? We are of the opinion that these articles when construed together mean the same thing; they mean that all questions arising out of the contract itself, such as the proper construction to be placed on any of its provisions, the amount of payment due, the annihilation of the contract in the case provided for by the contract itself, shall be decided summarily and without appeal by the tribunal of arbitrators, and that any dispute as to the practical execution of the contract, such as the proper execution of any particular work, the selection of the material, shall be decided by the engineers named by the Government of Chile, with the right of appeal to the ministry of industry and public works. In regard to all these purposes of the contract, the contractor agrees to be considered as a Chilean citizen and to be treated in all respects as a Chilean citizen who might enter into a similar contract for similar purposes. To this extent, and to this extent only, has the claimant agreed to renounce the protection which as a citizen of the United States it had a right to demand from its own government.

"It is further to be asserted that the different provisions aforesaid must be considered as being in co-relation, giving to the memorialist, in lieu of its agreement to be considered for the ends of the contracts as a Chilean citizen and of its renunciation of the protection of its government, the assurance that 'the difficulties or disagreements of every nature which may arise in the interpretation or execution of the contract will be decided summarily and without appeal by three arbitrating arbitrators.' This last provision must be looked upon as one of the considerations of the contract; it should have the effect to exempt the memorialist from the jurisdiction of the regular courts of Chile and to subject it to the competence and to the decision of the tribunal of arbitration provided for by article 49 of the general conditions.

"This tribunal of arbitration would have been competent, as aforesaid, to decide the question of the taking possession of the company's property by the Chilean Government, as provided for by articles 7, 8, and 9 of the general conditions.

"By the decree of September 11, 1891, suppressing the tribunal of arbitration, the legality and validity of which were recognized by another decree of His Excellency the President of Chile, of June 26, 1893, inserted in the official journal of the republic of Chile of June 27, 1893, the rights of the memorialist, in so far as concerned the jurisdiction acknowledged and accepted by the aforesaid document signed October 1888, have

been suppressed without having been since re-established. It is not to be doubted that in view of the suppression of one of the principal considerations of the contract, concerning jurisdiction by the Chilean Government, the memorialist can not be further considered bound by the corresponding obligation concerning jurisdiction, according to which it renounces the protection of its government; seeing that by renouncing this protection for the ends of the contract it has placed itself under the protection of that tribunal of arbitration provided for by Article 49 of the 'General conditions' and suppressed by decree of the Government of Chile of September 11, 1891.

"By the suppression of this tribunal of arbitration the memorialist has recovered its entire right to invoke or accept the mediation or protection of the Government of the United States.

"In regard to the second proposition of the demurrer we hold: That the claimant was not bound after the suppression of that tribunal of arbitration, despite the accepted contract, to resort to the aid of the regular courts of Chile, inasmuch as, recurring to the latter, it seems to have sanctioned the suppression of the aforesaid tribunal or recognized the jurisdiction of those courts, which conjecture has been set aside by article 49 of the general conditions for the benefit of the contracting parties.

"Finally, it is to be noted that the first article of the convention of Santiago, of August 7, 1892, provides that all claims on the part of corporations, companies, or private individuals citizens of the United States upon the Government of Chile arising out of acts committed against the persons or property of citizens of the United States not in the service of the enemies of Chile, or voluntarily giving aid and comfort to the same, by the civil or military authorities of Chile, shall be referred to this arbitration commission; that that convention substitutes this commission for the Chilean courts therefore in cases of the aforesaid character, in which an action is founded upon the wrong and injuries complained of. It is undeniable, as aforesaid, that the memorialist is a company, which in the person of its Vice-President as signer of the contract of October 18, 1888, has neither relinquished nor lost its quality of American citizenship, even when it conditionally agreed to be considered as a Chilean citizen for the ends of the contract and not to invoke or accept the protection of its own government. It is further undeniable that a wrong has been done to the memorialist by the suppression of that court of arbitration which had been competent to decide about the taking possession of the property and the bonds of the claimant. The acts complained of have been committed by the civil authorities of Chile against the property of a citizen of the United States. It has not been asserted that the memorialist ever was in the service of the enemies of Chile or that it ever

gave them aid or comfort. In consideration of all these facts, the memorialist is entitled to claim the benefit of the convention signed at Santiago August 7, 1892, which convention was concluded many years after the enactment of the contract of October 18, 1888, into a law of the republic of Chile.

"The demurrer, therefore, should be overruled and the respondent government required to answer."

North and South American Construction Company v. Chile, No. 7, United States and Chilean Claims Commission, convention of August 7, 1892. See Shield's Report, 54.

Mr. Gana, the Chilean commissioner, dissented. He argued that that which gave to a private claim an international character was "the official support vouchsafed it by the claimant's government;" that it was necessary in each case to consider whether such official intervention was admissible, according to the rules of public law and of treaties; that it was "a recognized principle of public and private law that persons signing a contract submit themselves for the purposes of such contract to the jurisdiction of the country wherein the same is made and is to be executed" (citing Wheaton's Elements, sec. 78; Story's Conflict of Laws, ch. 2; Dalloz, Jurisprudence Générale, 1849); that the United States had maintained the principle that claims for damages growing out of a contract should not be confounded with claims not so arising (citing various passages from Wharton's Int. Law Digest); that by article 18 of the contract the company placed itself in a position with which its appearance before the commission was wholly at variance; that the company by the contract submitted the settlement of all questions that might arise, including the question whether Chile might abolish the tribunal to which article 18 referred, to the decision of the executive and judicial authorities of Chile, precisely as if the contractor had been a citizen of Chile, and that to "wrest the cognizance of this matter from the jurisdiction of Chile and submit it to this commission is to cast into forgetfulness the stipulations legitimately contracted and to appeal to a course which, if it be accepted, would essentially change the contract, compelling the Republic of Chile to answer before a tribunal from whose jurisdiction it was exempt."

2. NATIONALITY OF THE INTEREST INVOLVED.

Nationality of the Claimants: Case of the "Champion." Certain persons who, as passengers on the American schooner *Champion*, which was illegally captured by a Mexican vessel of war in 1837, claimed indemnity from the Mexican Government for injuries resulting from the capture, alleged in their memorials that they were at the time citizens of Texas, but that they had by the annexation of that republic become citizens of the United States. Their claims were rejected on the ground that they were not citizens of the United States when the injury complained of occurred.

Memorials of *Edward Dwyer and J. H. Grammont*: Opinions of Messrs. Evans, Smith, and Paine, commissioners, December 9, 1850, under the act of Congress of March 3, 1849.

In the foregoing cases it might have been held, apart from the simple principle laid down, that the claims, as claims of citizens of Texas against Mexico, had ceased to exist before the annexation, even if they could have existed at all, owing to the state of war between Mexico and Texas.

Cases of Sandoval
and others.

"These several memorials set forth claims alike in all respects, except as to the amount of indemnity demanded. * * * In each of them the memorialist asserts that he had long been a resident in and a citizen of New Mexico, and was such at the time the United States took possession of the same, and has remained such to the present time, with the firm and avowed intention of remaining a citizen of the United States; that he is the holder of a certain claim against the Government of Mexico, which, by the papers presented, appears to have had its origin prior to the date of the treaty of February 2, 1848, being for services rendered as a civil officer of the territory of New Mexico, and in one case for money obtained by means of a forced loan; that no part of said claim has been paid, and that the whole is now due to him. Each of the memorialists asserts that 'his citizenship and allegiance have been totally changed from that of Mexico to that of the United States, so that he has no recourse upon the Government of Mexico, nor means of asserting or enforcing his claim but through the Government of the United States, to which he owed his allegiance;' and he therefore 'prays that his claim may be admitted among that class of claims defined in article 14 of the late treaty with Mexico.'

"The fourteenth article of the treaty exonerates the Mexican republic from 'all claims of citizens of the United States which may have arisen previously to the date of the signature of the treaty,' and the fifteenth article provides for their payment to the United States to an amount not exceeding three and one-quarter millions, and this board is constituted under that article of the treaty. This board is of opinion that not only must the *claims*, which they are empowered to receive and decide upon, have arisen prior to the date of the treaty, but that the *claimants* must have been at that time citizens of the United States to entitle them to receive indemnification from the American Government. These memorialists were not citizens of the United States at the date of the treaty, and by its terms they were not made such. By the eighth article they were at liberty to remain Mexican citizens and to retire from

the ceded territory; or to become citizens of the United States by residing in the territory one year after the exchange of ratifications on an express election to become such within that period.

"It would be a forced interpretation of the language employed in the treaty to regard the memorialists and others similarly situated as embraced within the provisions of the fourteenth and fifteenth articles, and as entitled to the indemnification thereby secured to citizens of the United States whose claims originated anterior to that period, and which it is known had long been the subject of negotiation and discussion between the two governments. The Government of the United States could have had no knowledge of the amount of claims of Mexican citizens within the ceded territory upon that republic, nor of their origin or validity; and could have had no purpose or intention of assuming their payment out of the limited fund provided for indemnities to its own citizens for claims which are generally understood to amount to a much larger sum. The treaty does not discharge the Mexican republic from claims of this character, and the United States have done no act to invalidate them."

Memorials of *Antonio Sandoval*, and *Francisco and Clement Saracina*: Opinion of Messrs. Evans, Smith, and Paine, commissioners, November 30, 1849, under the act of Congress of March 3, 1849.

"The claimant in this case is a Mexican citizen of high character and distinction. The claim presented grows out of certain advances made by a Mr. Bernard Baurdin, a citizen of the United States, to General Herrera, in August 1816, to aid the cause of Mexican independence. General Herrera gave bills of exchange on persons in Mexico for the amount of \$17,424, which bills, it is alleged, have become the property of the claimant by assignment from a citizen of the United States, to whom they had been transferred; and it is contended that the claim, having an American origin, is provided for by the treaty. The bills in question became the property of General Jarrero some years prior to the date of the Treaty of Guadalupe Hidalgo. The language of that instrument is explicit. The fourteenth article says: 'The United States do furthermore discharge the Mexican Republic from all claims of citizens of the United States,' etc.; and the fifteenth article, 'The United States exonerating Mexico from all demands on account of the

claims of their citizens,' etc., makes provision for their payment. The object of these provisions was not to pay the debts of Mexico, but to obtain for our own citizens such indemnity as they were entitled to receive. It matters not that the claim was American in its origin. It had ceased to be American at the date of the treaty, and the holder of it could not invoke the interposition of our government for his protection. There can be no doubt of the validity of the claim against the Government of Mexico, and there are strong grounds for an appeal by General Jarrero to its sense of justice and right, for indemnity. That government however appears to have considered it as released by the treaty. We are constrained to come to a different opinion. Only those were released which were, at the time, claims of citizens of the United States and who were consequently justly entitled to the protection of our government."

Memorial of *Don José Maria Jarrero*: Opinion of Messrs. Evans, Smith, and Paine, commissioners, April 1, 1851, under the act of Congress of March 3, 1849.

The complainant¹ "alleges in his memorial **Alien Partner in an American House.** that at the time that the injuries complained of were committed he was a British subject, but had before that time resided in the United States several years, and had in due form declared his intention to become a citizen thereof; that he has since been naturalized as a citizen of the United States and is now domiciled at New Orleans. The facts thus presented by the claimant in his memorial clearly show that his claim is not embraced in the provisions of the treaty of 2d February 1848. To sustain a claim under that treaty it is not sufficient to show that he was a citizen of the United States at the time that the treaty was made. He must also show that he was a citizen when the claim originated. * * *

"The memorialist however insists that, although he could not prefer a claim in his own right as a citizen of the United States, yet that such a claim may be sustained in his favor as the surviving partner of the firm. He claims the benefit of that principle of the common law, applicable to commercial transactions, which invests the surviving partner of a firm

¹ The complainant, Thomas Morrison, was the surviving partner of the firm of Plumer & Morrison, of Zacatecas. Plumer was a citizen of the United States when the injuries were committed and continued so.

with the right to collect the debts and dispose of the partnership effects. The principle of the common law has no application to this case. The right of the claimant must be tested by the law of nations and not by the municipal law.

“By the law of nations the United States may extend its protection to its citizens temporarily engaged in business in other countries, and may require the payment of a just indemnity for injuries committed upon their persons or property by the authority of the government under whose jurisdiction they may reside. The right of the citizen to claim the protection of his own government against the wrongful acts of a foreign government is a personal right confined to the citizen injured, and can not be by him extended or transferred. He can not by connecting himself with the citizens of another country in his business relations throw over them the mantle of his own government, or enable them to invoke its protection. If the government of a country in which a citizen of the United States is temporarily domiciled destroys property owned jointly by such citizen and by foreigners, the United States, by the law of nations, can demand indemnity only for the injury to its own citizen, and the measure of the indemnity would be the extent of the interest of such citizen in the property destroyed.

“The same principles must be applied in the distribution of a fund appropriated by a foreign government as an indemnity for injuries committed by the authority of such government to citizens of the United States. No citizen of any other country can claim a participation in the fund. His connection in business with a citizen of the United States confers upon him no right to any portion of it. The citizen of the United States who is a joint owner with foreigners of property injured or destroyed can not make his citizenship the means of securing indemnity to the joint owners, who have no claim as citizens of the United States.

“If Plumer were now living his claim for indemnity would be limited to his share of the property destroyed. His death has conferred no right upon Morrison to claim any portion of the indemnity which the Government of the United States has secured for the benefit of its own citizens. Whatever right Plumer possessed has passed to his representative, who is alone entitled to prosecute a claim for indemnity, and such indemnity, if obtained, will enure to the exclusive benefit of his estate.

"This principle of the law of nations which confers upon the members of a firm different rights according to their several national characters has been frequently recognized by judicial decisions in cases of prize. Mr. Duer, in a late work on the principles and practice of marine insurance, says:

"It is not, however, in all cases that the property of a neutral partner in a house of trade established in a hostile country will be considered liable to condemnation. Where the capture of goods shipped on account of the house is made at the commencement of the war, the share of a partner resident in a neutral country it has been determined may be restored, while those of the partners domiciled in that of the enemy is condemned.' (See 1 vol. p. 526.)

"The same author says:

"Where the property seized as contaminated by an illegal traffic with the enemy is proved to belong to a house of trade established in a neutral country, as a general rule it is wholly restored; but if any one of the partners is shown to be a resident subject of the belligerent country, his share, notwithstanding the neutrality of the house, will be condemned, and this rule will be enforced, even where the belligerent partner is strictly dormant and takes no part whatever in the direction and management of the affairs of the house.' (See same volume and page.)

"According to the principle laid down in this authority it is proper to award to the American member of the firm an indemnity equal to his share of the property destroyed, while the other member, not being a citizen of the United States, can claim no portion of the indemnity which the United States has procured for its own citizens alone.

"The board is therefore of opinion that the claim preferred by Thomas Morrison is not a valid claim against the Government of Mexico under the treaty of 2 February 1848."

Memorial of *Thomas Morrison*, surviving partner of *Plumer & Morrison*: Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 21, 1850, under the act of Congress of March 3, 1849.

Diversity of Nationality among Partners. "In the case of *L. S. Hargous v. Mexico*, No. 784, the claim arises out of an amount alleged to be due to the claimant by the Mexican Government.

"A brief statement of the circumstances connected with the case seems to be necessary.

"At the time of the origin of the claim the commercial house of Hargous & Co. consisted of the claimant, a citizen of the

United States, who had a two-thirds interest in the concern, and of Emilio Voss, a German subject, who had the remaining one-third. This firm had large transactions with the Mexican Government, and at the close of the war between the United States and Mexico the Mexican Government owed a large amount to that firm. By the treaty of February 2, 1848, the Government of the United States assumed all previous claims of its citizens against Mexico, released the latter from them, and undertook their payment to the aggregate extent of three and one-quarter millions of dollars.

"A board of commissioners was appointed by the United States Government to examine these claims. Hargous & Co. presented a claim for a large amount to the board. After reducing the original sum, the board decided that it could award only two-thirds of the reduced sum to the claimant, because a remaining one-third belonged to the German subject, Emilio Voss, and it had consequently no power to deal with it. This award was dated April 12, 1851. The present claim arises out of this unpaid one third of the claim presented by Hargous & Co. to the board in 1849.

"At the end of the war the claimant and Mr. Voss dissolved partnership, and it is to be supposed that the partnership went on in liquidation till the 18th of February 1852, on which day Mr. Voss signed an assignment of all his rights in the firm and of all claims, etc., standing in the name of either of them on condition of the payment by the claimant of all the debts and liabilities of the late firm of Hargous & Co. and for value otherwise received. Voss's credit against the Mexican Government was of course included in the assignment. Until this time, then, the claim was actually owned by Voss. It is therefore somewhat strange that in December 1851 the claimant presented this claim to the Mexican Government on his own account, and in his own name when it really at that time belonged entirely and separately to Voss.

"The claimant had then purchased a claim which, when it originated, belonged to the German who sold it to him. It does not seem that the claimant was in any way obliged to buy the credit. There is no pretension and no proof that Voss, if the joint liquidation had continued, would have been unwilling or unable to meet his third share of the liabilities of the firm of Hargous & Co.; it is to be supposed that the sale and purchase were effected for the mutual convenience of both

parties. The amount of the 'value otherwise received' by the vendor is not shown.

"But in acquiring the credit in question, the claimant accepted its inherent qualities. One of the qualities was that it was a German claim and it could not be divested of that character. It had been declared to be so, as the claimant well knew, by the board of commissioners appointed under the treaty of February 2, 1848. As far as it was concerned the Mexican Government could only have to do with Voss, and was responsible to no one else. The umpire is of opinion that the Mexican Government is indebted for the above-mentioned claim and that the government of which Mr. Voss is a subject might remonstrate against the refusal of the Mexican Government to pay the claim. But the umpire can not see that this commission has any right whatever to take cognizance of it. If it did so, it would be an encouragement to speculators, in countries where, either from financial embarrassment, or from dishonesty, the obligations of the government are not attended to, to buy up claims of all nationality at a low price in the hope that they, being citizens of a more powerful country, would some day be able by the assistance of their government to enforce the payment of their claims. The umpire would consider that such a course would be on the part of citizens of the United States taking a very unfair advantage of the generous protection afforded them by their government with regard to their legitimate operations. We are left in the dark as to the real price which the claimant paid for Voss's credit against the Mexican Government; but it is no uncharitable inference that Voss, being desirous of completing the liquidation of the firm of Hargous & Co., as far as he was concerned, and of leaving Mexico, sold the credit at a low price, and that the claimant, imagining that through his influence as a citizen of the United States, he would be able to obtain its payment, hoped to realize a great profit upon it.

"But supposing for a moment that the acquisition by the claimant of this credit brought the claim within the jurisdiction of this commission, it would then be the duty of the umpire to inquire into its merits. It does not appear to him that because the board of commissioners appointed under the treaty of February 2, 1848, decided in favor of the claimant, as far as his two-thirds of the claim presented was concerned, it is a necessary consequence that the remaining one-third is of a nature which can bring it within the province of this commission.

By the fourteenth article of the treaty of 1848, the United States discharged the Mexican republic from all claims of citizens of the United States not theretofore decided against the Mexican Government which might have arisen previously to the date of the signature of the treaty. The board of commissioners to be appointed to examine these claims were to be guided and governed by the principles and rules of decision prescribed by the first and fifth articles of the unratified convention of November 20, 1843. The first article of this convention speaks of all claims of citizens of the United States against the Government of the Mexican republic; there was no qualification or limitation as to the class or nature of the claims which might be presented. It simply was all claims. The United States Government may have had special political reasons for thus discharging Mexico from all claims of its citizens. The umpire was himself able at that time to judge of the feeling of the United States Government with regard to Mexico and knows that, as it had come to an agreement with regard to the questions at issue between the two countries, it earnestly desired to relieve Mexico from all embarrassments, financial or of whatever nature, and to enable her to maintain a strong Government, to preserve her independence, and by her prosperity to improve her commercial intercourse with her powerful neighbor. This feeling may well have induced the United States to relieve Mexico from all her liabilities of whatever class or nature as far as the United States citizens were concerned, whether they were such as could be legitimately enforced by the Government of the United States or were only moral obligations.

"But the terms of the convention of July 4, 1868, were different. The claims to be presented to the commission were qualified, they were claims arising from injuries to the persons or property of the United States citizens by authorities of the Mexican republic. The claim now in question had its origin in a variety of business transactions entered into with the Mexican Government by Voss, as a partner of the house of Hargous & Co., voluntarily and of his own will, which promised great profits, if the Mexican Government should fulfill its engagements. The failure to fulfill them is not in the opinion of the umpire one of those injuries which were contemplated by the convention of July 4, 1868. But if there were an injury, it was the German subject and not the United States citizen who had to complain of it. The transfer by Voss to the claimant could not divest the claim of its original nationality.

"Being firmly convinced, then, that the commission is not justified in exercising jurisdiction with regard to this case the umpire feels compelled to award that it be dismissed."

Thornton, umpire, August 9, 1876, United States and Mexican Claims Commission, convention of July 4, 1868 (MS. Op. VI. 445). The claims of alien partners were also rejected by Sir Edward Thornton in *Jennings, Laughland & Co. v. Mexico*, No. 374 (MS. Op. III. 584), and *Adolph Widman & Bros. v. Mexico*, No. 74 (MS. Op. VII. 359).

The commission under the convention between the United States and Great Britain **The Importers' Case.** of February 8, 1853, for the settlement of claims, held that certain duties were exacted by Great Britain in violation of treaty stipulations, on articles exported to the United States. It appeared, however, that the duties were paid in the first instance by the British shippers, who were in the habit of entering in the gross, in their own names, all goods forwarded by one vessel, paying the sum total of the duties, and then charging on their books to each consignee the amount paid for him. Thus the amounts of duties severally paid by the American importers could not be ascertained from the custom-house records, and, owing to lapse of time and changes in firms, great delay and difficulty were encountered in obtaining evidence on the subject from the shippers' books. It was suggested that awards might be made to the British shippers, the money to be distributed among the American importers subsequently, as from time to time the proper evidence for that purpose might be obtained. But the commissioners said: "No persons can prosecute claims here but citizens of either country against the government of the other. Claims can not be allowed to the shippers, * * * but to citizens of the United States who are the actual owners and proprietors of the goods exported, and evidence must be had from the custom-house records, or from the shippers, of the amount of duties paid by them on account of such persons, and the awards sustained must be made up in their names, with such claims of interest thereon, if any shall be allowed, as the commissioners may direct."

To obviate the difficulty in sustaining the claims under this decision, the agent for the claimants entered into an arrangement with the British Government by which it was agreed that the government should accept the shippers' accounts, interest on the latter being waived, and that time should be

allowed for making the apportionment among the American importers. Notice of this arrangement was sent to the commission, which ordered it to be entered on the docket, and the claims were withdrawn.¹

Among the claims presented to the commissioners at Macao under the convention of November 8, 1858, for the settlement of claims of citizens of the United States against China, there was a demand made in behalf of George M. Ryder, M. D., who appeared before the board as a naturalized citizen of the United States of British origin. The claim was rejected on the ground that the claimant was not at the time of the loss complained of a citizen of the United States. The commissioners, Messrs. Bradley and Roberts, delivered the following opinion:

"Dr. Ryder is by birth a British subject, but claims to be a naturalized citizen of the United States on the grounds following, to wit:

"1. As having held the office of postmaster at Spring Creek, Harris County, Texas, under appointment by the Postmaster-General, dated January 11, 1850.

"2. As having declared his intention to become a citizen of the United States before the district court of said Harris County on the 29th of May 1851.

"With regard to the former of these supposed proofs of citizenship, no act of Congress nor the rulings of our courts recognize it as having any possible bearing on the subject.

"As to the latter, it might perhaps be enough to say that beyond the mere parole of the claimant, the commissioners have not had before them any evidence of the fact that such declaration of intention was ever made by him. Immediately after Dr. Ryder had lodged his claim for indemnity with the United States legation at Macao, Dr. Williams, the secretary, under date of March 9, 1857, addressed him an official letter asking him to produce a certificate of his naturalization. In his reply (March 10, 1857) Dr. Ryder promised to procure the certificate of his declaration of intention from the proper officer of the court before whom it was made in Texas, and to file the same in the archives of the legation when received. Nearly three years have elapsed since that correspondence, and the promised certificate has not yet been presented. But even if it were produced, the imperfect citizenship which the claimant had required by his simple declaration of intention had wholly lapsed by his removal out of the territory of the United States into a foreign jurisdiction and the establishing himself in business. Apparently, Dr. Ryder did not design to mature his 'intention' when he removed his domicile to a distant empire.

¹ S. Ex. Doc. 103, 34 Cong. 1 sess. 305-310.

How soon after his declaration before the court he removed to China the commissioners are not informed, but they have high authority for saying that 'the character that is gained by residence ceases by nonresidence. It is an adventitious character, and no longer adheres to him from the moment he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*.' (Wheaton, Part IV., Chapter I, section 17.) 'This national character which a man acquires by residence may be thrown off at pleasure by a return to his native country, or even by turning his back on the country in which he resides, on his way to another. * * * Mere declarations of an intention (to return to it) ought never to be relied upon, when contradicted, or at least rendered doubtful by a continuance of that residence (in a foreign country.) They may have been made to deceive; or if sincerely made they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination and ought to be permitted to do so.' (Wheaton, *ubi supra*.) There is not a shadow of evidence before the board to show that he ever had a purpose to return to the United States and there complete his naturalization at any fixed or definite time. It does not appear that he left any real or personal property, or that he has there those ties of family and kindred which might naturally lead him to return again. These considerations render the *animus revertendi*, if not positively improbable, at least a matter of grave doubt and uncertainty, and to relieve himself of the character of a renunciator of his incipient citizenship which this presumption fixes on him, 'he must show that his residence (in China) was only temporary, and accompanied all the while with a fixed and definite intention of returning' (to the United States). * * * 'This must be decided by reasonable rules and the general principles of evidence.' (Mr. Webster, on the case of John S. Thrasher, in answer to a resolution of the House of Representatives, December 1851.)

"Dr. Ryder seems himself to have been aware of his equivocal position as a claimant for indemnity. His first suit was made in the quality of a British subject, before the British consul at Canton; and it was not until after it had been thrown out of that tribunal on the ground of his assumed American character that he sought his remedy through the United States legation in China. He followed up this latter application with a return to the United States in March 1859 in order to complete his naturalization as a citizen thereof, and thus place himself within the considerations of the convention of the 8th of November 1838, which provides for indemnity only for 'citizens of the United States.' In a letter to the secretary of the United States legation in China July 9, 1859, he says: 'To-day I have received my naturalization paper from the prothonotary's office, having previously taken the requisite oath before the judge of the common pleas.' This, however, is an

ex post facto proceeding, and as such can not affect the alien character of the claim.

"The commissioners hold that, at the time when the claimant's losses accrued at Whampoa in January 1857 he was not a citizen of the United States, and he is therefore not entitled to an award.

"C. W. BRADLEY,
"O. E. ROBERTS,
"Commissioners of Claims."

Eduardo Cisneros, a Spanish subject, died Claim of an heir. in New York May 4, 1871. In 1869, two years previously to his death, his estates in Cuba were embargoed by the Spanish authorities. A question arose as to whether his daughter, Emma Cisneros, who was born in New York April 10, 1870, could claim indemnity from Spain as an American citizen for this alleged wrong, under the agreement between the United States and Spain of February 12, 1871. On this question Baron Lederer, the umpire, said:

"The said agreement was signed by the governments of the United States and Spain, 'for the settlement of the claims of citizens of the United States, or of their heirs, against the Government of Spain for wrongs and injuries committed against their persons and property, or against the persons and property of citizens of whom the said heirs are the legal representatives.' Emma Cisneros is the *heir* of a Spanish subject against whom, if there was a wrong, the wrong was committed. The claim of this Spanish subject had no standing before the American-Spanish commission, which derives its jurisdiction from the said agreement. Emma Cisneros could not inherit more rights than her father possessed during his lifetime.

"If Eduardo Cisneros had been a citizen of the United States, and if by a last will had conferred his property on a Spanish subject, the claim of this Spanish subject, being an heir of a United States citizen, would have been within the jurisdiction of the American-Spanish commission.

"The contrary is the case in regard to the claim of Emma Cisneros, whose citizenship of the United States may only, perhaps, entitle her, outside of this commission, to recover a part of her father's confiscated property.

"These considerations induce the umpire to hold that Emma Cisneros is not a citizen of the United States within the intent and meaning of the agreement between the United States and Spain of February 12, 1871, and that she has no right under said agreement to prosecute her claim before this commission."

Wm. Dudley Foulke, administrator v. Spain, No. 105, Span. Com. (1871), June 22, 1873.

Impairment of Security and other Indirect Injuries. "The memorialist is a citizen of the United States, who purchased a protested draft of a Spanish subject residing in Cuba more than a year after the drawee had refused to accept said draft on account of the insolvency of the drawer (Alfaro & Co.), and it had been protested for such nonacceptance, with full knowledge of the facts. Brief for claimant maintains 'that the draft was assignable at law, whether before due or afterward, and the assignee or endorsee took the paper with all the rights of the original owners.'

"This may be true as to the draft which is the cause of action, but I do not see how that can convey any other right than what it expresses on its face. A bill protested for nonacceptance is taken subject to all infirmities belonging to it. The maker of this draft was a Spanish subject, residing in Cuba, under embargo for alleged complicity in the insurrection, and the drawee had distinctly refused to accept it because the maker was insolvent, and it had been duly protested on that account. With full knowledge of these facts the memorialist buys the draft, and now seeks to hold Spain responsible for its payment, not for any wrong or injury done him, or any American citizen of whom he is the legal representative, which alone could give him standing before this commission, but because the Spanish subject in Cuba made the draft in part payment of freight charges on sugar shooks due to an American citizen; that these shooks having been delivered, *may have been* (it is not alleged that they were) part of the stock of the drawer taken under the embargo; that there was a maritime lien on them, if so, which Spain ought to discharge. The lien was discharged by delivery of the goods and the acceptance by the captain of the vessel of Alfaro & Co.'s draft for balance of freight money. He was not compelled to deliver the shooks until Alfaro & Co. paid the freight charges on them; but when he accepted their draft in payment of freight and delivered the shooks to them, he transferred the title by said delivery. The shooks were articles of merchandise, and might have been purchased by anyone who wanted them without inquiry as to whether they were paid for or the freight paid on them. The lien for freight charges attaches to the goods carried, and may be enforced against them by proceedings *in rem*; but when the party delivers the goods and accepts another form of payment he is concluded by his own action. It is not alleged that the

the memorial on the ground that it was not within the jurisdiction of the commission, since the act alleged to have been committed in violation of the rights of the claimant was committed in December 1869, nearly four years before his admission to citizenship of the United States. To this the advocate for the United States replied that the ground on which the claim was based was not, as alleged, anterior, but posterior, to claimant's admission to citizenship; and in support of this contention, he said:

"It is a historical fact that the Government of Spain ordered the authorities of Cuba to release the estates placed there under embargo. A copy of the decree of July 12, 1873, revoking the embargoes, was appended to the memorial, and can be found at page 1008, 2d volume, papers relating to the foreign relations of the United States in 1873.

"Spain did still more. She sent to Cuba the minister of the colonies, Señor Solar. And this high official issued on the 24th of November 1873 (see the copy of the *Oficial Gaceta* hereto appended), a decree ordering 'el desembargo de los bienes de ciudadanos extrangeros,' the release of the property belonging to citizens of foreign countries.

"Mr. Carrillo y O'Farrill was an American citizen on and before the 24th of November 1873; and consequently his property ought to have been released under Mr. Solar's orders. But the Spanish authorities of Cuba, *usurping and defying the authority of the home government*, as the President of the United States says, did not obey the order, and retain the property under embargo. Hence the claim.

"Carrillo y O'Farrill asks for his property and for indemnification for the wrong committed against him, in disobeying the orders of Spain, and specially the decree of the 24th of November 1873, posterior to his citizenship.

"In cases of such importance as these which are the object of an international arbitration, an appeal to technicalities should not be favored. The broad field on which this most respectable court of equity stands before the civilized world should not be forgotten, though even in that narrowest view, the claim of Isaac Carrillo y O'Farrill must be admitted here, because he claims for the due enforcement of the decree of November 24, 1873, and for indemnification of damages caused by the disobedience to that decree; and he was admitted to be a citizen of the United States before that date."

To this the advocate for Spain replied:

"By Article V. it is provided that the arbitrators shall have jurisdiction of all claims presented to them by the United States *for injuries done to citizens of the United States* by the authorities of Spain in Cuba since the first day of October, 1868."

"In the case of *Perfecto de Rojas*, No. 71, which was fully discussed in printed arguments, and finally decided by the umpire, the claim was rejected because it did not appear that the alleged wrongs and injuries complained of had been 'done to a citizen of the United States.' In that case it further appeared that even at the time of filing his memorial the claimant had not been naturalized, but had simply acquired a domicile in the United States, and declared his intention to become a citizen thereafter. But it is plain that the gist of the matter was that the wrongs and injuries complained of had not been 'done to a citizen of the United States,' having that character at the time when such wrongs and injuries were committed. That he should have become an American citizen at any time thereafter could not possibly have enlarged the jurisdiction of this tribunal, so as to give it cognizance of what was not, at the time it was done, a wrong or injury affecting the person or property of a citizen of the United States. * * *

"But the memorialist further alleges, that on the 12th day of July 1873, the Spanish Government ordered the entire, unconditional and peremptory release of all properties then under political embargo in the Island of Cuba.

"Assuming this allegation to be true, for the purposes of this demurrer, what award or decree is this commission authorized to make in the premises? Was the supposed decree of the Spanish Government an act of grace and favor, dictated by internal political considerations not affecting the validity of the original proceedings, or can it be construed as an admission that this memorialist is entitled to a favorable award here? In any view of the matter, was it not incumbent on him to show that he had applied to the Spanish authorities in Cuba for the restoration of his property under the supposed decree of July 12, 1873, and that his application was refused? Surely this commission will not assume gratuitously that the local authorities of Spain in Cuba refused to obey their government, or that the latter is powerless to enforce obedience. The alleged failure or refusal of these local authorities without more can hardly be supposed to furnish any foundation for an international reclamation."

M. Bartholdi, umpire, held that, "as the claimant was not a citizen of the United States of America when the authorities of the Island of Cuba placed an embargo upon his property," the case should be dismissed.

Case of Isaac Carrillo y O'Farrill, No. 113, Span. Com. (1871), January 12, 1875.

The decision in the case of *Perfecto de Rojas*, referred to above by the advocate for Spain, was made by Baron Lederer, umpire, May 14, 1873.

A claim was made for the seizure of a house by the Spanish authorities in Cuba in 1869. It appeared that the claimant

was naturalized as a citizen of the United States, September 8, 1870. It was alleged that orders had been given since the date of naturalization for the restoration of the property, but that these orders had not been carried out, and an attempt was made to establish the claimant's right to appear on that ground, if it should be held that he was incapable of claiming indemnity as a citizen of the United States for the embargo of the house in 1869. M. Bartholdi, umpire, made the following decision: "As the claimant was not a citizen of the United States of America when the authorities of the Island of Cuba placed an embargo upon his property in the said island of Cuba, it is my opinion that the case should be dismissed."

Manuel Prieto, No. 54, Span. Com. (1871) January 12, 1875.

A claim was made for damages for the confiscation of an estate in Cuba. It appeared that the estate was embargoed on the 15th of April 1869, and that the decree of confiscation was made on the 7th of November 1870. The claimant, who was by birth a Spanish subject, was naturalized as a citizen of the United States on the 14th of March 1870. He stated, through his counsel, that he based his claim, not upon the embargo placed on his property by the decree of April 15 1869, but upon "the confiscation of said property, the appropriation of it by the government, which was done by a judicial decision or sentence on the 7th of November 1870, eight months after the naturalization of claimant." To this the advocate of Spain answered:

"That decree (of April 15 1869) was the initiation of a proceeding of confiscation, and if a further decree was made on the 7th of November 1870, finally confiscating his property, this last has relation to the original proceeding. If the claimant was a subject of Spain on the 15th of April 1869, as he unquestionably was, and his property was seized while he was such subject, the Spanish authorities had jurisdiction of the *res*, and that jurisdiction could not be divested by any act of the claimant, or by any act of the United States courts. The offense imputed to him, and for which the proceedings were instituted, preceded the embargo. The United States have never pretended that naturalization protected an alien against trial and punishment, according to the laws of his native land, for offenses committed before naturalization, even were he not arrested until after his naturalization. And if naturalization would not protect the person, of course it would not protect the property, and that against proceedings commenced before naturalization. It seems to have been quite common with the

Cubans to come to the United States and declare their intention to become citizens, and then to go no further, but to remain in the position of being able to change their allegiance, and become citizens of the United States at an hour's notice. In this case the claimant declared his intention January 30, 1857, and for the ensuing thirteen years retained his Spanish nationality, and thus escaped the obligations of a citizen of the United States until the proceedings against him in Cuba rendered it desirable for him to seek the protection of the United States, and pending those proceedings he changed his nationality, and, as he thinks, interposed the power of the United States to arrest the proceedings against him. * * * I submit, with great confidence, (1) that the sentence of November 1870, being the completion of a process commenced against a Spanish subject, was an act clearly within the competency of the Spanish tribunals, and (2), neither in so far as it condemned him to the garote, and his goods to the use of the state for costs, etc., did it operate any injury to him of which the commission has jurisdiction."

The arbitrators being divided in opinion as to the question of jurisdiction, the umpire, M. Bartholdi, held that the commission had no jurisdiction, and that the case should be dismissed.

Case of Francisco C. Yzquierdo, No. 7, Span. Com. (1871), November 2, 1875.

A claimant, a native of Cuba, alleged that "he came to the United States when a minor, and received his education" there; that he "remained in this country many years, and although he went to Cuba lately, he came back" to the United States in 1869, and had lived there ever since. He was naturalized as a citizen of the United States on October 7, 1872. The injuries complained of he alleged to have been committed "when the revolutionary war broke out in Cuba in October 1868." But it was also contended in his behalf that if it should be held that he had no standing before the commission as to what was done prior to the date of his naturalization, he might claim indemnity as a citizen of the United States for the failure of the authorities to execute an order to pay for cattle which, though seized before his naturalization, were ordered to be paid for after that event.

The case was dismissed by the arbitrators.

Case of Zayas de Bazan, No. 103, Span. Com. (1871), February 26, 1876.

In the case of *Manuel J. De Rojas v. Spain*, No. 70, the claimant, who was a native of Cuba, came to the United States in

February 1869, and on the 30th of the following April made a declaration of intention to become a citizen of the United States. On May 13, 1869, an order was issued by the Spanish authorities in Cuba for the seizure of all his real and personal property in the island. This order of embargo was duly executed. On February 28, 1874, he was naturalized as a citizen of the United States. He urged his claim against Spain, not only for the original seizure of his property, but especially for the continued nonexecution of an order issued by the Spanish Government on November 7, 1873, for the raising of the embargo.

On the 23d of December 1873 the arbitrators ordered the case to be dismissed. Subsequently, the claimant filed a new memorial, No. 126. The advocate for Spain moved to dismiss this claim on the ground that it had already been disposed of in case No. 70. The arbitrators differing in opinion, the umpire rendered the following decision:

"There is on file in the commission a claim, No. 70, presented on account of seizure by Spain of certain property belonging to the present claimant. This claim was dismissed by the arbitrators on the 20th of December 1873.

"In the mean time the Government of the United States had included the claimant in the diplomatic negotiations with Spain for the restoration and release of embargoed property in Cuba belonging to American citizens. Those negotiations led first to the promulgation by the Spanish Government, on the 12th of July 1873, of a general decree revoking all embargoes in Cuba, and as this decree remained unexecuted the colonial minister at Madrid sent, on the 15th of September 1873, the following telegram to the governor-general of Cuba:

"Among the properties ordered to be disembargoed are some belonging to foreigners, especially North Americans. The government reminds your excellency of the urgency of executing the order, to avoid complications with foreign governments."

"This order remained also unexecuted.

"On the 21st of October the American minister at Madrid, Mr. Sickles, telegraphed to the Secretary of State, Mr. Fish, as follows:

"President Castelar assures the colonial minister on his arrival in Cuba next month will personally attend to the restoration of all embargoed property belonging to our citizens; and to this end I am desirous to furnish list of cases in which you are satisfied parties are in good faith entitled to benefits of seventh article of treaty of 1795."

"On the 25th of October Mr. Fish transmitted by telegraph

a list of such persons, and this list contained also the name of the claimant.

"Mr. Sickles communicated the list to the Spanish government, and thereafter the colonial minister at Madrid transmitted on the 7th of November 1873 the following telegraphic order to the governor-general Cua:

"I greet you and reiterate the substance of the telegram of the 15th of September relative to the restoration of property embargoed by the government of North American foreigners in obedience to the existing treaties; the said restoration before the 30th of November, to avoid international conflicts. The names of the citizens whose property has to be restored to them in conformity with the decree of July are * * * Rojas, Manuel, * * *'

"This order remained unexecuted.

"In the month of June 1877 the case of the claimant was again referred to the American consul-general at Havana, Mr. Hall, and in the month of March 1878 Mr. Hall was instructed by the State Department to demand the immediate and unconditional restoration of the property of the claimant.

"On the 8th of April 1878 the governor-general of Cuba issued an order for the restoration of said property.

"On the 25th of April Mr. Hall informed the governor-general that he had been instructed to inquire whether the restoration was unconditional, and in his letter he made this remark:

"As your excellency is aware, the name of Mr. Manuel José de Rojas is included in the telegram of the 7th November 1873 ordering unconditional restoration of the property of certain citizens of the United States, and it is in virtue of that telegram that my government has demanded the restoration of the property of Mr. Rojas.'

"On the 26th of April the secretary of the governor-general addressed to Mr. Hall the following letter:

"The restoration of the confiscated property of Mr. Manuel José de Rojas was agreed to and ordered without conditions (unconditionally), because he is comprised in the telegram of the supreme government of 7th November 1873.'

"The property was thereafter returned, with the exception of the sugar estate 'San Rafael,' but after some correspondence between the State Department and the Spanish legation at Washington the Spanish minister, Mr. Mendez de Vigo, informed the State Department on the 15th of February 1879 that the governor-general of Cuba had ordered the return of this estate.

"In this letter Mr. Mendez de Vigo remarked:

"The decision reached in this matter by the governor-general of the Island of Cuba was not due to or influenced by the circumstance that Rojas was included in the telegram of November 7, 1873, or that he had at that time been recognized

as an American citizen, for neither was he one then nor was the telegraphic order executed.'

"On the 25th of February 1879 the Secretary of State, Mr. Evarts, informed the Spanish minister that the American Government reserved 'to the party in interest whatever just claim he may have occasion to bring before the mixed commission for losses or injury sustained during the long period in which he has been deprived of his property, to be decided by that commission upon its merits.'

"On the 5th of July 1879 the present claim, No. 126, was filed in the commission.

"The advocate for Spain moved to strike the case from the docket.

"On the 19th of April 1881 the umpire rendered the following decision:

"'It is contended, on behalf of the claimant, that the title in the present claim is an order issued by the Spanish Government November 7, 1873, for the immediate release and restoration of the claimant's property, and inasmuch as this title was not asserted in No. 70 the motion to strike this case from the docket is hereby overruled.'

"The first question to be decided by the umpire on the present occasion is whether the commission has jurisdiction to hear and determine a case of violation of rights conferred by the above telegram of November 7, 1873, from the colonial minister at Madrid to the governor-general of Cuba.

"The advocate for the United States admits that the claimant was not naturalized before 1874, but he contends that in view of the diplomatic negotiations which had taken place, the telegram of November 7, 1873, from the colonial minister at Madrid to the governor-general of Cuba should be considered as an international compact between the United States and Spain, which invested the claimant with the international *status* and character of a citizen of the United States in respect to rights conferred by the telegram; that it vested in the claimant the right to the possession and enjoyment of his property as against the Spanish Government, and entitled him to claim under the international protection of the United States indemnity for the injury inflicted by the Spanish authorities in Cuba; that the failure of these authorities to comply with the orders in the telegram to restore the property was an active trespass to the property, and that the arbitrators have jurisdiction of 'all claims presented to them by the United States for injuries done to citizens of the United States by authorities of Spain in Cuba since the 1st day of October 1868.'

"The advocate for Spain contends that, even if it be assumed that the telegram ought to be considered as an international compact, it was in any case a compact concluded after the date of the agreement, and that on this ground the commis-

¹ Fifth article of agreement of 1871.

sion has no jurisdiction, because the agreement says that the claims shall be determined 'according to public law and the treaties in force between the two countries and these present stipulations.'

"The advocate for Spain says further, that the demand by the United States 'is founded upon a right claimed for the United States to enforce the actual execution of every order ever given by the Spanish Government in favor of the insurgents, upon the application or recommendation of the American minister at Madrid, and that in every case where orders so issued have not been obeyed, the person in whose favor they were given, or the person who could have derived the benefit from their execution, has a right to claim damages against Spain before this commission if he be now a citizen of the United States.'"

"Article II. in the agreement of 1871 contains the following stipulation:

"The arbitrators and umpire * * * shall, before proceeding to business, make and subscribe a solemn declaration that they will impartially hear and determine to the best of their judgment, and according to public law and the treaties in force between the two countries and these present stipulations, all such claims as shall, in conformity with this agreement, be laid before them on the part of the Government of the United States.'

"The umpire is of opinion that the question of jurisdiction in this case depends upon this stipulation, and that thereby the jurisdiction is limited to cases based upon a violation of rights conferred by public law, treaties in force at the time when the agreement was concluded, in 1871, or by the present agreement. The commission has no jurisdiction over a case based upon any other international compact than a treaty in force in 1871, or the *present* agreement, and no international compact can, in the opinion of the umpire, be described as a treaty in force without ratification. In view of this opinion, the umpire does not consider it necessary to determine whether the telegram of November 7, 1873, on which this case is based, ought or ought not to be considered as an international compact. It can not be considered as a treaty in force, and even if it could, the fact that it was sent after 1871 would alone operate as a bar to its examination by the umpire, under the agreement of 1871, and the umpire is not aware that the jurisdiction of the commission has been extended by any later agreement between the contracting parties. For these reasons the umpire hereby decides that the case be dismissed."

Count Lewenhaupt, umpire, case of *Manuel José de Rojas*, No. 126, Span. Com. (1871), January 19, 1882.

¹ Second article of agreement of 1871.

² Rejoinder for Spain, p. 7.

"The question referred by the arbitrators is whether this case ought to be dismissed.

"The property of the claimant, who was born a Spaniard, was embargoed in 1869. On the 23d of June 1876 he was naturalized in the United States. On the 5th of May 1877 the governor-general of Cuba issued a general decree ordering restoration of embargoed property. The injury complained of is the omission of the governor-general to execute this decree with regard to the claimant.

"The advocate for the United States says: 'This commission was established to settle cases of difference between the two governments and to remove causes of irritation. If these cases are not adjusted here, they have to be adjusted diplomatically, and the purposes of the arbitration would prove to be a failure. The claim does not arise out of the taking of the property. It arises out of the violation of the orders that the restitution should be complete and unconditional.'

"The umpire is of opinion that the jurisdiction of the commission is limited by Article II. in the agreement to cases based on a violation of rights conferred by international law, treaties in force in 1871, or by the present agreement; and that there is no indication in the correspondence preceding the agreement that it was the intention of the contracting powers to create a court of arbitration with power to decide all differences which might arise in the future concerning rights of citizens of the United States in the Island of Cuba. If it be contended that the claim is founded on an international compact, the commission has no jurisdiction, because such compact is not a treaty in force in 1871. If the decree of May 5, 1877, is not considered as an international compact, it is an act of grace. In case of seizure by Spain of property belonging to a Spanish subject, the retention of the property after the owner's naturalization is no new injury. If the governor-general had ordered to return all other embargoed property, but to retain the property seized from the claimant, no complaint could have been made before this commission, and if the order of restitution includes the property seized from the claimant, the omission of the governor-general to execute the decree is no violation of any right conferred by international law.

"For these reasons, the umpire hereby decides that this claim be dismissed."

Count Lewenhaupt, umpire, case of *J. R. Simoni*, No. 133, Span. Com. (1871), January 21, 1882. This decision was followed by the umpire in the cases of *Pablo Battle*, No. 128, February 28, 1882, and *Nestor Ponce de Leon*, No. 132, January 27, 1882. It was followed by the arbitrators in the case of *Frederick Martinez*, No. 135, February 25, 1882, and *José Delgado*, No. 125, October 18, 1882.

Certain real property in Cuba, belonging to the claimant's father, was embargoed by the Spanish authorities during the insurrection in Cuba, in November 1869. The father died in January 1870, and in August 1871 a new decree of embargo was issued against the claimant as sole devisee of his father. On December 30, 1871, the claimant was naturalized as a citizen of the United States. Subsequently, the Spanish authorities issued a decree raising the embargo, but this decree was not executed. It was sought in behalf of the claimant to treat the nonexecution of this decree as a distinct injury, committed subsequently to his naturalization. It also appeared that some of the property while under embargo was sold, and that a part of the proceeds due to the claimant had not been paid to him. It was urged that the continued withholdment of the proceeds, as well as the continued retention by the authorities of certain houses and the nonpayment of the rents thereof to the claimant, was a distinct ground of claim. The commission refused thus to divide up the case, saying: "The claimant was duly naturalized as a citizen of the United States, after the embargo of his property. It has been decided by the umpires that the commission is without jurisdiction in such a case."

Opinion of Mr. Lowndes, arbitrator for the United States, concurred in by the Marquis de Potestad-Fornari, case of *F. M. De Acosta y Foster*, No. 118, Span. Com. (1871), December 14, 1882.

Claimant, as a citizen of the United States, made certain demands based on transactions in 1863 and 1864. It appeared that he was a native of Italy, and there was no evidence of his having become an American citizen prior to 1868. Little, commissioner, delivering the opinion of the commission, said:

"Has the claimant then, not having been a citizen of the United States at the time of the occurrences complained of, a standing here? The question is a jurisdictional one. The treaty provides: 'All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the government of Venezuela * * * shall be submitted to a new commission,' etc. Citizens when? In claims like this they must have been citizens at least when the claims arose. Such

is the settled doctrine. The plaintiff state is not a claim agent. As observed elsewhere, the infliction of a wrong upon a state's own citizen is an injury to it, and in securing redress it acts in discharge of its own obligations and, in a sense, in its own interest. This is the key—subject of course to treaty terms—for the determination of such jurisdictional questions: Was the plaintiff state injured? It was not, where the person wronged was at the time a citizen of another state, although afterwards becoming its own citizen. The injury there was to the other state. Naturalization transfers allegiance, but not existing state obligations. Abbiatti could not impose upon the United States, by becoming its citizen, Italy's existing duty toward him. This is not a case of uncompleted wrong at the time of citizenship, or of one continuous in its nature.

"The commission has no jurisdiction of the claim for want of required citizenship, and it is therefore dismissed."

Albino Abbiatti v. Venezuela, No. 34, United States and Venezuela Claims Commission, convention of December 5, 1885. Affirmed, in principle, in *Charles H. Lochr v. Venezuela*, No. 44; *Paul Bettiker v. Venezuela*, No. 6; *Lorenzo H. Finn v. Venezuela*, No. 24.

In the case of *Lorenzo H. Finn*, No. 24, Andrade, for the commission, delivered the following opinion:

"This claim is for \$17,542 in Venezuelan currency, value of merchandises, cattle, and money furnished by Dr. Buenaventura Soto in 1859 to the Federal army under the command of Gen. Francisco Linares Alcántara.

"Dr. Buenaventura Soto was a citizen of Venezuela. Lorenzo H. Finn, his brother-in-law, represented him as attorney, a circumstance which does not suffice to give his claim the nature of one of a citizen of the United States. He alleges himself to be also a partner of Dr. Soto; but of such fact there is no sufficient evidence.

"This case, on call of the docket, was submitted some time ago, and a conclusion reached as indicated; but as counsel for the claimant was not aware of the submission, the case was held for argument. Argument being heard, we are only confirmed in the conclusion then reached. It now transpires that the property was taken in the cause of insurrection against the constituted authorities of Venezuela.

"If Finn was partner, *non constat*, he had any equitable interest in the firm assets as between the partners. If the claimant does not tell us what his interest was, or whether he really and equitably had any, how does he expect us to ascertain? Are we to guess at it? We think not. The claim to be allowed ought to be fairly made out to satisfy the conscience of its rightfulness and extent.

"The evidence, besides, plainly shows by a preponderance that the property was Soto's. There is only, we may say, the claimant's petition before the former commission which asserts part ownership of the property taken in him, and that is not evidence. The declaration that he was Soto's partner generally does not signify that he had an interest in this particular property. Even if the evidence was to the effect that he was partner with respect to this property, we should want to know to what extent he was partner—whether he owned the half, the fourth, the tenth,

or what proportion. A partner's interest as between the partners depends upon the state of their accounts on settlement.

"To allow claims of this character as for a moiety in the absence of proof, would open the door to fraud and the bringing in of claims actually in the interest of persons not entitled under the treaty in the name of citizens of the United States. If it were of a character that proof could not have been reasonably had on this point, it might be different. But we see no good reason for its absence here.

"There is still another objection to this claim that could be urged with strong, if not convincing, reason against it.

"In the treaty of 1803, between the United States and France, for the adjustment of claims, is this provision:

"It is the express intention of the contracting parties not to extend the benefits of the present convention to reclamations of American citizens who shall have established houses of commerce in France, England, or other countries than the United States, in *partnership with foreigners*, and who by that reason and the nature of their commerce ought to be regarded as domiciliated in the places where such houses exist."

"This provision, perhaps, simply embodies the international law on this subject.

"If Finn was in partnership with Soto it is believed the business took its character from the place, and was Venezuelan.

"As to the partnership business, was he not domiciliated in Venezuela, and a Venezuelan?

"The claim is disallowed for these reasons, and under the doctrine of case No. 34."

3. QUESTIONS OF ALLEGIANCE AND PROTECTION UNDER THE ACTS FOR THE DISTRIBUTION OF THE GENEVA AWARD.

By section 12 of the act of June 23, 1874, passed for the creation of a court for the distribution of the fund paid by Great Britain to the United States under the award of the Geneva tribunal, it was provided:

"And no claim shall be admissible or allowed by said court, arising in favor of any person not entitled, at the time of his loss, to the protection of the United States in the premises, nor arising in favor of any person who did not at all times during the late rebellion bear true allegiance to the United States."

In the case of *Charles Pratt Williams v. The United States*, No. 45 (Davis's Report, 30), the plaintiff alleged "that he was not, at the times mentioned in the petition herein, nor at any other time or times, actively or otherwise, or in any way, engaged in making or carrying on war against the United States, or in aiding or abetting, in any way, shape, or manner, the so-called southern confederacy, or any person or persons engaged in rebellion or making or carrying on war against the

United States aforesaid." It was held by the court, Porter, J., delivering the opinion, that this allegation was insufficient, and that the claimant must aver that he bore "true allegiance," though his own statement on oath to that effect would suffice to establish the averment *prima facie*.

In the case of *Cadwallader D. C. Rhind, Executor, v. The United States*, No. 242 (Davis's Report, 33), it was held, Porter, J., delivering the opinion of the court, that it was not sufficient to aver that, for any offenses committed during the rebellion, the claimant had received a pardon from the President of the United States.

In the case of *Benjamin Worth v. The United States*, No. 91 (Davis's Report, 35), it was held, Rayner, J., delivering the opinion of the court, that the act rendered admissible the claims of all persons, native born or naturalized, and even unnaturalized, who were at the time of their loss or injury entitled, in respect of such loss or injury, to the protection of the flag of the United States on the high seas, except British subjects, who were held to be excluded on the ground that they could not be entitled to the protection or intervention of the United States as against their own government.

The doctrine of the court in Worth's case was affirmed in the case of *Friedrich Albert Schrieber et al. v. The United States*, No. 740 (Davis's Report, 105). In the latter case, however, it was held that the exclusion of British subjects did not extend to persons who had acquired limited rights of naturalization in British India, but retained their citizenship of origin. In the course of his opinion, Jewell, J., delivering the opinion of the court, said:

"No claim shall be allowed in behalf of any person not entitled at the time of his loss to the protection of the United States in the premises.

"This provision was inserted for some purpose. If the act had contemplated indemnity only to those persons who were citizens of the United States, and had sustained losses, it would have been easy to have said so in terms. Citizens of the United States are always and everywhere entitled to the protection of their government, and no country has gone farther than ours in admitting the duty and asserting the right.

"But this question has already been deliberately passed upon by this court.

"In the case of *Benjamin Worth v. The United States*, with other cases presented at the same time, the question was raised on demurrer by the consul for the United States 'upon the ground that an unnaturalized foreigner can not claim indem-

nity before this court for losses sustained by the depredations of the rebel cruisers.' (See judgment of the court, opinion by Rayner, J.)

"The various cases were fully argued, and the demurrer was overruled in an opinion which fully stated the right of an unnaturalized foreigner to protection in the premises, and to recover for any loss sustained and proved.

"The syllabus of the case states the result as follows:

"The twelfth section of the act under which the court is organized provides that no claim shall be admissible or allowed arising in favor of any person not entitled at the time of his loss to the protection of the United States "in the premises," etc. Held, that this provision embraced all persons whether native born or of foreign birth, whether naturalized or unnaturalized, except the subjects of Great Britain, who are held to be excluded on other grounds."

"The learned judge who prepared the opinion fully examined the question of the right of protection of persons and property as constantly held by our government, and among other conclusions stated, said:

"It was a great principle for which our government had contended from its origin—a principle identified with the freedom of the seas, viz, that the flag protected the ship and every person and thing thereon not contraband."

"Nothing which we could now add would strengthen the statement of the law or the force of the reasoning made use of by the author of this opinion, as by citation and argument he sums up the course of the law in regard to the duty of protection, and concludes as follows:

"Therefore, on the ground of abstract justice and propriety and upon the ground of legal right, we decide that foreigners entitled to the protection of our flag in the premises, whether naturalized or not, have a right to share in the distribution of this fund."

"What the words 'in the premises' mean is also fully stated in the opinion:

"The next question is, Are they entitled to this protection, being foreigners, unnaturalized? The act of Congress creating this court, as before suggested, says nothing about citizens in providing for who may present claims here, and it says nothing about foreigners or aliens in specifying those who may not present such claims. It would seem that the framers of the act had a view to the case of unnaturalized aliens. Naturalized aliens having the same legal rights (we do not mean the same political privileges in entirety) with native-born citizens, of course it was unnecessary to have made any allusion to them. The act speaks of those entitled to the protection of the United States "in the premises." Those words, "in the premises," define and limit the application of the law within a narrow circle. It is not everybody entitled to the protection of the government that can come before this court; it is not every one entitled to that protection who was a loser by depredations on the part of the so-called Confederate government, by land as well as by sea; it was not every one that lost by Confederate cruisers generally that can come here. But it is every person entitled to the protection of the United States in the premises, viz, every such one who sustained loss or injury, directly resulting from damage caused by the so-called insurgent cruisers *Alabama*, *Florida*, etc., and the *Shenandoah*, after, etc., that can come before this court, and without reference to whether such person is native born or foreign born, whether naturalized or unnaturalized."

"Since that decision, which was pronounced at a very early period in the sittings of the court, a large number of claims have been passed upon in which the claimants were persons of foreign birth not naturalized, and in every case the court has entered judgment in their favor when they showed a loss under the provisions of the act, except in the cases of native born subjects of Great Britain. No matter what were the circumstances or the place of residence, if the claimant, not a native-born subject of Great Britain, had goods on board of an American vessel which were destroyed by the cruisers, we have given him a judgment for the value of the goods destroyed, always provided he showed that he did no act during the late rebellion inconsistent with true allegiance.

"An examination of the judgments heretofore entered will show a very large number of cases of this sort, in no one of which was the question of the domicile of the claimant at the time of the loss made a subject of discussion.

"One of these cases, that of *Levois v. The United States*, No. 158, is in all respects like the present.

"He represented in his petition that he was born in Paris; that during the entire period of the rebellion he resided in Paris; that he was never naturalized in this country, and was a subject of France. It appeared from his own testimony taken in the case that he had visited this country prior to 1851, but from that year to 1867 he had constantly resided in Paris, and did not during that period visit the United States. At the time of the breaking out of the rebellion he had a house of trade in New Orleans, at first with one Vidal as partner, and afterwards with one Mathon. While in business with Mathon this house made a shipment of goods to New Orleans which was destroyed by one of the inculpated cruisers. Mathon being dead, Levois made claim as surviving partner for the amount of this loss. The case was heard, and at first dismissed on the ground that the disloyal acts of his partner, Vidal, in the conduct of their business, were imputable to him; but a rehearing was granted, and on further proofs, showing that Levois personally did no disloyal act, and that he was not responsible for the conduct of Vidal, the court, acting upon the doctrine settled in the case of *Worth*, gave him judgment for the entire amount of his claim.

"Between that case and the present there are no differences. Levois was a nonresident alien, as are the petitioners in the case now under consideration.

"This court has in oft-repeated instances made awards in favor of seamen who were not citizens or residents of this country, whose only title to protection arose from the fact that they were upon an American ship.

"The only limitation of the right to recover in this court which has been made is in the case of native-born British subjects, who have been held under the peculiar circumstances of the case not entitled as against the negligence of their own government to protection in the premises.

"The views of the court upon this question are found in the opinion of the court in the case of Worth before referred to.

"It may not be amiss, however, to restate the view taken by the court in regard to the exclusions contained in the last clause of the twelfth section of the act.

"The claimant is excluded unless he was at the time of the loss entitled to the protection of the United States *in the premises*, and unless he at all times during the rebellion bore true allegiance to the United States.

"The language of the first exclusion is peculiar. The words are, 'not entitled to the protection of the United States *in the premises*;' not simply not entitled to the protection of the United States, but not entitled *in the premises*.

"Now, no foreigner, no alien nonresident, is entitled to the protection of the United States as to his person, except under special circumstances. He may have sought the asylum of one of our legations, and, being there received, may be entitled to protection.

"A foreigner may be entitled to protection either as to his person or as to his property, or both. If he is within this country, or on the deck of one of our vessels, his person and his property with him are under our protection. And if his property alone is within this country it is entitled to and everywhere receives the same protection as the property of citizens; and so of the property of an alien nonresident upon the seas in an American vessel, this government has always extended to it the same protection as to that of citizens.

"We think the language of this clause of the act exactly adapted to a state of facts like the present, and that Congress meant to say, 'Whenever, under the circumstances of the case, the person or property of any claimant was so situated as to be entitled to the protection of the United States, you shall award to such claimant indemnity for loss; but you shall have regard to the power against whom protection is claimed. If a claimant who either in his person or his property might otherwise have been entitled to our protection, was a native-born subject of England, through whose negligence these losses occurred, you will not grant him redress. We did not engage to protect him as against the acts of his own government, even though as against all the rest of the world he was entitled to and would receive protection.'

"These considerations enable us to come readily at the meaning of the last of the exclusions above referred to, that the claimant must at all times during the late rebellion have borne true allegiance to the United States.

"In a strict sense, no one but a citizen can bear true allegiance; that is, complete, perfect allegiance.

"But this court has in numerous instances made awards to persons not citizens. The case of Levois, above referred to, is one. During the entire period of the rebellion he resided in Paris. He bore no personal allegiance; no duty was required of him personally, yet he showed that he did no act which a

loyal citizen might not have lawfully done. He made such a use of his property in this country as was conformable to law, and so bore all the allegiance which a nonresident citizen could be required to bear.

"Having done no act to aid the Confederacy, either personally or by an improper use of his property here, the court awarded him his claim. The only doubt which arose in his case, which was twice argued, was whether his partner and agent, Vidal, in the conduct of the business, did not aid the Confederacy.

"In the cases of very many sailors awards have been made to aliens who were not proved to have been on our ships but for the single voyage on which their property was destroyed.

"In every case hitherto it has been considered sufficient for the claimant to show that he did no act at any time in aid of the rebellion.

"It is to be observed that the allegiance is only *during the late rebellion*.

"Construing this clause in connection with the part that precedes it, we think the true meaning is that no award shall be made in favor of any person who was not entitled to protection as to his property at the time of his loss as against the British Government and as against the Confederacy, and that even if he was entitled to such protection as against both governments at the exact time of his loss, yet if he at any time during the rebellion was guilty of any breach of true allegiance to the United States he shall not recover in this court.

"This seems to us to furnish a construction of the law conformable to its terms and consistent with reason and justice, and entirely in harmony with all the preceding decisions in this court.

"It gives full effect to the principle for which this court in the case of Worth assert that our government has contended from its origin, viz, 'that the flag protects the ship and every person and *thing* therein not contraband.' (Worth's case.)

"The only other objection to the recovery by the claimants in this case arises out of the fact that Meyer had applied for and been admitted to the privileges of a British subject in India. It is claimed that he comes within the case of the British subject excluded by former decisions of this court.

"Meyer was not a native-born British subject, as has been the case of every one heretofore rejected. He was never naturalized in England. The qualified naturalization which he obtained gave him no rights of a British-born subject in England. It only entitled him to the enjoyment of certain privileges in British India. He did not renounce his allegiance to his native country, nor did he acquire the right of protection from Great Britain, except as to his person and property while within the jurisdiction of the colony which gave him the naturalization. Upon his return to his native country he might lawfully bear arms against Great Britain.

"Lord Chief-Justice Cockburn, in his *Treatise on Nationality*, published in 1869, states the British law as to the effect of naturalization in the British dominions, as follows:

"By the law of every other country, naturalization, if valid at all, carries with it a new nationality, and invests the party naturalized, not only with the status of a subject, but also with the rights, political and civil (barring in some respects the higher political rights, which attach to that status, including the full extent of protection to which a subject can be entitled in return for the allegiance he owes to the state. In this country, on the contrary, since 1851, the government, with a view to prevent claims for protection being made abroad by persons naturalized in Great Britain, has taken care, by the terms of the grant, to limit the effect of naturalization to the dominions of the crown. . . . Thus restricted, it is plain that the effect of naturalization in Great Britain is only to remove the legal disabilities of the alien, and to place him as to certain minor political rights, and as to civil rights, on the same footing as the natural subject; and, further, that the oath of allegiance taken by him amounts to no more than a promise of that allegiance which every alien while residing in the realm is bound to render, and must be taken to carry with it the implied reservation, that it is to operate no longer than while the party remains within the Queen's dominions. When abroad he is no longer a subject. On his return to his own country his nationality of origin, so far as this country is concerned, would revive, and in case of war between the two countries he might legally bear arms against Her Majesty without incurring, legally or morally, the guilt of treason. (Ch. J. Cockburn on Nationality, 114, 115, 116.)"

"The commission appointed by Parliament, composed of the most learned publicists of the kingdom, and among them Lord Clarendon, Sir Robert Phillimore, Sir Roundell Palmer, W. Vernon Harcourt, and Mountague Bernard, reported on the state of this branch of law, and said:

"In the case of an alien born, naturalization in the United Kingdom under the act of 1844 does not confer any rights of nationality within the colonies. (10 and 11 Vict., c. 83.) On the other hand, colonial naturalization confers no rights of nationality beyond the limits of the colony granting naturalization. (Reprinted in *Opinions of the Executive Department, and other papers relating to expatriation, naturalization, and change of allegiance*, Washington, 1873, page 73; *U. S. Foreign Relations*, 1873, part 2, p. 1241.)"

"These citations seem to fully sustain the foregoing conclusions as to the legal condition of Meyer, and we do not think he comes within the principle upon which we have deemed native-born British subjects excluded from the benefits of the law under which we act.

"We therefore are of opinion that the claimants are entitled to recover the loss which they have proved."

Rayner, J., who delivered the opinion in *Worth's case*, read, in *Schreiber's case*, a dissenting opinion, in the course of which he said:

"It is true Meyer did not, in his oath of allegiance in naturalization, expressly 'renounce his allegiance to his native country;' but that is not required in naturalization in England, nor does any other country in the world, except our own, require it. Allegiance must exist in its entirety, or not at all. It may be claimed by two rival powers—as the victims of

civil wars often find to their cost—but it admits no divided possession. Allegiance due for a nation's protection, is as exacting as that faithful sense of moral duty spoken of by our Saviour: 'No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.' Does not naturalization in British India 'make a man liable to do military duty?' I venture to say it does—or would, if military service were an enforced duty in the United States.

"A resort to the record will remove a difficulty in regard to the subject. In July 1852 an act was passed by the British Parliament providing for naturalization in British India. After providing for the applicant's presenting a memorial to the East India government 'praying that the privileges of naturalization may be conferred upon him,' stating that 'he is settled in said territories or is residing within the same, with intent to settle therein, to be signed and sworn to—

"The government may, if they shall think fit, issue a certificate in writing, etc., granting to the memorialist all the rights, privileges, and capacities, if any, as may be excepted in such certificate. Sec. 8: Upon obtaining such certificate, and taking and subscribing the oath, as hereinafter prescribed, the memorialist shall, within the said territories under the government of the East India Company, be deemed a natural-born subject of Her Majesty, as if he had been born within the said territories, and shall be entitled, within the said territories, to all the rights, privileges, and capacities of a subject of Her Majesty born within the said territories.'

"The following is the oath of allegiance to be taken by such naturalized foreigner:

"I, A. B. (here state the description of the person), do swear (or affirm, as the case may be) that I shall be faithful and bear true allegiance to the sovereign of the United Kingdom of Great Britain and Ireland, and of these territories as dependent thereon, and that I will be true and faithful to the East India Company.'

"Sir Alexander Cockburn, in a treatise which he has lately written upon 'Nationality,' which may be regarded as a standard of authority, says, in speaking of the laws of naturalization in the colonies:

"Suffice it to say that they all require the party naturalized to take an oath of allegiance, whereby he takes on himself all the obligations and duties of a British subject, and all admit the party naturalized to the rights of a British subject as though he had been born within the British colony.'

"He says further that in 1865 the opinion of the law officers of the Crown was taken upon the subject, and that—

"According to their views a foreigner duly naturalized in a British colony is entitled, as a subject of the Queen in that colony, to the protection of the British Government in every other state but that in which he was born and to which he owes a natural allegiance.'

"The case of *Joseph Levois, surviving partner, v. The United States*, No. 158, is by no means an adjudication of this question. That was the case of a representative, a surviving partner of a business firm which did for many years, and does yet, carry on a mercantile enterprise in New Orleans, on American soil, and under American protection. I admit that, with me, Levois did barely escape the fatal objection of being an unnaturalized

foreigner who has continuously resided in a foreign land. But the award was not to him in his individual character; it was to him as a member of a firm that had invested their money in our country. That business firm was consequently entitled to the protection of the government, and his right as surviving partner to recover the assets of the firm and settle up its affairs is recognized by the general municipal law of the land, just as in awarding to an insurance company the amounts of its losses over its gains we do not inquire whether any member of the company may or may not be an unnaturalized foreigner, nonresident in our country. It is to the corporation as a corporation we make the award, because it is the corporation as a corporation that is entitled to the benefit of our laws and the protection of our government. And so in regard to a business firm. It was to Levois as surviving partner of a firm entitled to the benefit of our laws and the protection of our government that we made the award. This court has decided that any one suing before it in a representative capacity, as guardian, executor, or administrator, agent, assignee in bankruptcy, etc., may be excused from the requirements of loyalty, allegiance, etc., without being necessarily entitled to the protection of the United States. And so with Levois, as surviving partner of a mercantile firm located and doing business in the United States."

Davis, in his report (pp. 15-17), summarizes certain cases as follows:

"Joseph Levois, surviving partner of the firm of J. Levois & Co., vs. The United States, No. 158.

"The firm of J. Levois & Co. was composed of the petitioner and Pierre Ferdinand Mathon, who died in 1869. The partnership was formed in 1862.

"The petitioner, a Frenchman, did not reside in the United States during the rebellion; his business in New Orleans being conducted by Mathon, also a French subject. There was no averment in the petition that the complainant bore true allegiance during the rebellion to the United States, or was entitled to its protection at the time of his loss.

"The claim was for the value of certain merchandise shipped from New York to the firm in New Orleans, on the steamship *Electric Spark*, which was destroyed July 10, 1864.

"The counsel on behalf of the United States demurred to the petition—

"1. Because it does not state that the said petitioner did, at all times during the late rebellion, bear true allegiance to the United States.

"2. Because it does not state that the said complainant was entitled, at the time of his pretended loss, to the protection of the United States.

"3. Because the said complainant was, at the time of his alleged loss, and still is, an unnaturalized foreigner, and never resided within the United States.

"After the demurrer was filed, complainant amended his petition, setting forth that 'the firm was entitled, at the time

of the loss, to the protection of the United States in the premises, under the terms of the treaty of February 1855 and former treaties between France and the United States,' and 'that Levois and Mathou did, at all times during the late rebellion, conduct themselves as neutral foreigners; and that during such time neither of them committed any act detrimental to the Government of the United States, or in violation of their duties as such neutrals.'

"There was no argument on demurrer, all the questions of law and fact being considered at the final hearing, when it appeared from the testimony that up to the close of 1861 or the beginning of 1862 Levois had been in partnership with one Paul Vidal, also a French subject, residing in New Orleans; that Vidal was engaged in the liquidation of the business of the firm under a general power of attorney from Levois, from the beginning of 1862 to the occupation of the city by the United States troops, and that in the course of liquidation he purchased \$10,000 of New Orleans city bonds, paying for them in Confederate money.

"The court entered judgment for the respondent. A motion for a rehearing was then filed and denied. Subsequently another motion for a rehearing, accompanied by additional testimony, was filed and granted. The additional testimony showed that the firm of J. Levois & Co., the complainants, was a different firm from that of which Vidal was a member; that the account between Vidal and Levois had never been closed; that Levois had never authorized or ratified the purchase of the bonds by Vidal, but considered it a personal affair of the latter; that the price of the bonds had not been placed on the books of the firm to the account of profit and loss.

"After rehearing, judgment was entered for the complainant in the sum of \$5,033.21, with the usual interest.

"No opinion was delivered by the court in this case, and the reasons for its decision can only be inferred.

"As the opinions in the cases of *Worth vs. The United States*, and *Schreiber & Meyer vs. The United States*, sustained the right of an unnaturalized foreigner, not a British subject, to sue in this court, it would seem that the judgment at first entered in favor of the respondent was not intended to sustain the third ground of demurrer by the counsel on behalf of the United States, but rather that the purchase of the New Orleans city bonds by Vidal, together with his possession and use of Confederate money, was a breach of neutrality toward the United States which deprived him of his right to sue; that this breach of neutrality being committed in his capacity as a member of the firm, was imputed to the surviving partner; and that upon subsequent proof that the transaction of Vidal was not imputable to Levois, he having repudiated it as a firm transaction, the judgment was reversed.

"*William Hutchinson vs. The United States*, No. 1797.

"The complainant, a native of Ireland, 'sailed out of the United States, and lived on shore since 1849,' and 'resided between April 13, 1861, and April 9, 1865, both inclusive, at sea, sailing on vessels under the flag and register of the United States, and in the city of New York.'

"The claim was for personal effects and wages lost while on the *Electric Spark*, July 10, 1864.

"It appeared that the complainant declared his intention to become a citizen of the United States in 1857, but was not in fact naturalized until 1865, after the loss was sustained for which he claimed indemnity. Mr. James Lowndes, for complainant, called the attention of the court to section 2174 of the Revised Statutes.

"Counsel on behalf of the United States contended that this section of the Revised Statutes, taken from the act of June 7, 1870, not being in force at the time of the alleged loss, the complainant was at that time a subject of Great Britain, and, under the decision of the court in *Worth vs. The United States*, not entitled to recover.

"Petition dismissed.

"*Lord and Munn vs. The United States*, No. 233: Complainants (copartners, doing business in New York during the war) claimed the value of some wheat destroyed on the *Lafayette*.

"The complainant, Lord, was born in the United States, but Munn was a native of Ireland, and arrived in the United States in 1860. He was naturalized in 1872.

"The petition was demurred to on the ground that an unnaturalized foreigner could not claim indemnity before this court. The demurrer was argued in connection with *Worth vs. The United States* and several other similar claims.

"The court delivered an opinion sustaining the demurrer. (See *Worth vs. The United States*.) The case was afterward submitted to the court on the evidence, when judgment was entered in favor of 'William G. Lord, one of the said complainants,' for a sum which seems to be one-half the entire loss.

"*Rodocanochi, Sons & Co. v. The United States*, No. 1883: The principal house of this firm was at Leghorn, with branches in London, Marseilles, and Odessa. The firm claimed for goods destroyed on the *Brilliant* and the *Lamplighter*. All the members of the firm were foreigners; two of them resided in London, and one of them, Mr. Michael Em. Rodocanochi, was a British naturalized subject at the time of the loss; the other was naturalized in Great Britain in 1868.

"Mr. F. W. Hackett, counsel for complainants, contended that the firm was entitled to a judgment for the value of the goods as an entirety, and that the fact that a member of the firm was a British naturalized subject should not effect a diminution in the award of the court.

"The property was Italian property, the domicile of the firm being in Italy. (The *Cheshire*, 3 Wall., 231; *Ang. and Ames on Corp.*, § 108; *Regina v. Arnaud*, 9 Q. B., 806.)

"While the nationality of a corporation is that of the sovereignty which creates it, and that of a firm is the nationality of its individual partners, still, where a firm has a main house in one country with branches in other countries, the analogy between a corporation and a partnership is complete, and the country where the main house is situated gives the firm the impress of its nationality.

"The requirement that a person must be entitled to the protection of the United States is satisfied by a firm's being so entitled, even though a partner might not be. (6 Court of Claims, 360.)

"Mr. Michael Em. Rodocanochi is entitled to recover for, his certificate of naturalization excepted, 'any rights and capacities of a natural-born British subject out of and beyond the dominions of the British Crown and the limits thereof.' He had no right to the protection of the British Government as to any property 'out of and beyond the dominions of the British Crown,' and in that is distinguished from a native-born British subject. He can fairly be considered as a foreigner of some other nation than Great Britain. (App. Rep. Brit. Comm. Natln., 1869, p. 76; Foreign Office Circular, 8 January, 1851; Cockburn on Nationality, pp. 115, 116; United States For. Rel., 1873, part 2, p. 1350; *ibid.*, p. 1351; Schreiber & Meyer *vs.* The United States, *post*; 7 and 8 Vict., c. 66; 10 and 11 Vict., c. 83; *Worth vs. The United States post*.)

"Judgment was entered in favor of the firm.

"The decisions of the court show that aliens shipping goods on American vessels during the rebellion, or employed at that time as seamen on vessels owned and registered in the United States (except subjects of Great Britain), were held to be entitled to 'the protection of the United States,' and to indemnity for property destroyed by one of the so-called insurgent cruisers named in the act of June 23, 1874.

"It seems also to have been held that the allegation required by the statute, that they had 'during the late rebellion' borne 'true allegiance to the United States,' was in the nature of a negative declaration, setting forth that they had not in any manner aided or assisted the rebellion. Proof of the strict neutrality of aliens, resident in the United States, appears to have been held sufficient to sustain this allegation.

"Claims of subjects of Great Britain were excluded on special grounds; this exclusion does not seem, however, to have been extended to naturalized subjects of Great Britain, apparently on account of the peculiar provisions of the British naturalization laws."

In the cases of *Eliza A. Pike, administratrix*, Case of the "Texan Star." *v. The United States*, No. 736; *Samuel Stevens et al. v. The United States*, No. 737; and *Samuel Sterens et al. v. The United States*, No. 775, a question was raised and decided as to the simulated transfer of the ship

Martaban, or *Texan Star*, by her American owners to a British subject with an intention to prevent her capture by Confederate cruisers. The case, as reported by the clerk of the court (Davis's Report, 89), was as follows:

"A statement of the case will be found in the opinion of the court.

Mr. C. C. Beaman, jr., for the complainants:

"The complainants were directly injured by the destruction of the vessel.

"a. The transfer to Currie was merely colorable and was not a sale.

"b. The bark would have been condemned had she been brought before a prize court. (1 Kent Com., p. 87; Sir Wm. Scott in the *Sechs Geschwistern*, 4 C. Rob. p. 100; The *Jemmy*, 4 C. Rob. Rep. p. 31; The *Omnibus*, 6 C. Rob. p. 71; The *Packet de Bilboa*, 2 C. Rob. p. 133; The *Andromeda*, 2 Wallace, 481; The *Cheshire*, 3 Wallace, 231; The *Baigorry*, 2 Wallace, 474; The *Bermuda*, 3 Wallace, 514; The *Jenny*, 5 Wallace, 183.)

"c. The sale was void as to third parties. (2 Kent Com. p. 521; *Hamilton v. Russell*, 1 Cranch, 310; The *Princess Charlotte*, *Browning & Lushington Rep.* p. 75.)

"d. The complainants are not estopped from asserting their ownership—

"1. As against Currie. (*Bigelow on Estoppel*, p. 268; *Van Rensselaer vs. Kearney*, 11 Howard, 297; *Ormsby et al. vs. Ihmsen*, 34 Penn. State, 462; *Gray vs. Bartlett*, 20 Pick. 186; *McCune vs. McMichael*, 29 Georg. 312; *Jewett vs. Miller*, 10 N. Y. (Selden) 402; *Hill vs. Epply*, 31 Penn. 331; *Ferris vs. Coover*, 10 Cal. 589; *Tilton vs. Nelson*, 24 Barb. 595; *Storrs vs. Barker*, 6 Johns. Ch., 166-170; *Whitfield vs. Parfitt*, 4 De Gex & Smale, 240; *Myers vs. Willis*, 17 C. B., 77; *Langton vs. Horton*, 5 Beav. 9; *Ring vs. Franklin*, 2 Hall, 1; *Mark vs. Pell*, 1 Johns. Ch. 594; *Strong vs. Stewart*, 4 Johns. Ch. 167; *Steere vs. Steere*, 5 Johns. Ch. 1; 3 Phillips Ev., Cowen & Hill's notes, 1431 *et seq.*; *Jones vs. Blum*, 2 Rich. (S. C.) 475; *Hayworth vs. Worthington*, 5 Blackford, 361; *Chapman vs. Tunier*, 1 Call, 244; *Dabney vs. Green*, 4 Hen. & Mumf. 101; *European, &c., Co. vs. Royal Mail, &c., Co.* 4 Kay & Johnson, 676; *Gardner vs. Cazenove et al.*, 1 H. & N. 423.)

"2. As against the United States. (*La Flora*, 6 C. Rob. 3, and note in index, p. 2; *Dodson's Reports*, p. 175, case of the *Bennet*, *Reusse vs. Myers*, 3 Campbell (N. P.) 475.)

"e. The complainants were the legal owners of the vessel under the mortgage, accompanied by absolute power of attorney and possession. (6 *Opinions Attorneys-General*, 647; *DeMattos vs. Gibson*, 1 Johns. and Hemmings's Reports, 79; *Weston vs. Penniman*, 1 Mason, 306; *Lincoln vs. Wright*, 23 Penn. State Reports, 76; *Deane vs. McGhie*, 4 Bing. 45; *Kerswill vs. Bishop*, 2 C. & Jer. 529; *Dickinson vs. Kitchen*, 8 El. & Bl. 789; *Brobst vs. Brock*, 10 Wallace, 519; *Powell on*

Mortgages, 9, 10; 2 Black. Com. 158; Littleton, 332; 4 Kent Com. (12th ed.) pp. 162-165; 1 Washburne Real Property, 562, 567, 568, 569, 570; Lowell *vs.* Shaw, 15 Maine, 242; Hotchkiss *vs.* Hunt, 49 Maine, 213; Ely *vs.* McGuire, 2 Ohio, 372 (ed. of 1833); Wright *vs.* Ross, 36 Cal. 414; Mowry *vs.* Wood, 12 Wis. 413; Harding *vs.* Coburn, 12 Met. 333; Esson *vs.* Tarbell, 9 Cushing, 407; Veazie *vs.* Somerby, 5 Allen, 281; Woodruff *vs.* Halsley, 8 Pick. 333; Prat *vs.* Harlow, 16 Gray, 379; Gellston *vs.* Hoyt, 13 Johns. (N. Y.) 561; Philips *vs.* Ledley, 1 Wash., p. 226.)

"*f.* Or the complainants were owners of the vessel, by a parol sale and delivery by Currie. (The *Amelia*, 6 Wall. 18; Wardover *vs.* Hogeboom, 7 Johnson, 308; Sharp *vs.* U. S. Ins. Co. 14 Johnson, 201; Lamb *vs.* Durant, 12 Mass. 34.)

"Currie was not the owner. A bill of sale does not necessarily change the ownership of property. (Horn *vs.* Ketaltas, 46 N. Y., 605; Ross *vs.* Norvell, 1 Wash. (Va.) 14; Brogden *vs.* Walker, 2 Hen. & J. (Md.) 285; Reed *vs.* Jewett, 5 Me. 96; Caswell *vs.* Keith, 12 Gray, 351; Fuller *vs.* Parrish, 3 Mich. 211; Carter *vs.* Burris, 10 Smede & Mar. (Miss.) 527; Despart *vs.* Walbridge, 15 N. Y. 374; Tyler *vs.* Strang, 21 Barb. 198; Picard *vs.* McCormick, 11 Mich. 68; Fowler *vs.* Stoneum, 11 Tex. 478; Howard *vs.* Odell, 1 Allen, 85; Blanchard *vs.* Fearing, 4 Allen, 118; Clarke *vs.* Washington Ins. Co. 100 Mass. 309; Ward *vs.* Beck, 13 Com. Bench, N. S. p. 688; Collins *vs.* Blanteen, 2 Wilson (K. B.) 347.)

"The claimants were entitled to the protection of the United States in the premises. (Vattel, book 2, chap. c.; President's Message, Dec. 6, 1875; U. S. Statutes at Large, vol. 14, 212; Abbott on Shipping, p. 58; 6 Opinions of the Attorneys-General, pp. 648, 649; The *Margaret*, 9 Wheaton, 421; Smith's Mercantile Law, pp. 143-144; Parson's Maritime Law, vol. 1, p. 39; Bixby *vs.* Franklin Insurance Co. 8 Pick. 86; Ocean Ins. Co. *vs.* Pollocks, 13 Peters, 157; Coolidge *vs.* Ingles, 13 Mass. 26; 3 Kent Com. 139, 146, and 149; Long *vs.* Duff, 2 Bos. & Pull. 209; Hatch *vs.* Smith and Trustee, 5 Mass. 42; Consular Regulations of the U. S. Art. XVII.)

"The complainants, at all times during the late rebellion, bore true allegiance to the United States. Their act in transferring the vessel is not evidence to the contrary. (Vattel, book 3, chap. 10, sec. 178; The *Bennet*, Dodson's Reports, p. 179; English Statute of 1854.)

"This claim has been examined by the Department of State, the tribunal of arbitration, and the British board of trade, and not criticised. It was included in all presentations and estimates, and undoubtedly included in the award of the tribunal.

"Mr. J. A. J. Creswell, for the respondent—

"Cited statutory provisions in relation to vessels of the United States (Customs Regulations, Treasury Department, 1874. p. 1; Rev. Stats. § 4132, § 4311, § 4312, § 4136, § 4180,

§ 4165, § 4177, § 4178, § 4189, § 4190, § 4308; 6 Opinions Attorneys-General, p. 652; Consular Regulations, secs. 219, 220, 221, 225; Rev. Stats., § 4172) and contended—

"1. That the bill of sale executed and delivered by the owners, through their agent, the master, to Currie did in law convey a good and valid title to Currie. The fact that no purchase money was paid would not impair the validity of the transfer. (14 Johns. 210; 20 *id.* 338; 3 Har. & McHen. 433; 4 Serg. & R. 564; 17 Mass. 249; 4 N. H. 397; *The Ariel*, Moore's P. C. Reports, Vol. XI. p. 131; 1 J. J. Marsh, 388; 16 Wend. 460; 9 Cowen, 266; 1 Bland Ch. 249; 2 Ham. 182. Disapproving, 1 B. & Cres. 704; 2 Taunt. 154; 5 B. & Ald. 606; 1 Greenl. 1; 2 McLean, 543.)

"The pretext that the transfer was merely colorable will not avail. (16 sec. act Dec. 31, 1792; *The Margaret*, 9 Wheat. 421.)

"The owners of vessel and cargo are now precluded from denying that she was a British ship. (Phil. Int. Law, 2 ed. 1873, Vol. III. pp. 734-5; Halleck's Int. Law, chap. 20, sec. 17, p. 486; *The Fortuna*, 1st Dods. Adm. R. 87; *The Success*, *ibid.*, 131; *The William Bagaley*, 5 Wall. 410.)

"The complainants therefore have no standing in this court, for if they claim as owners they must claim as owners of a British ship. There is no justification for a demand by the complainants as mortgagees in possession or as owners by sale and delivery without paper title. (*The Virginius*, 14 Opinions Attys. Gen. 340.)

"The complainants voluntarily expatriated the vessel and placed her beyond the protection of the United States.

"Rayner, J., delivered the opinion of the court:

"From the evidence in these cases it appears that the bark the *Texan Star* was built in Boston in 1858, and measured 798 $\frac{1}{2}$ tons. In 1863 she was successfully engaged in the East India trade, her managing owners being Samuel Stevens & Co., of Boston, and her commander or master being Samuel B. Pike, who owned one-sixth of the vessel. On July 3, 1863, Stevens & Co. wrote to Captain Pike warning him that one of the Confederate cruisers was on her way to the East Indies, and saying to him:

" 'We advise that you place your ship under the British flag immediately (or any other flag). You have probably been advised by Atkinson, Tilton & Co. of the process, which is as follows: You are to sell her and receive notes in payment, and as soon as the transfer is made you to take a mortgage and give the notes in payment; then receive an irrevocable power of attorney in your favor to sell or to manage the ship as you please, receive all moneys, etc., which will place you in the same position as at present. If you find it difficult to do this, and a good price can be obtained, you had better sell. * * * In regard to ship's employment in case you do not sell we can only advise as heretofore, that you act according to the best of your judgment.'

"On the 11th of November 1863 Captain Pike arrived at Maulmain, where he received the foregoing letter from Stevens

& Co. At Maulmain Captain Pike took on a cargo of rice for Singapore. On the 13th of November he wrote to Stevens & Co. doubtfully about his change of flag, saying he 'would not like to make such arrangement unless he was satisfied with the parties to whom the transfer would be made.' On December 9 Captain Pike again wrote to the same parties, saying, 'Since I last wrote you matters in this vicinity have undergone a great change.' He went on to state that, after completing his loading and being about ready to clear from the custom-house, the mail steamer from Singapore had arrived, bringing news of the destruction of American shipping in the Straits of Sunda, and that in consequence of this he deemed it necessary, for the interest of all concerned, to change the flag in accordance with the advice he had received.

"Accordingly it was arranged that Captain Pike should make a temporary transfer of the ship to Mark R. Currie, of the house of M. R. Currie & Co., and that her name should be changed to the *Martaban*; that Currie should give in return a mortgage to the nominal vendors for the nominal consideration of 80,000 rupees, with the understanding that Captain Pike should, as master, continue to exercise the same absolute control and management of said vessel as before.

"It was further agreed that Currie was to receive one per cent for his services in the matter. All this was accordingly done, and the paper-writings passed. The cargo was already on board, 12,556 bags of rice of 164 pounds each, with freight agreed upon at one rupee four annas per bag. Captain Pike paid the cost of the proceedings. On the 12th December 1863 Captain Pike sailed from Maulmain, and on the 24th of the same month the *Martaban*, as then called, was captured and, with her cargo, burnt by the *Alabama*, when within only a few hours' sail of Singapore.

"These claims of the parties complainant against the United States for the value of the said ship, freight, and master's private property are preferred upon the grounds, first, that there was in fact no sale at all, and that the right of property in the ship by the owners, Stevens and others, was never divested; secondly, that even if this be not so, and the sale must be regarded as valid and binding, yet, as mortgagees retaining possession, they must be regarded as virtual owners of the property, and are entitled to remuneration before this court.

"To the allowance of these claims the counsel for the United States objects. He takes the position that the claimants are excluded under the operation of the restriction imposed on this court by the twelfth section of the act of Congress establishing this court, as follows: 'No claim shall be admissible or allowed by this court arising in favor of any person not entitled at the time of his loss to the protection of the United States in the premises.' That the complainants having sold their vessel to a British subject, and put her under a British flag, the

said vessel was British property; and therefore not being entitled to the protection of the United States in the premises, they can have no show before this court.

"The act of Congress under which this court derives its jurisdiction provides that all claims are admissible before it directly resulting from damages caused by the so-called insurgent cruisers *Alabama*, etc., and claims admissible must be those arising in favor of persons entitled at the time of loss to the protection of the United States in the premises.'

"It is proven that the claimants are American citizens, whose status as to loyalty, noncompensation from other quarters, etc., brings them within the category of rightful claimants, so far as that status is concerned. It is proven that they suffered loss and damage directly resulting from the acts of the Confederate cruiser, either as owners of the ship or as mortgagees in possession. Is there any other consideration in the premises by which they have forfeited this protection? All the facts, the circumstances, and the evidence go to prove that the conveyance of the ship to Currie was never intended or regarded by any of the parties to have any validity. It was designed and carried out in collusion and pretense. It was not done in the way of trade or of commercial enterprise. It was not to secure gain, but to avoid loss. There does not appear to have been any attempt at secrecy or deception, or misrepresentation, except as against the common public enemy.

"Stevens & Co. advised Captain Pike to place the ship under the flag, as a precaution against threatened danger; and instructed him as to the manner of proceeding, empowering him to reserve to himself in the mortgage full control and management of the ship, 'according to the best of his judgment.' The evidence shows that about that time there was a sort of panic with the American shipping in the East Indian seas. Captain Pike seems to have been reluctant to put the ship under another flag, and so far from attempting anything clandestinely, he first consulted Mr. Brooke, the American consul at Maulmain, and applied to him to aid him in the matter. M. R. Currie & Co. wrote to Atkinson, Tilton & Co.:

" 'We have had the vessel transferred to our Mr. Currie, in order that he (Captain Pike) may sail in safety from Southern privateers.'

"E. J. Stanley, an assistant in the firm of Currie & Co., testified that Captain Pike was brought to the office of Currie & Co., and introduced to them by Brooke, the American consul, to—

" 'Consider the question of danger to the vessel and her cargo, in consequence of the presence of the Confederate cruiser *Alabama*, and to make arrangements to avoid the same.'

"Captain Pike wrote to Stevens & Co. that he deemed it necessary, 'for the interest of all concerned, to change the flag.' Currie did not pay a rupee for the ship, but received a commission of one per cent for his services, and even executed

a mortgage for ten thousand rupees more than the nominal consideration of the collusive sale. Currie never claimed any ownership in the vessel, but admitted the pretended sale was in order to be safe against danger from the *Alabama*. Captain Pike, in the terms of the mortgage, retained the absolute power of attorney to manage and control the vessel as he pleased. Captain Semmes, in his journal, speaking of the capture of the *Texan Star*, says he asked Captain Pike if he did not know that the transfer was intended merely as a cover to prevent capture, and that Captain Pike replied, 'Yes, I do know it.' Semmes burned the ship, because he was shrewd enough to discover that the pretended transfer of the ship was a sham to escape him. He burnt her as an American ship. Currie has never interposed any claim to the ship. Great Britain did not, through her representatives at Geneva, take the position that she was an English ship, or attempt to evade her responsibility for the destruction by the *Alabama*.

"Looking at the matter, therefore, with all its circumstances and surroundings, the pretended transfer from Pike to Currie must be regarded as no sale at all, but as utterly null and void—intended as such by all the parties at the time, and so regarded since—and that when the vessel was destroyed, she was the property of Stevens and others. There are, however, other questions that present themselves, touching the right of the parties to remuneration by this court, even admitting the conveyance of the ship to have been null and void. Although the transfer was collusive and designed to work no change in the ownership of the property, still the question arises, Are the applicants *estopped* from pleading collusion and deception? Although such sale was void, as against the rights and interests of third parties, was it binding and operative on the parties themselves? Can they be allowed to ignore and nullify their own deliberate acts with a view to their own benefit?

"The first point to be considered here is, What was the nature of the act done (seeking the protection of a foreign flag)—was it wrongful in its character? Did it contravene public or private rights? It is a well-settled principle of law that contracts involving *wrong* are not to be favored. Chancellor Kent, in his Commentaries (vol. 2, page 366), says, in treating of contracts:

" 'The consideration must not only be valuable, but it must be a lawful consideration, and not repugnant to law or sound policy, or good morals. *Ex turpi contractu, actio non oritur*. The reports, in every period of the English jurisprudence, contain striking illustrations of the general rule that contracts are illegal when founded on a consideration *contra bonos mores*, or one against the principles of sound policy, or founded in fraud, or in contravention of the positive provisions of some statute law.'

"The 'consideration' here mentioned by Chancellor Kent, as is evident from the context, is to be understood in its largest and most comprehensive sense. It means something more than the simple *quid pro quo*; something more than the mere reward or expected benefit moving the parties to the contract.

It looks specially to the results and consequences as they may involve the rights and interests of others. It keeps in view the fundamental principle of the 'social contract;' that every man may do what he pleases with his own, so far only as that he does not thereby encroach on the privileges of others. Did the pretended sale of the ship in the cases now under consideration come within the category of either of the objections presented by Chancellor Kent? It can not be said to have been '*against good morals* or against the principles of sound policy.' I think the position may be assumed that it is a common practice, recognized by the commercial nations of the world, to seek protection to private property on the ocean by a transfer of the ship to a foreign flag. Sir William Scott said (see the case of the *Bennet*, 1 *Dodson*, 182):

"It has been the practice of all times to assume disguise for the purpose of imposing upon enemies. States in declared hostility frequently stand in need of the commodities of each other's country, and ships have in all times been permitted to assume disguise for the purpose of supplying such necessities. *Seemle* that such disguises, assumed for the purpose of deceiving the enemy, are not a ground for condemnation.'

"Such change of flag is a safe precaution, recognized by the courts of admiralty; and such courts are rigid in requiring that such transfers shall be *bona fide* and absolute, in order to escape condemnation before a prize court. The reason of this is that in cases of lawful *prize* the rights of third parties (the captors) are involved, and prize courts will not allow legal captures to fail and enemy's property to escape condemnation by any collusions and deceptive transfers. (See the cases of *The Jemmy*, 4 Rob. Adm. Rep. p. 31; *The Omnibus*, 6 Rob. Adm. Rep. 71; *The Andromeda*, 2 Wallace, 481; *The Baigorry*, 2 Wallace, 474; *The Jenny*, 5 Wallace, 183.)

"Such transfers cannot be said to be against 'sound policy.' The commercial marine of its citizens, although private property, constitutes a material portion of the power, wealth, and efficiency of every nation. Its commercial tonnage is regarded with pride by every country as an element of its strength. Therefore, any honestly entertained purpose to secure this great element of national power and wealth by misleading the public enemy, where no wrong to third parties is involved, and where, owing to the peculiar circumstances of the case, the nation can not afford protection, is rather favored than discouraged by national policy. It certainly is tolerated.

"Was the transfer to the British flag of the *Texan Star* 'founded in fraud?' This depends upon the *animus* of the parties in the transaction. All the testimony goes to show that Captain Pike reluctantly resorted to the transfer of the ship to the British flag as the only safe method of saving her from destruction. The thing was not done in a corner. No secrecy was attempted, except as against the public enemy. Mr. Brooke, the official representative of the American Government, was consulted, and sanctioned the proceeding. No

private gain or profit was the object in view; it even entailed expense on Captain Pike and the other owners of the vessel.

"Was the transfer 'in contravention of the positive provisions of some statute law?' We are not aware of the existence of any such law. So far from it, prize courts recognize such transfers, where they are *bona fide*, as being valid and binding. On the other hand, they are very vigilant in examining and exposing such transfers when they are fictitious and intended to do wrong to others. In many cases such pretended transfers to another flag are either to invade the rights of others or to violate the law, either of the power whose flag is abandoned or of that whose flag is assumed, or to deprive legal captors of rightful prize. In all such cases prize courts treat such transfers as null and void. It is readily admitted that if a war had existed between the United States and Great Britain at the time, and the *Texan Star*, or *Martaban*, had been captured by a British cruiser, she would properly have been condemned as lawful prize; or if the Confederate States had had any port to which the vessel could have been taken, she would have been condemned—and why? Because, being truly an American vessel, notwithstanding the pretended sale, she would have been regarded as enemy's property, therefore making such capture lawful according to the law of nations, and because the captors would have had a just claim to the captured property.

"Because the law regulating the action of prize courts will not listen to the plea of change of flag where the object is to deceive and defraud—and where the consequences are to impinge upon the rights of others, either nations or individuals—does it necessarily follow that a party directly concerned may not himself insist upon the nullity of such change of flag, where there is no purpose to interfere with the rights of others or to violate any law?

"In deciding upon the application of the parties in these cases the same *reason* does not apply that applies in prize courts. Here there are no third parties whose rights are to be injuriously affected. Here there was no disposition to violate any law or to contravene any principle of public policy. Here the maxim of Lord Coke seems to be in point, '*Mutata legis ratione, mutatur et lex.*'

"There is no law making the assumption of the flag of another nation a crime *as such*, with any special punishment annexed thereto.

"True, the policy of commercial nations induces them to foster and protect their shipping interests. In the United States and in Great Britain especially this policy encourages the citizen to name and to register and to navigate his vessel as of his own country. But, so far as our country is concerned, it is not compulsory. There is a law of the United States that American vessels, unless duly enrolled and having a license in force, shall not be entitled to the privilege of vessels employed in the coasting trade or fisheries (see Rev. Stat.

sec. 4311). But there is no law *compelling* or requiring registration, enrollment, or license; the law only denies to vessels certain privileges if they are not so registered, enrolled, and licensed. A citizen of the United States may own a vessel not having such registration, enrollment, or license, and may employ her in foreign commerce. The act of 10th February 1866, chap. 8, provides:

“That no ship or vessel which has been recorded or registered as an American vessel, pursuant to law, and which shall have been licensed or otherwise authorized to sail under a foreign flag, and to have the protection of any foreign government during the existence of the rebellion, shall be deemed or registered as an American vessel, or shall have the rights and privileges of American vessels, except under the provisions of an act of Congress authorizing such registry.”

“But it does not provide that no such vessel shall be owned by a citizen of the United States, nor that the government will not protect him in the ownership of such vessel. The act of 1792 also provides (see Rev. Stat. sec. 4172):

“That if any ship or vessel heretofore registered, or which shall hereafter be registered, as a ship or vessel of the United States, shall be sold or transferred, in whole or in part, by way of trust, confidence, or otherwise, to a subject or citizen of any foreign prince or state, and such sale or transfer shall not be made known in manner hereinbefore directed, such ship or vessel, together with her tackle, apparel, and furniture, shall be forfeited.”

“‘The manner hereinbefore directed’—that is, alluded to—is that (see sec. 4171):

“‘When the master or person having the charge or command of a registered vessel is changed, the owner, or one of the owners, or the new master of such vessel, shall report such change to the collector of the district where the same has happened, or where the vessel shall first be after the same has happened, and shall produce to him the certificate of registry of such vessel, and shall make oath, etc.’

“Here it will be seen that the penalty of ‘forfeiture’ attaches, not to the transfer of the vessel to a foreign flag (which is made entirely lawful when the prescribed conditions are complied with), but it is the failure to report the facts to the collector of the district that works the forfeiture. In the case of Captain Pike and the other owners of the vessel, it was impossible to report the facts to the collector in order to save the vessel from forfeiture. The vessel was destroyed. The law does not require impossibilities. *Lex non cogit rana seu impossibilia*. So far as the consequences to the vessel, the cargo, and the crew were involved, the destruction of the ship by the *Alabama* was as if done by the act of God.

“If the captain of the ship had returned with her and had not made known the transfer, change of name, etc., he would have been liable to the penalty of the statute; but the penalty is imposed, not for making the sale or changing the name, but for not making the fact known as required. He never did return with the ship, and consequently did not violate the statute, and the question of forfeiture is out of the case altogether.

"Supposing the conveyance of the ship to Currie to have been null and void, yet can the complainants be allowed to urge the invalidity and designed collusion of their own acts? Are they estopped from denying the force and virtue of their own deed? They certainly would be if thereby the rights and interests of third parties were to be affected. If the transfer of the ship to the British flag had been a wrongful and illegal act, it might be the safer course to leave the parties to reap the consequences of their folly or their crime. But, looking to all the consequences, and the *animus* as we are able to judge of it by the testimony, we do not think the law of *estoppel* applies in this case. There are no third parties whose rights are to be affected by the denial by the complainants of the validity of the transfer to Currie. There is not estoppel as against Currie. Currie is not here to plead such estoppel, and we are not called on to go out of our way to protect the rights of him, a British subject. Bouvier, in his Law Dictionary, defines estoppel:

"Where a fact has been admitted or asserted for the purpose of influencing the conduct or deriving a benefit from another, so that it can not be denied without a breach of good faith, the law enforces the rule of good morals as a rule of policy, and precludes the party from repudiating his representations or denying the truth of his admissions. * * * The principle has come to be applied in all cases where one, by words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own private position."

"The same doctrine of *estoppel* as laid down by the Supreme Court of the United States, in *Van Rensselaer vs. Kearney* (11 Howard, 297), seems to be specially applicable in the cases before us. Mr. Justice Nelson then said:

"Estoppel bars the truth only in the case where its utterance would convict the party of a previous falsehood; would be the denial of a previous affirmation upon the faith of which persons had dealt and pledged their credit or expended their money. It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when, in conscience and honesty, he should not be allowed to speak.

"The doctrine as to estoppel declares the truth only in the case where its utterance would convict the party of a previous falsehood, upon the faith of which persons had dealt, pledged their credit, or expended their money."

"Currie is not within the category of this doctrine, even if he were a party contestant here, which he is not. So far from being misled by falsehood or breach of faith, he was a willing party to the transaction. There is a concurrence of decisions in many of the States of the Union in favor of the doctrine that no one can plead the acts or declarations of another by way of *estoppel*, except where he has *himself* been misled or deceived thereby.

"The complainants are not estopped as against the United States. In the first place, they have not misled or deceived the United States. In the second place, the United States does not occupy the position of a party litigant, with rival interests

to defend, but rather the position of a 'respondent' to an appeal to its protection in a transaction where the complainants suffered loss, in an effort to protect its commercial marine against a public enemy.

"The cases cited to prove that a colorable transfer to a foreign flag can not be relied upon to save a vessel from condemnation by a prize court do not, as it seems to me, apply in the cases before us. In the case of the *Margaret* (9 Wheat. 421), the transfer was to the Spanish flag, for the avowed purpose of evading the Spanish revenue laws, which involved a loss of money to the Government of Spain. Mr. Justice Story said well in that case:

"There is certainly nothing in this record that shows that the intention might not also have been to evade the American revenue laws; for the obvious purpose of keeping the Spanish master and papers on board was to assume the American character in our ports, and to reassume the Spanish character on the next voyage, so that the parties might obtain the fullest benefit of the double papers."

"The question was, whether the vessel was forfeited to the government under the act of 1792. The rights of third parties were involved. The proceeding was 'against the principles of sound policy—founded in fraud—and in contravention of a positive provision of law.' In such a case, of course, the parties defendant were not allowed to plead the invalidity of their own acts.

"In the case of the *Fortuna* (1 Dods. Adm. Rep. 87), the sale was by an American owner to a Portuguese, with a view to fitting her out as a slave ship. She was confiscated on the ground that Great Britain and the United States having declared the slave trade to be beyond the pale of national protection, the sham sale of the vessel was void because of the criminality of the purpose intended.

"In the case of the *William Bagalley* (5 Wallace, 410), the vessel was captured in an attempt to run the blockade at Mobile. She was sailing under the Confederate flag, and the court simply refused to recognize the intervention of a part owner of the vessel, who had remained loyal during the war.

"In the case of the *Success* (1 Dods. Adm. Rep. 131), the vessel was condemned for a violation of the British orders in council of January 1810, which prohibited intercourse between all ports from which British ships were excluded. She was captured while prosecuting a voyage from Gottenburg to Malmo, under the Swedish flag; and the evidence showed that the cargo and a moiety of the ship was Swedish property, and the other moiety was British property.

"In these cases mentioned, all of which were prize cases, the condemnation was not by way of punishment or forfeiture for the desertion of one flag and the seeking the protection of another. The courts simply declared that they could not, by a fictitious transfer of the property and change of flag, avoid the responsibility that would attach to them in their original character; that when engaged in or preparing to commit any unlawful

act, or to impinge upon the rights of others, all such collusive and deceptive transfers for the objects mentioned should avail nothing before prize courts.

"Even admitting the sale of the ship from Captain Pike to Currie was valid and binding, and that the complainants are *estopped* from pleading the nullity of the sale and the invalidity of the transfer, still it seems that the complainants, in virtue of the mortgage, accompanied by unqualified power of attorney and possession, must be regarded as the legal owners of the ship.

"The well-recognized policy of the law, resting on an uninterrupted series of decisions, is peculiarly favorable to mortgagees in possession. If the deed from Pike to Currie was valid, the mortgage from Currie to Pike must also have been valid. Mr. Justice Strong, in the case of *Brobst vs. Brock* (10 Wallace, 519), in the United States Supreme Court, thus expounds the doctrine of the effect of mortgage:

"As between the parties to the instrument or their privies, it is a grant which operates to transmit the legal title to the mortgagee, and leaves to the mortgagor only a right to redeem. * * * Courts of equity as fully as courts of law have always regarded the legal title to be in the mortgagee until redemption."

"True, this case involved the title to real property, but the law leans still more favorably to mortgagees in possession of personal property. The books abound with cases that recognize a mortgagee in possession as the legal owner of the property, and as entitled to the rights and privileges, and liable to the duties and responsibilities, of ownership. The mortgagee of a ship may take out a register in his own name, and even before delivery, and may exercise the rights of ownership. A mortgagee of a ship may maintain an action of replevin against an attaching creditor, and also against one claiming to have purchased from the mortgagor. A mortgagee of personal property may maintain trespass against a stranger who takes it from the possession of the mortgagor, even in cases where the debt is not yet due, and has not come into the mortgagee's possession, and even where the mortgage is not recorded. (See the following cases: *De Mattos vs. Gibson*, 1 Johnson and Hemming, 79 Eng. Chanc. Rep.; *Weston vs. Penniman*, 1 Mason U. S. Circuit Rep. 306; *Ring vs. Franklin*, 2 Hall N. Y. Rep. 1; *Esson vs. Tarbell*, 9 Cushing's Mass. Rep. 407; *Harding vs. Coburn*, 12 Metcalf's Mass. Rep. 333.)

"The above decisions clearly show that even if the deed to Currie was binding, still the legal title was in the complainants, as mortgagees in possession, and that as such they possess all the rights and remedies recognized as pertaining to absolute ownership. In a late case decided in England it was held where a ship was mortgaged to secure a loan from the mortgagee to the owner, that by reason of the mortgage the mortgagee became the rightful owner of the ship. (See *Dickerson vs. Kitchen*, 8 Ellis & Blackburn, 789.) This was in conformity with the settled doctrine in such cases. In the case of

Westerdell vs. Dale (see 7 Term Rep. 312), Lord Kenyon held that—

“As to the cases respecting a mortgagee of a ship, whether in or out of possession, he is the legal owner, and must be so considered in a court of law, notwithstanding his title is subject to equitable interests.”

“The fact that Captain Pike, in his own right and as the agent of others, with full powers, was in the actual and peaceable possession of the vessel when she was destroyed, gives him a status as complainant before this court—as it would have given him the right to maintain an action for any tort against the ship. (See *Gelston vs. Hoyt*, 13 Johnson, N. Y. Rep. 561.)

“As to the effect of a mortgage upon freight, the principle is well recognized in the English courts that a mortgage of a ship carries with it the freight, and the mortgagee intervening by taking possession before the freight becomes payable, is entitled as against the mortgagor or his assignee in bankruptcy. (See *Rusden vs. Pope*, 3 Law Register Exchequer Rep. 269, 37 ditto, 137.)

“The counsel for the United States in his forcible argument, and also in his very able brief filed in these cases, takes the ground that the entire proceeding, first of a pretended sale from Pike to Currie, and then of a mortgage from Currie to the complainants, was irregular, illegal, according to British law, and an attempted fraud upon the British Government, and therefore should not receive relief or countenance from this court. He earnestly urges the points that ships belonging to British subjects must be registered under the merchant-ship-*ping* act in order to be recognized as British ships; that in order to obtain such registration the person applying must subscribe a declaration, denying that any alien holds any legal or beneficial interest in such vessel; that no notice of any trust, express, implied, or constructive, shall be recorded or entered by the registrar; that the movement to procure fraudulent documents and get the ship registered as a British ship, when there was no intention, in fact, of changing her American character, involved conspiracy and combination to override the law and impose a simulated British ship upon the Government of Great Britain; and that if the whole facts of the case should be exposed upon a proceeding to enforce such a mortgage in a British court, the mortgage would be at once declared a fraud on British law. Admitting all this to be true, yet, with all deference to the learned counsel for the United States, I do not see how that should affect the status of the applicants before this court. They may have blundered; they may have acted illegally, judging from a British standpoint, but are we called on to take judicial cognizance of these facts? Conspiracy and combination to defraud is a judicial fact, the result of investigation and trial. No such stigma as that supposed has been put on the acts of the complainants by any

court—no such annulment of the mortgage. Was their loss of the ship owing to the facts of the sale and mortgage? Was it not owing to other causes altogether extraneous to the negotiations between Pike and Currie?

"The counsel for the United States admits that the sale of the ship to Currie by Pike was a valid sale, as against the vendors, and that it transferred the right of property in the ship to a British subject. He also admits that 'as against Currie the mortgage might be maintained upon the doctrine of estoppel.' Although the mortgage was not registered, that was not material as against Currie, and it has not been set aside in any British court for illegality. Although the mortgage may not have been recorded according to the requirements of the British statute, that could not affect its validity as between Pike and Currie, or enable anyone but subsequent mortgagees, purchasers, or creditors to contest the force of the mortgage, although it may not have been recorded. (See Kent's Com. vol. 4, p. 168, 12th edition.)

"Although the British shipping act required that the registration of the ship, as a British ship, should have been done with all due forms and conditions, still the neglect of such registration, while it might deprive the ship of certain rights, privileges, and advantages appertaining to lawfully registered ships, could not affect the question of the right of property under the sale and mortgage. Shall we summarily dismiss the complainants because they may have blundered into a neglect or violation of British law, while endeavoring to avoid the misfortune that has brought them as petitioners to our bar?

"Stress has been laid by the United States counsel upon the fact that prize courts look with disfavor on mortgages and other beneficial interests, set up to captured property; and he cites the cases of the *Hampton* (5 Wall., 372), the *Aina* (Spink's Eccles. and Adm. Rep. 315), the *Ida* (Spink's do. 331), the *Maria* (11 Moore's Privy Council Rep. 271), the *Amy Warwick* (2 Sprague, 150), to sustain the position. That is all very true, and for the reason that prize courts cannot stop to investigate all the niceties and details of beneficial interests in captured property. They interfere with and impinge upon the rights of others, captors in prize cases.

"Chancellor Kent (vol. 1, page 87) says: 'If prize courts were to open the door to equitable claims, there would be no end to discussion and imposition.' In the case of *Hampton* (5 Wall. 372) Mr. Justice Miller says:

"'If the claim of a mortgage were once admitted in these courts, there would be an end of all prize condemnations. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to a capture would only have to raise a sufficient sum of money on them by *bona fide* mortgages to indemnify them in cases of such capture.'

"It is not because the admiralty courts have any special spite against mortgagees *per se*, but because it would be impos-

sible to preserve the old landmarks of the prize-court system, and to preserve and enforce the laws regulating capture, if the prize courts had to take cognizance of and settle vexed questions of equitable interests constantly arising. But the same reason does not apply in this court. Because prize courts eschew discrimination between absolute ownership and mortgages and equitable interests, is no reason why this court should look on them with disfavor or impatience. There is no reason why this court should adopt, as the standard of its duty or the measure of its generosity, the principles by which prize courts regulate their action on the subject of mortgage.

"We do not think we could do strict justice to those persons whom it was the purpose of Congress to relieve, by adhering technically to the principles governing the admiralty courts, whether by 'instance' jurisdiction in time of peace, or 'prize' jurisdiction in time of war. While keeping within the limits of 'the principles of law' in admiralty, wherever applicable, we are constantly in danger of insensibly falling into the rigid technicality, which is inevitable for their guidance in courts of admiralty. In cases arising before such courts there are individual parties litigant, whose conflicting rights have to be protected and adjudicated. In prize courts the rights of captors have to be protected; and behind all personal rights involved there are certain great elementary principles of sectional policy and sectional interests that every maritime and commercial country must scrupulously guard and maintain.

"In this court our duties are somewhat peculiar. After discharging a great and important trust, our task will be ended, and we shall become *functi officio*. Here there are no individual parties litigant, whose conflicting rights have to be weighed with so much exactitude. The government allows itself to be sued as an act of grace. It invites the citizen to its protecting generosity. To be sure, it demands that the great landmarks of the law must be kept in sight; otherwise we would not be a court, and our decisions would lack uniformity and system. But within the purview of the 'principles of law' we are to decide according to 'the merits of the several cases.' These last quoted words are not unmeaning. They are not put there as a mere platitude.

"There are many cases in the admiralty reports which are so variant in their *conclusions* (although based on concurrent principles of law) that if we were to attempt to conform our decisions to those in prize cases we should find ourselves in endless confusion. In many cases (viz, the *Vigilantia*, 1 C. Rob. 13; the *Vrow Elizabeth*, 5 C. Rob. 2; the *Vrow Anna Catherina*, 5 C. Rob. 167; the *Fortuna*, 1 Dodson, 87; the *Success*, 1 Dodson, 130) the courts of admiralty have decided that a ship captured, sailing under the flag and papers of an alien enemy, shall abide the consequences of its own act; that it shall not be allowed to disclaim and ignore the nationality

of its own selection; that the party who takes the benefit of the flag and pass of another country is bound by them, when they turn to his disadvantage. On the other hand, there are many cases reported (viz, the *Bremon*, 1 C. Rob. 1; the *Embsen*, 1 C. Rob. 17; the *Endraught*, 1 C. Rob. 20; the *Omnibus*, 6 C. Rob. 71) where ships ostensibly transferred to neutrals, and sailing under neutral flags, with neutral documents, yet really belonging to alien enemies, have been condemned as belonging to the real and not the assumed nationality. In such cases the court not only allowed but favored and encouraged evidence to show that the transfer was fraudulent and simulated, and therefore not to be regarded.

"Now, which rule shall this court follow in deciding cases before us? Shall we say that inasmuch as Captain Pike changed his flag of his own accord, at the hazard of consequences, he shall not now be allowed to repudiate his own act, and prove to us the sale was a simulated one, and that his ship continued in fact to be an American ship, notwithstanding the collusive sale? Or shall we decide, in conformity with the other class of cases, that the pretended sale, being a sham and disguise for temporary security, was no sale at all, and the ship continued to be an American ship? We think we should not be governed by either class of decisions, so far as awarding judgment is concerned. We fully admit the soundness of these decisions, most of which were by that great judge, Sir William Scott, as applicable in the cases as presented before him. We also admit there is really no inconsistency in the decisions upon these two classes of cases, although variant in their results. They were both right, viewed from the standpoint of the established principles governing prize-court adjudications. But we are not sitting as a prize court. Let us suppose a case by way of illustration. The Confederate States were recognized as entitled to belligerent rights by the European powers. Suppose the Confederate States had been at war with Great Britain, instead of the United States, and had captured the *Martaban* as a British ship; suppose she had had the benefit of a prize court before which to carry her prizes, and suppose we had composed that court. According to the principles of law applicable in such cases, we would have had to condemn her as lawful prize. We should have had to say to Captain Pike, 'You selected your nationality and your flag; it has got you into trouble; we can not allow you to repudiate your own deliberate act, and therefore we shall not entertain the question as to whether the vessel was transferred to the British flag collusively or in good faith.'

"On the other hand, suppose the *Martaban*, captured as she was, as an American ship, notwithstanding her British flag and her British register. I suppose we would, without doubt, have condemned her as a lawful prize to the Confederate States steamer, the *Alabama*, and have admitted testimony to prove that she was in fact an American ship, and that the

transfer to the British flag was a mere pretense and attempted deceit.

"But, I repeat, we are not sitting as a prize court. We have no crowd of captors clamoring for their shares of the prize money and reminding us of the decisions in cases of capture. The warning and admonition we hear is that of a beneficent and paternal government, saying to us, 'Don't disregard the great principles of law, on which our free institutions rely for safety, but within that condition we confide in your sound discretion and your sense of justice to distribute this fund, with a view to the merits of the several cases.'

"This court will not lay down any standard of moral delinquency or shortcoming which may affect the capacity of anyone to appear before us as complainant. Whether Stevens and others, in their eager effort to avoid danger, may have complicated their affairs and jeopardized their interests, whether a British court might have pronounced the simulated sale and subsequent mortgage as an attempt to defraud and swindle British law and British interests, are questions with which this court has nothing to do.

"The argument that prize courts will not recognize the distinction between legal and equitable interests, or allow any such rival claims to interfere with their action in proceeding to condemnation of the vessel or cargo of an enemy, proves too much for the purpose for which it is introduced. It shows that prize courts make no distinction between mortgagees and original owners; in fact, that mortgagees are to be regarded as the owners.

"If mortgagees are liable to the same responsibilities and dangers involved in capture as the original owners, they certainly should be entitled to the same measure of remuneration and redress from any party bound to afford such remuneration and redress. Was not Great Britain as much bound to make redress to an American mortgagee that suffered from the depredations of the *Alabama* upon the mortgaged property as to an American mortgagor? The question is, Who suffered loss? If the effort of Stevens & Co. to save their property by means of transfer and mortgage resulted in failure, and the loss was occasioned by the default or connivance of Great Britain, was not Great Britain bound to make remuneration to them in common with other sufferers?

"This claim of Stevens and others was, in due form, transmitted to the Department of State; was by that Department laid before the arbitrators at Geneva; was, in common with other claims, subjected to the rigid scrutiny of the representatives of Great Britain, and never was objected to, as was the claim of John Burns, on the ground of his being a British subject. They interposed no objection on the score of the vessel having been sold to Currie, and was therefore the property of a British subject. (See 4th volume Claims of the United States against Great Britain, and Report of the Committee on the

Board of Trade, Schedule C, page 103 of British Counter Case.)

"In the cases before us, it is not denied that the parties complainant were loyal during and through the war. It is not denied that they have never received compensation from any other quarter. It is not denied that they suffered loss directly resulting from damage caused by the insurgent cruiser, the *Alabama*; but it is denied that they are entitled to the protection of the United States in the premises. It should be borne in mind that this is the only means afforded them of invoking that protection in the premises. It was because it was impossible, under the circumstances, for the United States to protect them that the loss occurred. It was because of this impossibility to obtain protection from their own government that they resorted to this pretended sale and transfer to a foreign flag. The doctrine is laid down by Vattel (book 2, chapter 6) that—

" 'Whoever uses a citizen ill indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation, since otherwise the citizen would not attain the great end of the civil association, which is safety.'

"The protection sought before this court is against the act of a public enemy, against which the United States could not afford protection at the time. Did the parties forfeit this right to protection because of the transfer to another flag under a pretended sale, or because the vessel no longer had an American register? We think not. They still preserved their characters as American citizens, and the protection of their government still ensured to them to be extended at the earliest possible time and in the only possible way. By the usage of nations, cruisers are allowed, in war, to resort to stratagem in order to make a capture, and so a vessel pursued does not compromise her rights or her nationality by running up a false flag or using simulated papers or adopting other devices in order to escape capture. As to the effect of registration Chief Justice Mansfield (in *Cheminant vs. Pierson*, 4 Taunt. 357) said:

" 'The register is not a document required by the law of nations, as expressive of a ship's national character.'

"In Smith's Mercantile Law (p. 143-4) it is said that—

" 'No ship is required to be registered, registry being only necessary to confer privileges on that particular ship.'

"Parsons, in his Maritime Law (vol. 1, p. 39), says:

" 'The law is unwilling to recognize in the fact of registration any other efficiency than that of imparting certain privileges, or to permit the absence of that registration to have any other effect than merely to prevent these privileges from attaching to the ship.'

"Chancellor Kent (see Kent's Com. vol. 3, p. 146):

" 'The registry is not a document required by the laws of nations. The registry acts are to be considered as forms of local or municipal institutions for purposes of public policy.'

"Attorney-General Cushing, in an official opinion, says (see 6th Attorney-Generals' Opinions, p. 649):

"The statutes do not *require* a vessel to be registered or enrolled; and if owned by a citizen of the United States, she is American property, and possessed of all the general rights of any property of an American."

"And, further, Mr. Cushing says (page 652), when speaking of the right of an American citizen to purchase and own a foreign ship:

"The ship so purchased becomes entitled to bear the flag and receive the protection of the United States."

"And this without any reference to registration.

"It thus seems that the complainants, whether continuing to be the absolute owners in consequence of the invalidity of the fictitious sale, or whether, as mortgagees in possession, with unlimited authority, whether with or without any register, owned property in the *Texan Star*; that that property was under the protection of the United States; that this property was lost to them from damage directly resulting from the act of the Confederate cruiser; that the ship was destroyed by the *Alabama* as an American ship, and as the property of American owners; and therefore the complainants come within the provisions of the act of Congress providing for distribution under the Geneva award.

"As to any shortcomings of Captain Pike and the other complainants, on the score of patriotism—as to whether they preferred to save their gallant bark, that had so often braved the hurricane and the tempest, rather than see her converted into a bonfire upon the ocean—that is a matter of *sentiment*, which, sitting as judges, we dare not entertain. While we might as individuals admire that defiant patriotism which would rush into the very jaws of danger rather than attempt by circumvention to delude a public enemy, yet in the absence of all proof tending to show any ignoble or unworthy motive, in the exercise of charity we might not be unable to impute to Captain Pike a praiseworthy object in trying to protect by indirection a portion of the commercial marine of his country where he was utterly powerless to resist by force.

"Ever since *Æsop* wrote the fable of the oak and the reed, it has been regarded as the part of wisdom to bow to the storm that can not be safely resisted. Owing to one of these peculiar contingencies that arise in the history of nations, our commercial marine was in danger of being swept from the seas; and that result was, in great measure, prevented by a resort for protection to a foreign flag. Those who navigate ships in commercial ventures are scarcely actuated by purely patriotic impulses. Private gain is the leading object. True, it is a pursuit where private gain and national power go hand in hand. May it not be that there is as much patriotism in trying to save a nation's commercial wealth by deceiving the enemy as by defying him, where personal prowess can avail nothing? We

may admire the stoical firmness of a Scævola, who thrust his hand into the flames to be consumed, by way of showing to the public enemy his defiant resentment and unforgiving resolution, while prudence might suggest whether it would not have been wiser to preserve his hand, with which to strike for his country at a more auspicious day. Abraham did not forfeit the blessings under the covenant of the promise because he assumed for Sara the disguise of being his sister, that he might thereby deceive the Egyptian King and thus secure the safety of himself and the honor of his wife. In justice to Captain Pike it should be borne in mind that he was not acting for himself alone. He was acting in a fiduciary character for others who had intrusted to him their interests, and whose confidence he possessed. It may be that, while it wrung his heart with anguish to repudiate the flag of his country, even temporarily, yet that he felt that duty to others required he should do everything in his power to save their property from destruction.

"We render judgments in favor of the complainants in each case.

"Wells, P. J., and Baldwin, J., dissenting."

On the question of the exclusion of the
Claims of British Sub-
 jects. claims of British subjects, the second *Alabama*

Claims Court, in the case of *John Cassidy v. The United States*, No. 144, departed from the view of the first court, and held that such claims were admissible. The court, Harlan, J., delivering the opinion, held that the money paid under the Geneva award "became the property of the United States, to be disposed of according to the sovereign will of Congress;" that "Great Britain could not be supposed to feel any concern" whether the money "should be put into the Treasury of the United States for the common benefit of all its citizens or distributed in whole or in part to the individual sufferers;" and that "why Great Britain should feel offended if some small fraction of it should be awarded to subjects of Great Britain resident in the United States and under the protection of the United States flag on the high seas, it is difficult to imagine."

In the case of *John McStea v. The United*
Charges of Disloyalty
 as to Partners. *States*, No. 1015, Class I., second *Alabama*

Claim's Court, a claim was made for property destroyed on the high seas by a Confederate cruiser. It appeared that the claimant, a British subject, was at the time (1864) doing business in New Orleans as a member of the firm of McStea & Value, Value acting as the purchasing member of the firm in New York. McStea had a two-thirds interest in

the partnership, which was a general one, and claimed for two-thirds of the value of the property destroyed, no claim being made for his copartner, for the reason, as stated by the only witness in the case, a clerk of the house, that "he could not swear to his loyalty to the United States Government." The question arose as to whether a claim for partnership property could be so divided where the disloyalty of one or more of the partners was alleged. The court referred to the case of *J. Lerois & Co. v. The United States*, Davis's Report, 109, where a claim was so divided on proof that the claimant was not responsible for the disloyal conduct of his partner. But in the present case, French, J., delivering the opinion of the court, said:

"In the present case we have a general partnership between two persons, continuing during the whole period of the rebellion, the disloyalty of one of them resting upon the same testimony as the neutrality of the other; the alleged disloyal partner residing all the time in New York, while the other remained in New Orleans, without anything from which the court can draw a conclusion as to whether the disloyal acts were or were not imputable to the claimant, except the general statement of a third person (both partners being alive and not testifying) that the claimant 'remained neutral' during the rebellion, and did not, to his knowledge, aid or assist the Confederates in any way.

"As the case stands, as well upon the evidence presented as upon the absence of testimony easily attainable and necessary to establish the claimant's right to recover, we think the presumption is that the disloyal acts of Value were imputable to McStea, and judgment must therefore be entered for the United States."

4. ASSIGNMENT OF CLAIMS.

A claim was made (1) for \$552.11, with interest at 5 per cent. from November 7, 1818, the sum originally due Capt. Manuel Antonio de Aroiza, a Mexican, for salary; and (2) for \$3,498.69, with interest at 5 per cent. from December 25, 1816, the sum originally due Lieut. Col. Ygnacio de Aroiza, also a Mexican, for certain supplies furnished to the Mexican troops. The Mexican commissioners contested the claim on the ground that it was not within the competency of the commission, since it consisted of debts originally due from Mexico to its citizens which had come into the hands of the American claimants by assignment.

Case of Parrott &
Wilson, 1839.

The umpire, June 2, 1841, decided that the claim could not be entertained.

Parrott & Wilson v. Mexico: Commission under the convention between the United States and Mexico of April 11, 1839.

The foregoing decision was discussed in *Slocum's Case*. another case, the circumstances of which, however, presented somewhat different features. These circumstances were as follows:

In 1835 William A. Slocum, a citizen of the United States, sent a cargo of dry goods to Mexico consigned to his agent, Thomas Buchart, of Guaymas, who sold them to José Elias, a merchant of Arispi, in the State of Sonora, for upwards of \$10,000. In payment for the goods, Buchart received and indorsed over to Slocum certain drafts which the State of Sonora had, in the exercise of practically sovereign powers, issued on the interior custom-house of Guaymas. As a portion of the revenues of the State was pledged for the payment of such drafts, they became a kind of circulating medium and were used as a substitute for money in commercial dealings. The primary object of their issuance was the payment of debts in the civil administration of the State government. It seems that when Buchart received the drafts in question from Elias he expected to obtain payment of them and to remit the proceeds to Slocum, but failing to do so, assigned the drafts themselves. By this transaction Slocum, as it was maintained, became "a *bona fide* creditor of the State [of Sonora] to the aggregate amount" of the drafts.

While the transaction between Slocum, Buchart, and Elias was in progress, the State of Sonora, under the centralized government established by the Mexican constitution of October 27, 1835, yielded up its sovereign powers and became a constituent part of the Mexican Republic. It was alleged by the claimant that the republic expressly assumed the debts of the States, but that the exigencies of the Texan revolt caused the diversion of the revenues to another object, so that the drafts were not paid.

A claim having been made for the payment by Mexico of the amount of the drafts assigned to Slocum, the Mexican commissioners objected to the claim on the following ground:

"5th. This claim arose out of a private transaction between Elias and Slocum, and became a debt of the central government of Mexico in consequence of the discontinuance of the

sovereignty of the States, and was embraced in the general debt resulting from particular debts contracted by the several States, and which the Government of Mexico has acknowledged or recognized, without having hitherto agreed to give a preference to any one of them."

The American commissioners in reply said:

"It is admitted by our Mexican colleagues in the fifth point of their statement of facts that the claim '*became a debt of the central government of Mexico.*' They further state that it is embraced in the general debt which the government has '*acknowledged or recognized.*' It is then beyond doubt or question a claim against the Republic of Mexico. * * * No reason whatever appears on the statement of facts made by the Mexican commissioners against the allowance of the claim by the board unless it is to be drawn from the concluding remark of their statement of facts—which is in effect *that the Mexican Government has not hitherto given any preference to any one of these debts*—that is, the debts of the States previous to their being consolidated into the Mexican Republic. We confess our inability to draw any such inference from such a fact if it were established. The Mexican Government has solemnly agreed to submit all the claims of American citizens against her to this board; it is required to decide them according to the principles of justice, etc., and in case of an award by the board or the umpire against her she agrees to satisfy the award in a particular way. Our colleagues intimated that this case was similar to that of Parrott & Wilson, which the umpire had decided not to be within the cognizance of the board, but as the umpire had not expressed his reasons or the grounds of his decision, our colleagues appeared to be quite at a loss to state what they were, and we were in a like state of uncertainty. The features of the two cases are very dissimilar, and without knowing the grounds of the former decision we cannot positively say that a similar ground may not be found in this case; but we believe it is highly improbable. Parrott & Wilson had a bill or certificate issued by the Republic of Mexico to one of its own citizens, in which it explicitly acknowledged itself to be indebted to the holder thereof in a certain sum. * * * But this is an entirely different case. The claimant does not hold the accredited paper of Mexico. The claim was not bought up in market on a speculation. * * * This is a claim which arose directly out of the commercial transactions of the citizens of the two republics, and is not a speculation in the securities of the Government of Mexico, as was the fact in the case of Parrott & Wilson."

The American commissioners held that the claimant was entitled to an award of \$8,365.07, the principal of the drafts, with interest at 5 per cent from August 1, 1835, to the date of the award.

The umpire, October 27, 1841, disallowed the claim. His reasons were not disclosed, except so far as they may perhaps be gathered from the following statement which he made of the position of the Mexican commissioners:

"The Mexican commissioners contended that the convention of April 11, 1839, had been concluded for the purpose of terminating discussion which had taken place in regard to claims which had been made by citizens of the United States who had suffered injustice on the part of the Mexican authorities, either in person or in their property; that demands against the Mexican Government for certain bills drawn for the profit of certain public functionaries and other creditors of the government could not be included in those claims; that the assignees could not acquire a greater right by the assignment than had been possessed by the first creditor; that in consequence the present claim was not comprised by the word 'claim,' and that the mixed commission could therefore not allow it."

Jane H. Slocum, executrix of William A. Slocum, v. Mexico: Commission under the convention between the United States and Mexico of April 11, 1839.

The claim of Parrott & Wilson was brought
 Case of Parrott and by W. S. Parrott, surviving partner of the
 Wilson, 1849. firm, before Messrs. Evans, Smith, and Paine, commissioners under the act of 1849, who, after adverting to the fact that the claim had been held by the umpire not to be within the competence of the commission under the convention of 1839, said:

"It is not therefore among the claims provided for by the fifteenth article of the convention of 2 February 1848, and can only be considered as a new claim now for the first time presented. It has an ancient origin, and grows out of debts originally due to two Mexican officers * * * for military services and supplies furnished in the early period of the Mexican war of independence. These debts were recognized by the Government of Mexico about the year 1826, but, although repeated efforts were made by the Mexican holders of them to obtain payment, no satisfaction appears ever to have been made. Several transfers and assignments of them were made to Mexican citizens, until, in the year 1829, they fell into the hands of Parrott & Wilson, American merchants residing in Mexico, who claim to be the assignees for a full consideration of the sums thus originally due by Mexico to her own citizens.

"From the view which the board take of claims of this description it is unnecessary to decide certain questions which arise in the case touching the sufficiency of the proof and the validity of the title of the claimant for want of competent authority in some of the antecedent parties to make the transfer.

The claim was not American in its origin. For the reasons more fully set forth in the opinion of the board upon the memorial of F. M. Dimond, this claim can not be regarded as valid against Mexico, under the treaty of 2 February 1848, and it is accordingly not allowed."

The claim of Slocum also was brought before the commissioners under the act of March 3, 1849 by Henry May, his administrator. The commissioners, after describing the origin of the claim, said:

"These drafts are now presented as a claim against the Government of Mexico. It is alleged that after the issue of the drafts the State of Sonora became a part of the Republic of Mexico, and its sovereignty was merged in that of the republic. It is contended that the merger of the sovereignty of the State by the Republic of Mexico created an implied obligation to pay the debts of the State. It is also alleged that there was an express assumption of the debts existing prior to the union. No evidence has been presented of any express assumption of the debts of the States by the supreme government; and from the view which the board has taken of the claim it is conceived to be unnecessary to decide how far the change which occurred in the Mexican Government from a confederated to a consolidated form created an obligation to pay the debts of the States. A portion of these drafts appear to have been issued after a change in the form of the government was completed. * * *

"The claim was fully discussed before the board [under the convention of 1839], and upon a disagreement between the American and Mexican members was referred to the umpire for a final decision. * * * This board, not having access to the reasons which were assigned by the umpire for his decision, can only infer the grounds upon which he decided that this claim was not within the jurisdiction of the board from the evidence which was before him, taken in connection with the terms of the treaty defining the cases of which the mixed commission should take cognizance. The first article of the convention of 11th April 1839 provided 'That all claims of citizens of the United States upon the Mexican Government, statements of which soliciting the interposition of the Government of the United States have been presented to the Department of State or to the diplomatic agent of the United States at Mexico, until the signature of this convention, shall be referred to four commissioners, etc.' This claim was embraced in that description. Among the papers which were before the umpire as evidence in the case was a letter addressed by Mr. Slocum, claimant's intestate, to Powhatan Ellis, then 'the diplomatic agent of the United States at Mexico,' dated 30th July 1836, in which he presented the drafts as a claim against the Government of Mexico and urgently solicited the

aid of Mr. Ellis to secure their payment from that government. * * * The inference seems irresistible that it was decided to be without the jurisdiction of the board, upon the ground that it was not a claim of a citizen of the United States within the meaning of the treaty. A rejection of the claim upon that ground must have involved the merits of the case, as a subject of reclamation under the treaty, and under the terms of the treaty would be 'final and conclusive.' But without determining whether the decision of the umpire could be interposed as a bar to the examination of the claim upon its merits, the board will examine it with reference to its admissibility under the treaty of 2nd February 1848.

"In the case of Wilson & Parrott, and also in that of F. M. Dimond, the board has decided that no claim can be admitted as valid under the treaty which was not American in its origin and which has not retained its American character up to the time of its presentation to the board. * * * It is not sufficient for a claimant to show that he is a citizen of the United States and that he holds a claim against the Government of Mexico. * * * The board has given a liberal construction to the treaty in favor of claimants by admitting, as valid, claims arising out of contracts with the Government of Mexico. To enlarge this construction still further by admitting, as valid, claims that are based upon contracts between Mexico and her own citizens, and which have passed into the hands of citizens of the United States by assignment, would be in violation of both principle and precedent. * * *

"An application of these principles to the claim under consideration compels the board to reject it. The drafts were issued by the State of Sonora to its own citizens in payment of debts due them from the State. They were voluntarily received by the agent of Slocum in payment for his property sold to a citizen of that State. The obligations were not American in their origin and have passed into the hands of a citizen of the United States only by assignment. If it should be conceded that the Government of Mexico became responsible for the debts of Sonora, that liability would not impart such a national character to the claim growing out of these drafts as would bring them within the terms of the treaty and the rule of decision which the board has adopted. The board therefore decides that the claim now presented is not a valid claim against the Republic of Mexico under the treaty, and the same is accordingly disallowed."

Dimond's Case.

"The claimant sets forth in his memorial that in the years 1843 and 1844 he was residing in the city of Vera Cruz and held the office of United States consul for that port; that during those years several persons alleged to have been citizens of the United States, who had been serving as seamen in the Mexican Navy, were discharged

by the expiration of their terms of service without receiving from the Government of Mexico the compensation due to them for such service; that they applied to him for assistance in obtaining the wages to which they were entitled; that he was unable to obtain payment of the sums due to them, and that as they were destitute and in need of assistance he advanced money to them and received assignments of their claims against Mexico; and he now prefers them in his own right, and asks their allowance with interest. The memorial further states that at the period of these transactions these seamen were living in Mexico for the time being, but that it is utterly impossible for him to state or to express an opinion as to where they may be residing at the present time.

"When citizens of the United States leave their own country and enter into the service of another, they thereby voluntarily renounce their allegiance, and with it relinquish their right to the protection of the government under which they were born. They are to be regarded as citizens of the country of their adoption and in whose service they are employed. As they can have no just claim to the protection of the government of the country which they have abandoned, they can convey none by assignment to one who has never renounced his allegiance, and has always been entitled to the protection due to a citizen of the United States. The present claimant stands in no better relation than those from whom his title is derived, and who, serving in some instances, in depredating upon American commerce, for which perhaps claims are now pending before this board. It does not appear that these men have ever returned to the United States, thereby resuming their original allegiance; they may have remained in Mexico, taking part against the United States in the late war between the two countries.

"But, however that may be, the board is of opinion that it was never contemplated by the treaty of February 2, 1848, to provide for indemnification to any others than citizens of the United States, who were such at the origin of the claim, and who were then entitled to the protection of its government. It could never have been intended that citizens of the United States could obtain valid claims under the treaty by taking assignments from Mexican subjects of demands against their own government, or from any other than an American source. None of the correspondence between the two governments sanctions the idea that any other than claims American in their

origin were or could be set up by the United States against Mexico, or were to be provided for. The same principle, it is believed, has been observed in all former commissions for awarding indemnities obtained from foreign nations for injuries to our own citizens. The following extracts from the published 'notes' of a member of the board of commissioners under the convention with France of 4 July 1831 shows that this subject was considered by that board: 'It was of course indispensable to the validity of a reclamation before the commissioners that it should be altogether American. This character was held by them to belong only to cases where the individual in whose right the claim was preferred had been an American citizen at the time of the wrongful act, and entitled as such to invoke the protection of the United States for the property which was the subject of the wrong and where the claim up to the date of the convention had at all times belonged to American citizens.' Again: 'It was necessary for the claimant to show not only that his property was American when the claim originated, but that the ownership of the claim was still American when the convention went into effect. A renunciation of American character in the intervening period would have disqualified him from prosecuting his reclamation against the fund. Nor could a claim that had lost its American character ever resume it if it had heretofore passed into the possession of a foreigner or of one otherwise incapacitated to claim before the commission. A purchaser from him would be merely the assignee of a defective claimant, and his rights would be measured by that of his assignor.' This board agrees with the commissioners under the convention with France in the principles thus enunciated and acted upon. To hold otherwise would be to expose the fund obtained and appropriated to indemnify citizens of the United States for injuries sustained by them, and who at the time of the injury were entitled to the protection of their government, to be swallowed up and exhausted by claims indefinite in number and amount, and of which at the negotiation of the treaty the United States had no knowledge, originally due to citizens of other countries and in whose inception no wrong whatever was done to the United States.

"In the opinion of the board the claim set forth in the memorial is not valid under the treaty of 2d February, 1818, and it is therefore rejected."

Claim of *F. M. Dimond*: Opinion of the commissioners under the act of Congress of March 3, 1849,

Robinson's Case.

Sophie Robinson, widow of John Hamilton Robinson, presented to the commission under the convention between the United States and Mexico of April 11, 1839, a claim for services which her late husband had rendered as a brigadier-general in the service of Mexico from 1815 to 1819. The claim was held by the umpire not to be within the competence of the commission. Subsequently Anthony S. Robinson, son of the deceased, presented a claim for the same services to the commissioners under the act of March 3, 1849. The commissioners rejected it, saying:

"It would be a sufficient objection to the memorial to say that the claim is not preferred by the proper person, an executor or administrator being alone the proper party to prosecute such a claim; yet the board does not hesitate to say that the memorial presents no valid claim for its consideration under the treaty with Mexico of 2d of February 1848. The principle which governs this case has already been decided by the board in the case of F. M. Dimond. It will be found there that the board has refused to recognize as valid a claim founded solely on military services rendered to a foreign government."¹

The principle laid down in the foregoing cases in regard to claims founded on military service to foreign governments does not appear to have been strictly applied by the commissioners in two other cases, if indeed they considered it relevant to the latter. In February 1828 an engagement took place between the Mexican brig *Guerrero* and the Spanish frigate *Lealtad*, resulting in the killing and wounding of a number of men. On the 27th of the following month the Mexican Congress passed an act granting pensions to the widows, children, or mothers of those who fell. Among those who fell were David H. Porter, the captain of the *Guerrero*, who was expressly named in the act, and Alexander H. McRae, a midshipman, both citizens of the United States. Neither Porter nor McRae left a widow or children, but each left a mother. It seems, however, that the pensions were not paid, and when the mixed commission under the convention of April 11, 1839, assembled, Rhoda McRae, the mother of Alexander H. McRae, presented a claim to it on account of the non-payment of the pension due for the death of her son. The commissioners differing, the umpire decided that the claim did not come within the convention; and it was afterward brought before the commissioners under the act of 1849, who, after describing the circumstances in which it originated and referring to the act of the Mexican Congress, merely said: "In the opinion of the board she [Rhoda McRae] has a valid claim against the Government of Mexico for the amount of the pension specified in the decree," i. e., in the act of the Mexican Congress. They subsequently awarded the claimant \$7,146 as principal and \$4,234.50 as interest, making in all \$11,380.50. They also awarded to Henry May, administrator of Mrs. Ann P. Boulden, mother of Captain Porter, \$22,656.53 as principal and \$18,567.09 as interest; in all, \$41,223.62. In these two

On the 2d of June 1852 Mr. James C. Jewett, a citizen of the United States, addressed a letter to Mr. Webster, then Secretary of State, inquiring as to the right of citizens of the United States to take guano from the Lobos Islands. On the

Cases of Benson and Lasarte. cases the commissioners seem not to have looked beyond the act of the Mexican Congress. In their opinion in the case of McRae they stated that the claim was rejected by the umpire under the convention of 1839 because it had not been submitted for the interposition of the government of the United States, either to the Department of State or to the American minister in Mexico, as required by that convention.

The inference that the commissioners under the act of 1849 did not, in the cases of Porter and McRae, look beyond the act of the Mexican Congress as the basis of the claims, is strengthened by their decision in the case of Cassius C. Young and others, heirs of Guilford D. Young, in which they delivered a clear and well-reasoned opinion to the effect that for the United States to press the claim of one of its citizens against a foreign government for compensation for military services would constitute a violation of the principles of neutrality. It is further strengthened by their opinion in the case of Andrew Meyer, of Baltimore, who furnished to Gen. Xavier Mina, in 1816, cartridge boxes, caps, and other articles to the amount of \$399.20, for his expedition in aid of the independence of Mexico. For this amount a note was given by General Mina, payable to Meyer six months after its date, which was September 15, 1815. It was also proved that a bill dated October 23, 1816, and payable fifteen days after sight, was drawn on Meyer by B. Bianchi, a commissary in the army of General Mina, for the sum of \$100. This bill was drawn to cover expenses incurred by the officers of Mina's army on their route to Mexico. It was accepted by Meyer and paid. Nothing was received by Meyer on these bills, and a claim was filed for the amount advanced, with interest. The commissioners on April 10, 1851, said:

"The aid furnished by citizens of the United States to the expedition of General Mina was rendered in violation of the act of Congress of 1794, and therefore created no claim which would be recognized as valid in the courts of the United States. It appears, however, that about the year 1825 the Mexican Government adopted the contracts of General Mina growing out of his expedition to Mexico and acknowledged its liability to pay the claims based upon them. This new obligation was not obnoxious to the objection which vitiated the claim arising out of the original contract, and has since been recognized as valid and binding upon that government. The mixed commission under the convention of 1839 recognized several of these claims as valid and awarded in favor of the claimants. These awards were made with the full concurrence of the Mexican as well as the American commissioners. The validity of the claims against Mexico based upon the obligation of 1825 has been recognized by the court of appeals of Maryland, in the case of *Gill, trustee, v. Oliver et al.*, which originated in a controversy relative to one of the awards above referred to. The board decides that the claim is valid, and it is allowed accordingly."

See, also, the decision of the commissioners under the act of 1849, given elsewhere, in the case of Margaret C. Meade, executrix of Richard W. Meade.

5th of June Mr. Webster replied to the effect that they would be protected in so doing, and at his suggestion an order was issued June 12 to Commodore McCauley, commanding the United States naval forces in the Pacific, to protect American vessels attempting to remove the guano in question. Subsequently, however, the United States decided to acknowledge the sovereignty of Peru over the islands. In accordance with this decision, Mr. Everett, who had then succeeded Mr. Webster as Secretary of State, on November 16, 1852, addressed a note to Mr. J. Y. de Osma, the Peruvian minister at Washington, in which he said: "The undersigned has accordingly been instructed by the President to withdraw unreservedly all the objections taken by the late Secretary of State, in his communications with Mr. J. Y. de Osma, to the sovereignty of Peru over the Lobos Islands and the other guano islands on the coast of Peru and in her possession; and to assure Mr. de Osma, for the information of his government, that no protection or countenance will be afforded by the United States to any proceedings on the part of her citizens inconsistent with this acknowledgment." In a preceding part of the note, however, Mr. Everett "invited the favorable attention of the Government of Peru to the case of the United States vessels which had been chartered for the Lobos Islands, under the expectation that they would be protected by this (United States) government." Mr. de Osma, replying on November 17, 1852, promised, "in the name of his government: 1st, That American vessels which sailed from the ports of the United States from and between the 5th of June up to the 25th of August last, fitted out for shipping guano at said islands (of which the undersigned incloses as correct a list as could have been drawn up from the data that have been collected), shall be chartered on account of the Peruvian Government, for the purpose of loading at the islands of Chincha, at the rate of twenty hard dollars per ton, the owners or shippers indorsing the contracts they may have entered into to the consignees or agents of Peru in the United States; 2d, the instruments or utensils used in excavating guano, which the aforesaid vessels may have carried over, shall also be taken on account of the government, security being given at Callao for their just value, to the masters of the vessels, by the same agents of the government, for the exportation of guano previous to the delivery of the articles; 3d, those vessels that have taken freight in the ports of

the Pacific, with the same object, in consequence of the orders that were sent by the United States, before the 25th of August, and which could not have been revoked afterwards, shall likewise be chartered on account of the Peruvian Government, at the same rate of \$20 per ton, provided that the contracts for freighting be presented and indorsed to the aforesaid agents of Peru in the United States before the 1st of next January."

The arrangement thus concluded was accepted by both governments as definitive, but it was alleged by persons who had, prior to its conclusion, prepared to take guano from the Lobos Islands, that its provisions turned out to be more or less illusory; and in consequence large claims were made both against Peru and against the United States—against the former for failure to fulfill the provisions of the agreement, and against the latter for the losses resulting from failure to preserve and make good the promise of protection given before the agreement was made. Among those who preferred such claims was Mr. A. G. Benson, a citizen of the United States. Mr. Benson afterwards assigned all his interest in his claim to Mr. José F. Lasarte, a Peruvian citizen residing in the city of New York; but before doing so he had presented to the Department of State at Washington a claim against Peru and to Congress a claim against the United States. When the mixed commission met at Lima under the convention between the United States and Peru of January 12, 1863, Mr. Benson's claim against the latter government, as submitted to the Department of State at Washington, was presented to the commission under that clause of the convention which invested the board with jurisdiction of all claims, "statements of which, soliciting the interposition of either government, may, previously to the exchange of the ratifications of this convention, have been filed in the Department of State at Washington, or the department of foreign affairs at Lima." Subsequently Mr. Lasarte, in his character as a citizen of Peru, presented, as the assignee of Benson, a claim against the United States. Thus there came before the commission two claims, one against the United States and the other against Peru, growing out of the same general transaction. The commissioners unanimously disallowed Mr. Benson's claim against Peru on the following grounds:

"The agent of the United States has asked permission to withdraw from the docket the claim filed on the part of A. G.

Benson, a citizen of the United States, against Peru, because the same claim appears before the mixed commission in the name of J. F. Lasarte, a citizen of Peru, against the United States.

"The application of the agent of the United States is denied for the following reasons:

"1st. The claim of Benson is a 'pending claim' as between the governments which are represented in this commission, and as such is legitimately within its jurisdiction. Had the Government of the United States or had A. G. Benson formally notified this commission that prior to the exchange of ratifications of the convention of 12 January 1863, the claimant had ceased to prosecute his reclamation against Peru, and had sought or intended to seek redress in any other quarter, the case would be without the jurisdiction of this tribunal.

"2nd. The mixed commission cannot ignore the fact, proved by documents submitted to its consideration in the most formal and authentic manner, that Mr. Benson has transferred his claim to another person.

"This fact does not remove the subject-matter from the jurisdiction of this commission, but merely changes the relation of certain persons to that subject-matter. To take a different view of the case and to permit the claim of A. G. Benson to remain in an unsettled condition between Peru and the United States, would be to frustrate the very object of the convention, which is declared to be 'to settle and adjust amicably the claims which have been made by the citizens of each country against the government of the other;' and which proceeds to refer 'all claims of the citizens of either country against the other which have not been embraced in conventional or diplomatic agreements between the two governments or their plenipotentiaries,' to the determination of this commission.

"3rd. The claim of Mr. Benson against Peru not only fulfills these essential conditions of the subjects referred to the decision of the mixed commission, but it imposes upon the commission the imperative duty of removing 'all' questions on the subject of claims from the discussion of the two governments.

"The natural and logical treatment of the 'subject-matter' then appears to be to consider:

"First. Has Mr. A. G. Benson a valid claim against Peru?

"The claimant has determined that question for himself, and it is only necessary for this commission to affirm his action.

"Altho' neither the Government of the United States nor that of Peru, nor A. G. Benson, has notified the commission that the claimant has withdrawn his claim against Peru, yet documents which have been submitted to and been received by this tribunal prove incontestably that he has transferred all the interests of his claim 'against the Government of the United States or the Government of Peru' growing out of the Lobos

Island enterprise to 'José Francisco Lasarte of the Republic of Peru.'

"The subject-matter then of A. G. Benson's claim against Peru, being before this commission and considered in that shape, is pronounced invalid against Peru and is disallowed.

"This decision affects only the claim of A. G. Benson against Peru, and does not dispose of the 'subject-matter,' as required by the object, the letter, and the spirit of the convention, which also requires the mixed commission to examine and decide,

"Whether J. F. Lasarte has any valid claim against the United States!"

The commissioners, Mr. Squier dissenting, also dismissed the claim of Lasarte in the following opinion:¹

"José F. Lasarte, a Peruvian citizen residing in New York, has by his attorney, José M. Hurtado, presented a claim against the Government of the United States for the specified amount of four hundred thirty-six thousand six hundred and three ³³/₁₀₀ dollars, besides other undefined amounts.

"The claim of Mr. Lasarte rests upon the assignment to him on the 10th of February 1863, by George W. Benson and James C. Jewett, of all the rights and interests which they had acquired from Alfred G. Benson by assignment on 24 July 1855 of all his claims 'against the Government of the United States or the Government of Peru or its agents or growing out of the Lobos Islands enterprise.'

"It appears from the evidence that up to the 27th April 1855 Alfred G. Benson prosecuted his claim against Peru before the Department of State of the United States; but, without giving any notice to that Department or to the Government of Peru of the termination of his claim against Peru, he petitioned the Congress of the United States to afford him indemnity for the losses he alleged he had sustained by the failure of his own government to do its duty towards him.

"Congress took no final action upon Mr. Benson's claim. When therefore the convention of January 12, 1863, was concluded, the claim of Alfred G. Benson was, so far as either the Government of Peru or the Government of the United States was informed, a 'pending claim' against the former government, and in that shape was presented to the commissioners by the agent of the latter, without the slightest intimation from Mr. Benson or any official or individual sources that the claim against Peru was terminated or withdrawn.

"Before reaching the investigation of the claim of A. G. Benson thus presented against Peru, Señor Hurtado presented

¹ Mr. Squier seemed to hold that, as the wrong complained of was in a sense the joint act of the two governments, the commission ought, in spite of the fact that Lasarte's only claim against the United States was that which he held by assignment from a citizen of that government, to allow him something.

the claim of José F. Lasarte against the United States, proving by incontrovertible evidence that all Mr. Benson's interests against all parties had passed to Mr. Lasarte, and that the latter had directed the prosecution of the claim 'against the Government of the United States and in no case against the Government of Peru before the commission.'

"Hence it was evident that Mr. Benson had abandoned all his rights as a claimant and that technically Mr. Lasarte had acquired them. Accordingly Benson's claim against Peru was rejected.

"The question then comes up whether José F. Lasarte has any valid claim against the United States under the stipulation of the convention of 12 January 1863.

"That convention imposes certain essential conditions upon all claims which are to be adjudged by this tribunal. The first of these is that it must be a pending claim of the citizen of one country against the government of the other; second, that a statement soliciting the interposition of either government must have been filed in the Department of State of the United States or in the ministry of foreign relations in Lima.

"As to the first of these conditions, the claim of Mr. Lasarte has not been at any time a pending claim against the United States according to the letter or spirit of the convention. He has never claimed redress from that government for any injustice or damage. He has never afforded it the opportunity of examining his claim and saying whether it would not recognize it. So that in no sense was it a pending claim of a citizen of Peru against the Government of the United States.

"As to the second, it is not claimed that Mr. Lasarte ever filed, either in Washington or Lima, a statement soliciting the interposition of either government. His own government is the only one which could interpose in his behalf. He has never asked it to do so. It has never done so. Mr. Benson's statement soliciting the interposition of his government against Peru can not by any fair or even technical interpretation of language fulfill the condition in question. No interposition could be permitted or exercised between Mr. Benson and his own government. Mr. Lasarte's claim against the United States is Mr. Benson's claim against that country. It is not possible to maintain that the interposition of the United States with Peru in favor of Mr. Benson can be made to answer the solicitation of interposition against itself.

"The third article of the convention requires this commission to examine and decide all claims submitted to it upon principles of justice and equity. No principle of justice or equity can warrant an international tribunal in sitting in judgment upon the dealings of one nation with its own citizens when it had never admitted any responsibility for the injuries alleged to have been sustained by that citizen, far less when it had never defined the extent of that responsibility. No principle of justice or equity or international law would warrant

this commission in placing the Government of the United States upon trial as defendant in a cause in which it had never received the slightest intimation that some of its most sacred prerogatives as well as large interests were involved.

"There are hundreds of millions' worth of claims held by citizens of the two countries at this moment against their respective governments, which, bought up by citizens of the other country, might with equal justice and equity be brought before the mixed commission. Such claims were never intended to be examined and decided by the commission, and if it should enter upon such an undertaking the two governments would have a perfect right to annul and reject all the proceedings.

"Under the terms of the convention the claim of José F. Lasarte does not appear before the mixed commission of the United States and Peru with the conditions essential for its consideration, and for this reason it is dismissed."

The two claims above stated were disposed of on purely jurisdictional grounds, originating in their assignment by their original American owner to a Peruvian. In the case of Samuel Churchman, a citizen of the United States, against Peru, the commission awarded the claimant \$2,428, with interest, for the difference between the freight actually paid by the Peruvian Government and the amount due under the Everett-Osma agreement, at the rate of \$20 a ton. That arrangement applied, as has been seen, only to vessels that sailed from ports of the United States in the eighty-one days between June 5 and August 25, 1852, chartered to load guano at the Lobos Islands. In another claim brought by Mr. Churchman it was held by the umpire, the commissioners having disagreed, that the Everett-Osma agreement could not be held to apply to a vessel which, though originally chartered so as to fall within its terms, was afterwards voluntarily withdrawn from the proposed transaction and chartered in October 1852 to load at the Chincha Islands. In another case, that of Dana & Co., owners of the ship *Michael Angelo*, the commissioners disallowed a claim of \$2,000 for freight at \$20 a ton on 100 tons of guano, which it was alleged that the Peruvian officials at the Chincha Islands prevented the master from taking on board in addition to what he had already shipped. The commissioners found that the *Michael Angelo* was permitted to take all that she could safely carry. They allowed the claimants, however, a small sum for certain port charges at the Chincha Islands, which charges the Peruvian Government had, in fact, promised to return.

Case of Mrs. Mora and others. "The claimants are the widow and children of Manuel H. Mora, and the claim is for indemnity for the seizure by Spain of property

belonging to Manuel H. Mora.

"The San Joaquin plantation was seized by Spain in May 1869 under a decree of embargo against Antonio M. Mora and José M. Mora, brothers of Manuel H. Mora, and it must be assumed in this case that the decree of embargo was legal. Antonio M. Mora was the manager of the estate and the owner of six-ninths, José M. Mora was the owner of one-ninth, and of the remaining two-ninths one belonged to Manuel H. Mora. It was unavoidable for Spain to take the whole plantation in order to seize the seven-ninths belonging to the two brothers mentioned in the decree of embargo, but, on the other side, Manuel H. Mora, against whom no charge is made, suffered an injury by thus being deprived of his property, and according to the agreement of 1871 he became entitled to ask indemnity of this commission.

"There is in the record a deed of sale protocolled in Havana on the 9th of March 1874 and signed by Rafael Lopez, as agent of Manuel H. Mora, and by J. J. Jerome, a citizen of Germany, as purchaser. It is said in this deed that the vendor transfers to the purchaser all his rights and actions as joint owner of the San Joaquin plantation from the time of the seizure up to the time of sale, either against the manager of the property, the government, or the court, or anyone who may have received the proceeds of said estate during said time; and the price stated is \$50,000.

"On the other side, the record contains a deposition of Jerome, that at the date of this conveyance he executed a private act of acknowledgment or resale, by which he acknowledged that the property continued in fact the property of Mora. This declaration of trust was not protocolled.

"Manuel H. Mora died November 18, 1877, and the present claimants filed the claim in the commission October 28, 1880.

"The claim as presented by the advocate for the United States embraces value of the part of the San Joaquin plantation belonging to Manuel H. Mora, net yearly income, and interest, in all, \$201,440.

"The arbitrator for Spain has rejected the whole claim.

"The arbitrator for the United States declares that the title of Mora must be considered divested on the 9th of March 1874, but awards \$66,928 as damages for the detention of the property from May 1869 to March 9, 1874.

"The advocate for the United States says:

"The deed, upon the agreement of the arbitrators, must be deemed to be valid *after* its date, and it transfers to Jerome *from* its date the title to the property and its revenues.

"The honorable arbitrator for Spain is of opinion that the deed also transfers to Jerome the title to the revenues from 1869, while the honorable arbitrator for the United States is of opinion that the revenues between 1869 and 1874 have not been divested. * * *

"This disagreement of the arbitrators, then, it seems to me, submits to the umpire the whole question of the validity of the deed and the declaration of trust upon the evidence, so far certainly as the revenues are concerned between 1869 and 1874, but no further, for the practical result of the agreement of the arbitrators in giving effect to the deed to Jerome is to decide that, from its date, this commission has no jurisdiction because of Jerome's German citizenship."

"In the opinion of the umpire, the arbitrators have agreed that the transaction between Mora and Jerome ought to be considered as a true sale after its date; that thereby Mora sold to Jerome his share in the San Joaquin plantation and everything due to him on this account after March 9, 1874, and that from this date the commission has no jurisdiction, because of Jerome's German citizenship. In consequence, the only part of the claim referred to the umpire is whether indemnity is due on account of loss suffered by Manuel H. Mora between May, 1869, and March 9, 1874.

"The umpire is of opinion that by the deed of sale Mora transferred to Jerome his right to anything due him after May 1869 as joint owner of the San Joaquin plantation; that if the deed of sale is decreed to be valid after the time of sale, March 9, 1874, it must also be considered valid with regard to anything due from May 1869 to March 9, 1874, and that the effect of the sale must be the same with regard to the whole claim.

"Therefore, the umpire hereby decides that, in view of the above agreement of the arbitrators, he has no jurisdiction to award indemnity on account of the part of the claim referred to him."

Count Lewenhaupt, umpire, case of *Mrs. Luz F. de Mora and others*, No. 134, Span. Com. (1871), December 9, 1882.

Camy's Case. Joseph Camy, a citizen of France, filed a memorial in which he set forth a claim arising out of the seizure of cotton by the military authorities of the

United States in Louisiana during the civil war. In this memorial he stated that in June 1863 he "sold and assigned his claim on the proceeds of the said cotton to the firm of Duthil & Faisans, of New Orleans," but that he had been advised that the assignment was null and void. Duthil & Faisans were citizens of the United States. Counsel for the United States demurred.

In answer to this demurrer, counsel for the claimant contended that, prior to the conclusion of the convention under which the commission was constituted, the claim was not a right, or, if a right, did not belong to the class of assignable rights; that "the practical test of a right is the existence of a remedy to enforce it. A law can not be said to give a right when it does not give an appropriate remedy." The cases of *Ogden v. Saunders*, 12 Wheaton, 259, and *Gunn v. Barry*, 15 Wallace, 610, were cited in support of this position. It was further contended that the act of the government was a "tort," and that the right, if there had been one, would have been a right of action for damages for a tort, and that the assignment of such a claim was not permitted either at law or by the rules of equity.

Counsel for the United States replied that, except for the circumstance that some of the assignees were citizens of the United States, the government of the United States would be without interest in the question raised. He referred to his argument in the case of *Roman v. United States*, No. 553, and to the decision of the commission in the case of *Wiltz*, administrator of *Delrien*.

April 21, 1882, the commission rendered the following opinion:

"This case has been heard upon demurrer to the memorial.

"The memorial states that the claimant on the 12th June 1863, 'sold and assigned his claim on the proceeds of the cotton to the firm of Duthil & Faisans, of New Orleans.'

"The counsel for the United States claims that such sale and assignment was legal, and that thereby the claimant ceased to have any title to the claim, and is not therefore entitled to present it and have an award.

"The claimant says in his memorial that he is advised that the assignment is null and void. He does not claim that the assignment was not made according to the agreement of the parties to it, or that it is void for fraud or other such cause, but only that it is not legally valid.

"In No. 657, Duthil & Faisans present the same claim as assignees of *Campy*.

"It is plain that there can be only one award for the claim. If Camy is legally entitled to it Duthil & Faisans are not; if they are entitled to it Camy is not.

"The grounds upon which the counsel for Camy claim the right to recover are—

"First. That the claim of Camy against the United States is not an assignable right; and,

"Second. That by the statute of the United States all assignments of such claims, before allowance, are null and void.

"The convention under which we act is silent upon the question whether the original claimant may or may not assign his claim to another.

"The commissions heretofore established by treaty between the United States and other powers for the settlement of such claims have recognized the right of the original claimant to transfer his claim to another. The rules of the British and American, the Mexican, and the Spanish commissions recognize the right and require the transfer to be set forth in the memorial. The rules of this commission also recognize the right.

"Several cases of awards to assignees may be found among the decisions of the British and American Claims Commission.

"We think the claim existed and vested in the claimant *a right* to relief and compensation when the acts of taking the cotton and converting it to the use of the United States were committed. True, there was no court or tribunal to which the claimant could present his claim and obtain judgment and compensation, but his moral right existed, and the establishment of this tribunal recognized it and gave him a legal remedy for his right because no other existed. To say he has no legal right because there is no established tribunal to give him a remedy is, in a certain narrow and technical sense, true. But we think international commissions established for the very purpose of giving a remedy where none existed before stand upon a higher principle, viz, that rights to relief and compensation do exist; that they arose at the time the acts were committed; that they are recognized as *rights*, and that international commissions are created because, from the very nature of such acts and the claims arising from them, they do not come within the jurisdiction of any other tribunal.

"It is urged that as the statute of the United States makes assignments void, that statute must operate to annul the assignment of Camy. We think that statute does not apply to the rights and claims of foreigners whose rights can not come before any American tribunal for decision. That statute was made to prevent frauds upon the Treasury. It can not fairly be extended to affect the claims of foreigners coming before an international commission.

"We hold, therefore, that the demurrer is sustained, and the claim must be disallowed because the claimant has no title to the claim or its proceeds."

Joseph Camy v. United States, No. 656, Boutwell's Report, 105: Commission under the convention between the United States and France of January 16, 1880.¹

5. CHANGE IN CLAIMANT'S NATIONALITY.

Case of Archbishop
Perché. Joseph Napoleon Perché, archbishop of New Orleans, presented to the commission under the claims convention between the United States and France of January 15, 1880, a claim against the United States for his arrest, and the destruction of his office and business at New Orleans by General Butler in November 1862. In his memorial he stated that he was born in France, January 6, 1806, and that in 1870 he became by naturalization a citizen of the United States. On this statement of facts counsel for the United States demurred to the claim on the ground that it was necessary for the memorialist, in order to maintain a claim against the United States before the commission, to aver and prove not only that he was a citizen of France when the losses occurred, but also that he was a citizen of France when his memorial was filed.

Brief for the United
States. Counsel for the United States, in support of his demurrer, filed a brief, in which he said:

"I. The jurisdiction of this commission is limited by the treaty, and authority is given to pass on those claims only which are therein described.

"*Henry Rutý v. United States*, No. 369. In this case it was alleged and proved that the claimant was a citizen of France; but it appeared also that he had become a voluntary bankrupt under the laws of the United States. It was claimed by the counsel for the United States that the decision in the case of Camy was applicable to the case of Rutý.

"The records of the bankruptcy court showed that the claim against the United States was not entered upon the schedule of assets; and it was claimed by the counsel for the memorialist that, inasmuch as it was not so entered, the title did not pass from Rutý to the assignee, but remained in Rutý.

"On the part of the United States it was contended that by the act of assignment the title to all the property of the memorialist passed from the bankrupt to the assignee by virtue of the statute of the United States (14 Stats. at L. p. 523), and that it was immaterial to inquire whether the bankrupt included the item upon his schedule or omitted to notice it.

"The claim was disallowed by the concurring vote of Baron de Arinos and Mr. Commissioner Aldis. The question of jurisdiction did not arise in this case, and it is reasonable to assume that the commissioners who signed the award of disallowance were of opinion that the assignment in bankruptcy passed the title from the bankrupt to the assignee." (Boutwell's Report, 108.)

"The claims against the United States which are described in the treaty are those for certain losses sustained by 'corporations, companies, or private individuals, *citizens of France*'—'*des corporations, des compagnies ou de simples particuliers citoyens français.*' (Art. I.)

"This claimant is not a citizen of France.

"a. By the laws of France. It is provided by those laws that '*La qualité de français se perdra 1° par la naturalisation acquise en pays étranger. . . . 3° enfin par tout établissement fait en pays étranger sans esprit de retour.*' (Code Civil l. i. t. i. c. ii. De la privation des droits civils, l s, 17.)

"The naturalization is admitted, and the naturalization coupled with the long residence of the claimant in this country is conclusive evidence that he is here '*sans esprit de retour.*'

"b. By the laws of the United States the claimant is a citizen of the United States, and entitled to the rights and privileges of a native. (Revised Statutes of the United States, sec. 2168.)

"II. By article two of the treaty it is provided that the commission 'shall be competent and obliged to examine and decide upon all claims of the aforesaid character *presented to them by the citizens of either country, except such,*' etc.

"The treaty thus speaks in the present tense, and bars any and every claim unless the person presenting it is, at the time of its presentation, a citizen of the country through whose agency the claim is to be enforced.

"By the first article of the treaty it is declared that claimants against the Government of the United States must have been citizens of France at the time when the acts were committed out of which the claim arose, and therefore it appears from these two articles of the treaty, considered together, that the citizenship which existed at the time when the claim arose must have been preserved without interruption until the presentation of the claim before this commission.

"In the case at bar it is not only admitted, but declared by the claimant, that in the year 1870, having theretofore been a French citizen, he was naturalized under the laws of the United States, and that since that time he has been an American citizen. Therefore, he has no legal capacity under the treaty to appear before the commission as a claimant.

"III. By the principles of international law this claimant is a citizen of the United States, subject to the jurisdiction of that country only, and to the government of that country only can he look for protection and for redress of any wrongs inflicted by its authority.

"Where a person 'by his own act has made himself the subject of a foreign power, . . . it certainly places him out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance.' (The *Charming Betsy*, 2 Cranch, 64.)

"Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal *bona fide.*' (The *Venus*, 8 Cranch, 253.)

"These are the decisions of the highest judicial authority in the United States, and they are supported by the opinions of the most eminent publicists. 'With regard to the jurisdiction and authority of States over their own proper subjects no doubt can be raised; under the term *subject* may be included both *native* and *naturalized* citizens.' (Phillimore, Vol. I.

Chap. XVIII. § CCCXVII.) 'It has been said that these rules of law are applicable to *naturalized* as well as *native* citizens. But there is a class which can not be, strictly speaking, included under either of these denominations, namely, the class of those who have ceased to reside in their native country and have taken up a permanent abode (*domicilium sine animo revertendi*) in another; * * * they are *de facto*, though not *de jure*, citizens of the country of their domicile.' (§ CCCXIX.) The claimant, however, acknowledges not only that he is a citizen of the United States *de facto*, but also *de jure*.

"Naturalized foreigners are in a very different position from merely *commorant* strangers. * * * Naturalization is usually called a change of nationality. The naturalized person is supposed, for the purposes of protection and allegiance at least, to be incorporated with the naturalizing country.' (§ CCCXXIII. See also, Story, Conflict of Laws, s. 48, c. III; *ib.*, s. 540, c. XIV; Fœlix, l. i. t. i., s. 2, 342, Du changement de Nationalité; Heffter, s. 58; Colquhoun's Civil Law, s. 393, vol. i, p. 377; *ib.*, s. 389, p. 373; Günther, vol. 2, p. 267, and pages 266-311, n. c.; Vattel, l. i., c. XIX. s. 211 *et seq.*; Cockburn on Nationality, c. III, sec. 2.)

"IV. National jurisdiction, like every other jurisdiction, is limited, and the capacity of two or more nations in the exercise of the treaty-making power is limited to the territory which they respectively possess and to the persons owing allegiance to each, respectively. It could not for a moment be claimed that the republic of France, by the treaty-making power, could exercise jurisdiction over a subject of Great Britain; and for a stronger reason it must be clear that France could not by treaty obtain jurisdiction over a citizen of the United States, except by a clear concession of the power on the part of the United States.

"It is the primary duty of every government to protect its own citizens, and this duty is a constant denial of a like power in any other government.

"In January 1880 the republic of France had no jurisdiction over those persons who, though born within the jurisdiction of France, had voluntarily withdrawn their allegiance from that government and transferred it to the United States; and therefore it was not competent for the government of the French republic to make any provision by treaty or otherwise for the protection of such persons or the enforcement of any of their rights.

"If such persons have suffered losses, their only remedy is by a direct appeal to the Government of the United States, without the intervention of any other power.

"This claimant, therefore, has no right of action against the United States before this commission, because he is not a citizen of France, but is a citizen of the United States, and therefore the Government of France had not, at the time the treaty was concluded, and it has not now, any jurisdiction over him or power to treat or act in his behalf."

Counsel for France, in reply to counsel for
Brief for France. the United States, filed a brief in which he
 maintained the following positions:

"I. The undersigned agrees with the counsel for the United States that 'the jurisdiction of this commission is limited by the treaty, and authority is given it to pass on those claims only which are therein described.'

And the undersigned maintains that if it be established that the demand of the memorialist grew out of and is founded in a *claim* which is described in the treaty, then there can be no doubt but that the commission has jurisdiction, and should consider the *claim* on its merits.

"To ascertain whether or not the commission has jurisdiction of a case, or claim, reference must be had to the treaty; and the undersigned proceeds at once to the consideration of the treaty.

"It will not be denied that the treaty was entered into between the two governments *bona fide*; and its immediate purpose, as appears from the language, was to give relief and to provide indemnity for a large class of sufferers—citizens of the respective governments—on account of injuries to person or property by them sustained *within certain jurisdictions, and during a specified period of time.* (Article I.)

"It becomes important, then, to ascertain what is meant by the expression 'jurisdiction.' 'Jurisdiction,' says the Supreme Court of the United States (*United States v. Arredondo*, 6 Peters, 709), 'is the power to hear and determine a cause. It is *coram judice* whenever a case is presented which brings this power into action.' * * * 'It [jurisdiction] is the power to hear and determine the *subject-matter* in controversy between the parties to a suit; to adjudicate or to exercise judicial power over them, the question is whether, on a cause before a court, their action is judicial or extrajudicial, with or without authority of law to render a judgment or decree upon the rights of the parties. *If the law confer the power to render a judgment or decree, then the court has jurisdiction.*' (*Rhode Island v. Massachusetts*, 12 Peters, 718; *Bauton v. Wilson*, 4 Texas, 404.)

"There are some principles of public law which are universally recognized by modern civilized States. One of these is, that international treaties are covenants *bona fide*, and are therefore to be *equitably* and not *technically* construed. (*Phillimore Int. Law*, Vol. II., p. 89.) Another is that the covenant or treaty contracted by *two or more* parties is to be interpreted with reference to the intention of them all—'*conventio aire pactio est duorum vel plurum in idem placitum consensus.*' (Ib. p. 92.)

"Another is, that good faith clings to the *spirit* and fraud to the *letter* of the convention. (Ib. p. 107.)

"Under any equitable construction of the provisions of the treaty, the commission must be held to have jurisdiction of the claim now submitted by the memorialist, and for the following reasons:

"First. Because the acts complained of were committed by the United States.

"Secondly. Because the acts were committed within the jurisdictional territory marked out by the treaty.

"Thirdly. Because the acts were committed during the periods fixed by the treaty.

"Fourthly. Because the acts complained of were injurious to the person and property of a citizen of France.

"All which above averments of facts are contained in the memorial, and are, for the purpose of this demurrer, admitted by the counsel for the United States.

"The undersigned therefore maintains that an *equitable* construction of the provisions of the treaty gives the commission jurisdiction of the claim

of memorialist. Any other construction would be *technical*, and would, to that extent, defeat the purpose and intention of the two contracting powers in the creation of this commission.

"If this claim is not entertained and examined on its merits by the commission, the memorialist is *without remedy and redress*, for the reason that there is no tribunal before which the memorialist may present himself.

"In fact, the undersigned has been informed that one of the honorable commissioners (Mr. Commissioner Aldis) very recently sat as the presiding officer of a claims commission, organized by authority of the United States, which decided that a naturalized American citizen could not present a claim before the said commission, *as an American citizen*, on account of acts committed by the United States against his person or property, *at a time when claimant was a citizen of France*.

"The contention of counsel for the United States can only be sustained on the theory or assumption that naturalization is *retroactive*. But *naturalization produces its effects only in the future*. (Stoicesco, Etude sur la Naturalisation, pp. 272, 285.)

"II. The answer to what the counsel for the United States says, under the second point of his argument, as to the meaning of certain expressions in article 2 of the treaty, is twofold:

"First. That such a construction is *technical*.

"Secondly. That article 2 is in aid of, and has immediate reference to, article 1, and that article 1 contains the *fundamental provisions of the treaty*, and the language of other articles must, in cases of doubt or difficulty, be construed with reference to it.

"The counsel for the United States says:

"The treaty thus speaks in the present tense, and bars any and every claim unless the person presenting it is at the time of its presentation a citizen of the country through whose agency the claim is to be enforced."

"But the commission cannot fail to detect the fallacy contained in this statement or proposition of the counsel for the United States. Legal representatives *certainly*, of deceased citizens of either country, and beneficiaries *presumably*, may present the claims of decedents and of original owners to this commission. And this, irrespective of the citizenship of such legal representatives or beneficiaries. (See Rule 1 of the commission, p. 1; see *Comegys v. Vasse*, 1 Peters, Supreme Court Reports, pp. 212, 213.)

"On the other hand, the language of article 1 of the treaty is: * * * 'And all claims on the part of corporations, companies, or private individuals, citizens of France, upon the Government of the United States, arising out of acts committed against the persons or property of citizens of France.' * * * This clearly refers to the persons or property of individuals *who at the time of the commission of the acts aforesaid were citizens of France*.

"If all claims that could not be brought within the description indicated by counsel for the United States in the paragraph cited are to be barred, the labors of the commission will be exceedingly light; and again, the palpable intention of the two contracting states will be defeated by a *technical* construction of the language conveying the grant of powers to the commission.

"III. The undersigned believes that the commission will see that cases cited by counsel for the United States, to wit, the *Charming Betsey* and

the *Venus*, have no application to the case at bar; neither do they contain anything which can be construed as in conflict with the position here taken by the counsel for the French republic. In those cases *the distinction between the national character of property and the nationality of persons was recognized and laid down.*

"Those were cases where the effort had been made to impress a hostile character upon property in certain situations as distinct from the national character of the owner, and *vice versa.*

"IV. There are some propositions of the counsel for the United States which are emphasized under the fourth point of his argument that are hardly pertinent to the discussion, as the undersigned understands it. Unless qualified, these expressions are misleading. The confusion in which the counsel has become involved is the result of failure to recognize the distinction which prevails universally, under international law and treaty stipulations, between the civil and political rights of an individual. The commission are, of course, familiar with the above distinction; which, as it seems to the undersigned, it is important to bear in mind when the claim of the memorialist is under consideration. In the case at bar, under the view of the counsel for the French republic, the discussion involves only a consideration of certain undoubted civil rights of an individual who, at a particular period of time, *being then a citizen of France*, sustained injuries to his person and property of a character of which this commission has cognizance. And in the controversy at bar, as it seems to the undersigned, the test of present political rights, or actual national character of the memorialist, should not be controlling or conclusive."

Counsel for the United States submitted a
 United States Brief brief in reply to that of counsel for France, in
 in Reply. which he maintained:

1. As to jurisdiction, that it was insufficient to show that the commission had cognizance of the subject-matter of the claim; that jurisdiction of the person as well as of the subject-matter was essential. From the contentions of counsel for France it would follow that a claim once valid would always be valid, no matter who might become the beneficial owner, whether a German or a citizen of any other third power. Such could not have been the intention of the contracting parties. Their object was to relieve each other's citizens. Neither government sought to recover anything for itself, as the United States did from Great Britain in the case of the *Alabama* claims, under Article I. of the treaty of Washington of May 8, 1871. On the contrary, the provisions of the treaty between the United States and France were similar to those of Article XII. of the treaty of Washington relating to the miscellaneous claims of the "citizens" or "subjects" of the contracting parties. The records of the commission under Article XII. had been carefully searched, and it was believed

that the British agent had not in any case presented a claim the owner of which had ceased to be a British subject, for the reason that he considered such claims inadmissible. In support of this statement counsel for the United States referred to Howard's Report, pp. 9, 255, 256-271, 314, 326.

2. As to the construction of the treaty, counsel for the United States maintained that there was no room for conjecture. The language of the treaty should not be strained in order to obtain jurisdiction.¹ Under the terms of the treaty claims must be (1) on the part of "citizens" of France, (2) for injuries to "citizens" of France, and (3) presented by "citizens" of France.

3. As to the intention of the contracting parties, there was, said counsel for the United States, no ambiguity in the treaty. Both France and the United States recognized the loss of original nationality by naturalization abroad. It could not be assumed that they intended to make provision for persons who had voluntarily renounced their allegiance.

4. As to the claimant's remedy or redress, counsel for the United States maintained that while the question was one with which the commission had nothing to do, he had a remedy by appealing to the Congress of the United States, or in proper cases to the Court of Claims. It was true that the claims of persons who were aliens during the war, but who afterwards were naturalized, were not allowed by the Southern Claims Commission, but this was because that tribunal was not authorized by Congress to investigate that class of claims.² "The undersigned does not," concluded counsel for the United States, "contend that naturalization is retroactive, but that it effects a full, complete, and total change of allegiance, and that from the day of naturalization all right to the protection of the native country is forfeited, and in its place the naturalized citizen obtains the rights, the advantages, and also the disadvantages of citizenship in the country of his adoption. In changing his allegiance he may fairly be presumed to have considered and estimated the advantages on the one hand and the disadvantages on the other, but whether he did so consider or not is not a question for this tribunal."

¹ Smith's Leading Cases, 6 Am. ed. 1011, 1024; *Monson v. Chester*, 22 Pick. 387; *Court of Coms. of Alabama Claims*, Davis's Report, 108; 2 Cranch, 358, 399; *Phillimore*, II, 84, § LXX, *et seq.*

² H. Mis. Doc. 16, 42 Cong. 2 sess.

At the meeting of the commission on May 20, 1881, counsel for France made an oral argument, in which, among other things, he said:

French Counsel's Oral
Argument.

"Is there, as is contended in the brief for the United States, a mode of redress left open to the Archbishop of New Orleans? * * * To this I answer no; and I shall now proceed to give the reasons in support of this answer. In the Southern Claims Commission it was held that aliens residing in the United States had no right to appear before that commission and to recover damages for losses inflicted upon them. * * * Therefore, the alien who has remained neutral during the war can not be compared to the citizen of the United States who was not only neutral, but loyal. On the other hand, a decision was rendered by that same commission in regard to aliens who were naturalized in the United States after the date of the injury suffered, and in rendering its decision the commission said: 'We think Congress intended to reserve to itself the consideration of the rights of foreigners. We have therefore held that foreigners domiciled here are not citizens within the limits of the act. We have also held that where claimant was also alien when the claim accrued, his naturalization since the war does not remove his disability.' * * * This doctrine has been also asserted by the State Department of the United States in the case of Emile Sauv , a Frenchman who had resided in Mexico and who claimed to have suffered damages in that country. Sauv  came to the United States and was naturalized. After he had obtained his letters of naturalization he applied to the State Department for intervention on his behalf on account of injuries suffered in Mexico while a citizen of France. To this application the Hon. Hamilton Fish replied in substance: 'Your naturalization was only prospective. It could not act retroactively, and therefore I can not interfere on your behalf for acts anterior to your naturalization by the United States.'

"Obviously, the case can not be presented to the Court of Claims. But my colleague on the other side says, 'There is the Congress of the United States; and Congress may do something or other.' To which I reply, that Congress has no jurisdiction over such cases; and for this simple reason, that naturalization is prospective. And therefore if Congress enacted to-day a measure tending to indemnify these claimants, it would violate one of those principles which govern the matter of naturalization.

"Again, it is said that Congress has sovereign power, and that it may grant relief. Simple measures of relief seldom pass Congress. * * * How many claims of aliens have ever been adjudicated by that body? * * * One in fifteen years. One, only one, a German case, and this was the result of long correspondence and protracted negotiation.

"I come now to another branch of the case, which arises from the convention itself. * * * Article I. of the convention provides that: 'All claims on the part of corporations, companies, or private individuals, citizens of France, upon the Government of the United States arising out of,' etc. * * * These words should be construed as referring to those who were citizens at the time the claim accrued.

"And now as to Article II., to which the brief on the part of the United States refers. It is merely by way of reference that the word 'citizen' is mentioned. The governing article is found in the words I have just cited.

It may be said that there are other articles in which the word 'citizen' may have been used, but it is not in such a way as to give us a construction of the words I have quoted; and the proof of it is this, that Article I., where these words are found, refers to claims '*on the part of citizens*,' etc.; while in Article II., the words '*on the part of citizens*' have been omitted. It is worded this way, 'presented to them by the citizens.' So in the article which defines the jurisdiction of this commission, the words used are '*on the part of citizens*,' and in the following provision, which most evidently refers to preceding article, the words are changed, and the paragraph reads, 'presented to them by the citizens of either country.'

"There is, however, another way of ascertaining the exact meaning of these words and of explaining them. These words, '*on the part of*,' were borrowed from the treaty of Washington of May 8, 1871, between the United States and Great Britain. In a case pending before that commission, where a somewhat analogous demurrer was interposed on behalf of the United States, in opposing it Her Britannic Majesty's counsel used the following language: 'Why were the words *on the part of* used? It seems to me that they must have been used *ex industria* to embrace claims other than those which could be presented by British subjects, and that they should include all cases arising out of a violation of British rights by acts committed against the persons or property of those entitled to the protection of the British Crown in respect of such acts committed. And thereupon the demurrer was overruled by the commission.' (See Henry Howard's Report, p. 329.) I submit that the convention between France and the United States contains the same expressions, and that here the decisions of the English commission must be of great weight.

"And now I come to the second division, I believe, of the brief of the counsel of the United States: 'Has the commission jurisdiction over these claims?' And this leads to this further inquiry: What is jurisdiction, and what constitutes jurisdiction in this case? * * *

"I claim that the jurisdiction of this commission as it is sought to be established by the counsel for the United States would conflict with the best precedents. I will quote first from a case decided by the Supreme Court of the United States. I select this case because it arose under the treaty of May 8, 1871, between the United States and Great Britain.

"The court says: 'In *Clark v. Clark*, where the contest was between the bankrupt and his assignee, touching a fund in the Treasury, derived from a foreign government, the secretary, though not a party, was enjoined from paying it over until the rights of the contestants were settled in the suit then pending.' 'But suppose, as has been suggested, that the money was in the British exchequer, at the seat of the home government, still the court below acquired jurisdiction of the parties and had an important duty to perform.' And again, in the same opinion: 'Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal.' (See *Phelps v. McDonald*, 99 United States, pp. 306-307 and 308.)

"The converse proposition is just as true. Who can deny that in every proceeding *in rem*, provided the subject-matter of the controversy is within the jurisdiction of the court, it does not matter whether the parties are or are not before the court? But the courts have gone further.

"In 1871 there were moneys belonging to the French Government—personal property—deposited with a certain banking house in England, and there were parties who claimed to recover certain sums from the French Government. They applied for an injunction to Vice-Chancellor Malin, then holding the equity court of England, to restrain the said bankers from paying to the French Government the moneys deposited with them, which moneys were within the jurisdiction of the court. Here no personal service could be obtained, since no subpoena could be served on the ambassador of France at London; nevertheless the court held that it had jurisdiction over the fund without personal process had on the defendant, and a temporary injunction was granted. * * * This view of the case I therefore earnestly submit to the commission: First, the jurisdiction over the subject-matter may exist independently of the jurisdiction over the person, and a claim to a chose in action may be decided here, even if the party was not subject to the jurisdiction of this commission.

"Let us look at another side of this same subject—that of a Frenchman deceased since the time of the injury suffered. Rule 1 of this commission says: 'If a claimant be dead, his executor or administrator or the legal representatives of the estate must appear, unless it be shown,' etc. So the commission, under its own rules, recognizes that a claim of a deceased Frenchman is before the commission. Thus an American-born citizen, appointed administrator by a court, is recognized under your rules.

"At the same time, I may refer this commission to the precedents created by the British Claims Commission under quite identical articles. I find that administrators presenting themselves with letters of administration granted by a county judge were recognized, and as such they represented the estate—no matter who might have been the parties interested in the estate, either as creditors, as heirs, legatees, etc. And here I wish to refer, also, to the words used by the *Alabama* court of claims, where the Honorable Mr. Davis was, I believe, secretary. It was held by that commission 'that, owing to the peculiar circumstances of these claims, they should not be allowed to perish through a strict adherence to the technical rules of courts of law.' And further: 'The court, by the presiding judge, stated its opinion early in its session that letters of administration or letters testamentary granted in any State of the United States would give authority to sue in this court.'

"I will take the liberty to come back to the proceedings of the British and American Commission, and I will do so in borrowing the very words used by Mr. Carlisle in his brief in opposition to the demurrer interposed by the United States.

"Where a British subject has died, and his property has not been administered, no one could make the claim but an administrator representing the British right of the deceased owner, and claiming in his stead. That this commission should refuse to make him an award, because it does not affirmatively appear that living British subjects are interested in procuring such award, would be manifestly unjust and unreasonable.' (See Howard's Report, pp. 329-330.) After the case was fully argued the commission decided to overrule those demurrers, 'the majority of the commissioners being of opinion that where the claim is prosecuted by an administrator, in respect of injury to property of an intestate who was exclusively a British subject, and the beneficiaries are British subjects as

well as American citizens, the claim may be prosecuted for their benefit. (See same volume as cited above, page 18.)

"In the case at bar, if this claimant, after suffering damages, had assigned his claim to a Frenchman, there is no doubt that the assignee, under your rules, would have a standing here, and that he might claim damages. Again, if this claimant had died before he became naturalized in the United States, an administrator could have come here and prosecuted the claim. And again, in case claimant had died a bankrupt before he changed his nationality, there is no doubt, under the jurisprudence established by the British Claims Commission, that his assignee in bankruptcy or the receiver appointed by a court of equity would have a standing before you. * * *

"I come now to another branch of the case. The counsel for the United States has said in his brief that there was no case of a similar character before the British and American Claims Commission (or that no claim answering the description of that of Perché was acted upon by the commission) and in support of his views he quotes certain circular letters written by the British agent, Mr. Henry Howard, in regard to the conditions to be complied with before claims were presented. * * * The reason that decided Mr. Howard to issue such instructions is very plain. Mr. Howard could not do otherwise than to exclude British subjects naturalized in the United States. The British Government was bound by treaty stipulations. The treaty stipulation I am referring to bears the date of May 5, 1871. It is found in the naturalization treaty between the United States and England. * * *

"The same would have been true in the case of a commission with Germany, the same with Austria, the same with Italy, with Belgium, and some other countries that I might name. But France has no treaty of naturalization with the United States. It never has had any, and to understand and decide who is a French citizen and how French citizenship is lost, one has to fall back upon the municipal laws of France.

"I will state first this proposition: That except under what is called 'The general principles of 1789,' there is no positive enactment anywhere permitting a French citizen to leave his country and to be naturalized abroad. The second proposition is this: That in case a Frenchman leaves his country and goes abroad, and becomes naturalized in a foreign country, his right to do so may have been implicitly recognized by the laws of France, but it is written in no legislative act of an affirmative character.

"In the act of 27th of July 1868, the United States declared positively that an American citizen had the right to go abroad and change his nationality. But there is no such a legislation in France. There are only the provisions of the civil code, whose negative character you will notice. Article 17 says: 'French citizenship shall be lost—first, by naturalization in a foreign country; second, by acceptance without authorization of the King of a public office conferred by a foreign government; third, and lastly, by a commercial establishment in a foreign country without intent to return.'

"Such is the article, and now I come back to its first provision. A Frenchman goes abroad. There he becomes naturalized, but it is not *ipso facto* that he loses his citizenship in regard to the country of his origin. * * * The civil code says merely that such a Frenchman has lost his

nationality, but by whom is this loss to be ascertained? * * * There is only one authority in France which has jurisdiction over the matter. That is the French courts. * * * And whenever the United States minister to France has called the attention of the imperial or republican government to those questions,¹ what has been the answer? There has always been but one, viz: We are going to test the case before the courts. So the Frenchman who claims to have been naturalized in the United States is imprisoned by the order of the Secretary of War, for instance, and thereupon the case is referred to the courts. The courts, on presentation to them of the certificate of naturalization abroad, decide that the citizen of French origin has lost his citizenship for the reason that he was naturalized abroad, and it is only when that point is decided by a competent court that the Government of France recognizes the newly acquired nationality of its native-born citizen.

"I wish to read a few lines from General Dix's correspondence on that point. I read from United States Diplomatic Correspondence of 1868, part 1, pages 444, 445:

"It is proper to add, that in all cases when a Frenchman has been conscripted, and stands on record as having failed to comply with the requirement of military service, a judicial inquiry takes place. His passport does not exempt him from arrest and detention; but the government always allows him to go at large on engaging to appear at the time and place appointed for the examination. The first examination is by a civil tribunal. If he is found to be a citizen of the United States, he is exempted from military service. He is then brought before a council of war, which decides whether he has been delinquent, and if so, whether his delinquency is removed by prescription."

"In the same volume there is a case of that kind stated on page 453:

"On being advised officially of these facts by the Marquis de Moustier, I sent him a copy, certified under the seal of the legation, of Brailly's certificate of naturalization, and he was promptly released. The imperial government only asked that he should satisfy the established form of proceeding by going before a civil tribunal with his certificate and passport, and show that he had been naturalized as a citizen of the United States.' So the case of Brailly comes just in support of the general statement made by General Dix.

"I have before me all the papers relating to naturalization, expatriation, etc., prepared at the request of the President of the United States. I am able to say that my statement is supported by the opinion of an advocate of the court of appeals of Paris, who is the counsel of the British embassy there; that opinion is printed in this book. Mr. Treitt refers to other cases besides that of Brailly, and finally he lays down the general doctrine in the following way:

"If the person seeking to avoid the performance of military duty pleads naturalization in a foreign country, the court-martial defers the enforcement of the penalty and grants the accused a delay, that he may be enabled to prove his foreign citizenship in the courts.

"If he obtains a judgment declaring that he has lost his French citizenship, the court-martial acquits him, but only when his naturalization

¹ The case here supposed is that of the arrest of a naturalized American citizen for the purpose of requiring military service.

took place three years before. If this is not the case, the judges enforce the penalty provided for the offense. In fact, the avoidance of military service is an offense which no mere lapse of time can cancel; it lasts until the military service is rendered. Now, the jurisprudence of courts-martial says that the offense no longer exists when the offender has become naturalized in a foreign country; thenceforward the offender who has been naturalized more than three years incurs no penalty.' (See U. S. Diplomatic Correspondence for 1873, p. 1280.) * * *

"And now comes a decree about which some words ought to be said here. It is the decree of the 26th of August 1811, which has never been repealed. Under that decree it is provided that 'no French citizen can be naturalized in a foreign country without our authorization.'

"This article stands to-day in full force. It is not always applied, but sometimes it is.

"I come now to the last branch of the case, about which I wish to submit some remarks to this honorable commission. If it comes to this—that the personal status of the French citizen must be established at the time of presenting his claim, I have to refer the counsel for the United States to two decisions, both of great weight. The former is a decision of the King's Bench in England; the latter is a decision by the American and British Commission of 1853. In the case of *Wilson v. Marryatt*, 8 Term Reports, 31, the question was as to the legality of a trading voyage to the East Indies, which was the subject of a policy of insurance to one Collet, who conducted the voyage. That trade was then forbidden to British subjects, but was open to American citizens by the treaty of 1794 between Great Britain and the United States. Collet was a British-born subject and an adopted citizen of the United States, and the question was as to whether or not he was entitled, under the treaty, in his character as an American citizen, to a right from which he was excluded by a statute as a British subject. Here is a case where the same man is at the same time a British subject owing perpetual allegiance to England and an American citizen. The case was argued three times before the Court of the King's Bench, and at last the court held that Collet, being within the description of the treaty of 1794 by virtue of his American citizenship, could not be excluded on account of his British nationality. The case was carried to the exchequer chamber, and there the judgment was affirmed.

"The second case is that of *Uhde & Co. v. Great Britain*, decided in the commission of 1853. I will take the liberty to read from the opinion of the honorable umpire of that commission:

"'However good the claim of Messrs. Uhde & Co., as conquered Mexicans, against the United States, by the interpretation of the law of nations as given by the decisions of the courts of Great Britain, may be, the claim ought to be excluded from this commission. The Government of the United States have, however, entertained the claim in the correspondence between the diplomatic agents of the two countries, and for this reason we hold that it should be considered and settled without further delay.' As the case is somewhat extended, I will state it in a few words. Here is a British subject who under the laws of war is to be regarded as a Mexican, and nevertheless his former character as British subject is held to be sufficient to secure for him an award by the honorable umpire of that commission.

And the undersigned maintains that if it be established that the demand of the memorialist grew out of and is founded in a *claim* which is described in the treaty, then there can be no doubt but that the commission has jurisdiction, and should consider the *claim* on its merits.

"To ascertain whether or not the commission has jurisdiction of a case, or claim, reference must be had to the treaty; and the undersigned proceeds at once to the consideration of the treaty.

"It will not be denied that the treaty was entered into between the two governments *bona fide*; and its immediate purpose, as appears from the language, was to give relief and to provide indemnity for a large class of sufferers—citizens of the respective governments—on account of injuries to person or property by them sustained *within certain jurisdictions, and during a specified period of time.* (Article I.)

"It becomes important, then, to ascertain what is meant by the expression 'jurisdiction.' 'Jurisdiction,' says the Supreme Court of the United States (*United States v. Arredondo*, 6 Peters, 709), 'is the power to hear and determine a cause. It is *coram judice* whenever a *case* is presented which brings this power into action.' * * * 'It [jurisdiction] is the power to hear and determine the *subject-matter* in controversy between the parties to a suit; to adjudicate or to exercise judicial power over them, the question is whether, on a cause before a court, their action is judicial or extrajudicial, with or without authority of law to render a judgment or decree upon the rights of the parties. *If the law confer the power to render a judgment or decree, then the court has jurisdiction.*' (*Rhode Island v. Massachusetts*, 12 Peters, 718; *Banton v. Wilson*, 4 Texas, 404.)

"There are some principles of public law which are universally recognized by modern civilized States. One of these is, that international treaties are covenants *bona fide*, and are therefore to be *equitably* and not *technically* construed. (*Phillimore Int. Law*, Vol. II., p. 89.) Another is that the covenant or treaty contracted by *two or more* parties is to be interpreted with reference to the intention of them all—'*conventio aire pacto est duorum vel plurum in idem placitum consensus.*' (Ib. p. 92.)

"Another is, that good faith clings to the *spirit* and fraud to the *letter* of the convention. (Ib. p. 107.)

"Under any equitable construction of the provisions of the treaty, the commission must be held to have jurisdiction of the claim now submitted by the memorialist, and for the following reasons:

"First. Because the acts complained of were committed by the United States.

"Secondly. Because the acts were committed within the jurisdictional territory marked out by the treaty.

"Thirdly. Because the acts were committed during the periods fixed by the treaty.

"Fourthly. Because the acts complained of were injurious to the person and property of a citizen of France.

"All which above averments of facts are contained in the memorial, and are, for the purpose of this demurrer, admitted by the counsel for the United States.

"The undersigned therefore maintains that an *equitable* construction of the provisions of the treaty gives the commission jurisdiction of the claim

of memorialist. Any other construction would be *technical*, and would, to that extent, defeat the purpose and intention of the two contracting powers in the creation of this commission.

"If this claim is not entertained and examined on its merits by the commission, the memorialist is *without remedy and redress*, for the reason that there is no tribunal before which the memorialist may present himself.

"In fact, the undersigned has been informed that one of the honorable commissioners (Mr. Commissioner Aldis) very recently sat as the presiding officer of a claims commission, organized by authority of the United States, which decided that a naturalized American citizen could not present a claim before the said commission, *as an American citizen*, on account of acts committed by the United States against his person or property, at a time when claimant was a citizen of France.

"The contention of counsel for the United States can only be sustained on the theory or assumption that naturalization is *retroactive*. But *naturalization produces its effects only in the future*. (Stolcesco, Etude sur la Naturalisation, pp. 272, 285.)

"II. The answer to what the counsel for the United States says, under the second point of his argument, as to the meaning of certain expressions in article 2 of the treaty, is twofold:

"First. That such a construction is *technical*.

"Secondly. That article 2 is in aid of, and has immediate reference to, article 1, and that article 1 contains the *fundamental provisions of the treaty*, and the language of other articles must, in cases of doubt or difficulty, be construed with reference to it.

"The counsel for the United States says:

"The treaty thus speaks in the present tense, and bars any and every claim unless the person presenting it is at the time of its presentation a citizen of the country through whose agency the claim is to be enforced.'

"But the commission cannot fail to detect the fallacy contained in this statement or proposition of the counsel for the United States. Legal representatives *certainly*, of deceased citizens of either country, and beneficiaries *presumably*, may present the claims of decedents and of original owners to this commission. And this, irrespective of the citizenship of such legal representatives or beneficiaries. (See Rule 1 of the commission, p. 1; see *Comegys v. Vasse*, 1 Peters, Supreme Court Reports, pp. 212, 213.)

"On the other hand, the language of article 1 of the treaty is: * * * 'And all claims on the part of corporations, companies, or private individuals, citizens of France, upon the Government of the United States, arising out of acts committed against the persons or property of citizens of France.' * * * This clearly refers to the persons or property of individuals *who at the time of the commission of the acts aforesaid were citizens of France*.

"If all claims that could not be brought within the description indicated by counsel for the United States in the paragraph cited are to be barred, the labors of the commission will be exceedingly light; and again, the palpable intention of the two contracting states will be defeated by a *technical* construction of the language conveying the grant of powers to the commission.

"III. The undersigned believes that the commission will see that cases cited by counsel for the United States, to wit, the *Charming Betsey* and

proceeds upon the idea that a French citizen may denationalize himself, and it declares that he loses his citizenship in France when he is naturalized in another country, as he may also lose his French citizenship when he does certain other things. * * *

"And I have to say, further, that all that Mr. de Chambrun has quoted of codes and decrees touching citizenship in France, with reference to persons naturalized in other countries, tends to support the positions I now maintain. Penalties are therein imposed for not performing military service. There is not one word, however, as far as I have observed, that has been read by him which goes to show that the French Government does not recognize the right of a French-born citizen or subject to become a citizen of another country, provided always that he stays in that country, or, if he returns, that the obligations resting upon him when he left the country are fairly met.

"MR. DE CHAMBRUN. Now, suppose a Frenchman naturalized in this country, and owns shares of the Bank of France, which, unless it has been very recently changed, can be held only by Frenchmen—suppose he has been naturalized here, what does become of the ownership of those shares? Is it a penalty that they must be turned over to somebody else—that he can not hold them? Is it a penalty? It is merely a provision of the civil law affecting rights of that kind.

"MR. BOUTWELL. I should call it a penalty, certainly. * * * When you take from a person a privilege, the taking of the privilege is a penalty. Therefore, when you take from a French citizen naturalized in the United States, and on account of his being so naturalized, the privilege of holding shares in the Bank of France, you impose a penalty upon him.

"MR. DE CHAMBRUN. In that case it does not relate to military duties or to duties to the government. It is a matter between individuals. The naturalization works as between individuals.

"MR. BOUTWELL. It is not necessary for us to consider what the effects of citizenship in another country are upon a born French citizen. The only point which concerns us is, for the moment—and I do not think that even that question is of supreme importance—to know whether under the French system the right of a French-born citizen to be a citizen of another country is recognized; and I submit with great confidence, and with entire respect, both to this commission and to the counsel for the Government of the French Republic, that not only the seventeenth article of the code, but all the history, both diplomatic and legal, goes to show that the French Government has recognized this right. * * *

"The decree of the 26th of August 1811 is of the same character. I am not going to trouble the commission with reading any portion of it, but two things will appear from an examination of that decree:

"First, that it was really a military order. It was issued in time of war. It was in an exigency. It was a military order, substantially like our military orders which we issued during the war. They passed away when the occasion for their enforcement had disappeared.

"But, secondly, and of more importance, this decree recognizes, from beginning to end, the right of French citizens to make themselves citizens of another country.

"I come now to the consideration of the question of naturalization, for the purpose of asking the commission to reach a conclusion as to what must have been in the mind of the French Government when the treaty of

January 15, 1880, was made. At that time the United States had treaties with Austria, with Baden, with Bavaria, with Belgium, with Denmark, with Ecuador, with Great Britain, with the Grand Duchy of Hesse, with Mexico, with the North German Union (made with Prussia in 1868), with Sweden and Norway, with Wurtemberg, and in all those treaties the right of citizens or subjects of the respective governments to become citizens of the United States under our naturalization laws was fully set forth and declared, and the converse, that citizens of the United States might become citizens or subjects of these several countries was also set forth and declared.

"I assert, as well-established facts and of general knowledge, that in 1880 citizens or subjects of the nations of Europe might become citizens of the United States, and that citizens of the United States might become citizens or subjects of the respective governments of Europe, and that these legal and practical propositions were substantially incorporated into the international law of the continent of Europe and of the United States.

"What, I ask, is international law? It arises from the practice, from the agreement in treaties, from the general understanding, from the aggregate of conduct and judgment of nations and of persons having charge of public affairs. In 1880, when this treaty was made, we may fairly say that this was the international law of the two continents. To be sure, France had not become a treaty party to it, but the municipal history of France, the public history of France, the international dealings of France with other countries, its code and its decrees, all tend to show that France recognized the same law. * * *

"But I say more than this. If the argument of the counsel for the French Government proves anything, it proves too much. If he proves anything in reference to the proposition, it is that the government that he represents—and I certainly do not intimate anything of the kind—but if he proves anything he proves that the government that he represents acted in bad faith in forming this treaty. Citizens of the United States and citizens of France are described in the language of the treaty, and who were meant? France must have known, from her intimate acquaintance with the principles and the practice of this government from the very beginning, that we recognize equally and alike as citizens of this republic those who were born on our soil and those who, born in other lands, have been naturalized and made citizens of the United States under our laws. With us, as France well knew, there was no distinction. France could not have understood otherwise than that we understood the words, 'citizens of the United States,' as including equally and alike those born upon our own soil and those naturalized under our laws. * * *

"This treaty, like every other arrangement between governments, was made as a matter of interest, but upon a principle. The interest was to protect on the part of the United States those persons who owe allegiance to the United States, of whom service might be required, and from whom contributions might be expected. On the part of France the interest was to protect and guard and help those who, as French citizens and owing allegiance to that country, could be depended upon for support, for aid, for contributions, for all the different services which the government might require. In 1880 France had no interest whatever in undertaking to protect a person who, though born in France, had ten years before absolved himself from all allegiance to that government, had taken upon himself

obligations to another government, and as to allegiance, to services, to contributions, to help, had placed himself at the disposal of another country. * * *

"And, last of all, unless this question of citizenship is to be forever in doubt, *in nudibus*, it is in the interest of us all, representing nations here, that each government should look to, provide for, protect, and defend its own citizens, and leave the citizens of other countries to be provided for, protected, and defended by the governments to which they owe allegiance. And I go so far as to say—I have said in the brief, and I do not hesitate to assert it and to stand by it—that the Government of the United States had no power on the 15th of January 1880, upon its own motion and by its own capacity, to act for or in behalf of any citizen of France. It could only indemnify citizens of France through the agency of the Government of France. I say, on the other hand, that on that day the Government of France had no capacity legally, had no jurisdiction, no authority, to act in behalf of a citizen of the United States. Citizens of the United States must look to their own government. Citizens of France must look to their government.' On the 15th of January 1880, Archbishop Perché, of New Orleans, had been for ten years a citizen of the United States. There is no evidence that he ever returned to France, or that he had ever given any intimation of a purpose to return. Indeed, in his memorial, in the first paragraph, he declares that in 1870 he was naturalized, and that since that time he has been an American citizen. Those are his very words, and the proposition now is to declare that he is not an American citizen, but is a French citizen."

At the close of the arguments the commission rendered the following decision:

"The Archbishop Perché in his memorial states that he was naturalized in the United States in 1870. He does not claim to be a French citizen.

"Without deciding upon any other cases which may be analogous to this, we think that the claim of Monseigneur Perché must be rejected, because it does not come within the terms of the treaty, which only provides for the claims of French citizens.

"While making this decision, we deem it proper for us to express our regret that we can not take jurisdiction of a case which seems upon its face to be so equitable."

The claim was then disallowed for want of jurisdiction.

The rule laid down in the case of Archbishop Perché, on the question of citizenship, was applied by the commission in all similar cases. At the end it appeared that there were thirty-three cases of persons claiming compensation who were citizens of France when the losses occurred, but who had in the intervening period been naturalized and accepted citizenship in the United States. These claims were all rejected. They amounted in the aggregate to \$282,884.50.

6. POWER TO SETTLE CLAIMS.

Case of McLeod. Alexander McLeod, a British subject, set up a claim against the United States for his arrest

and imprisonment in the State of New York on a charge of murder committed at the destruction of the steamer *Caroline* in the port of Schlosser, in that State, on December 29, 1837. This claim was presented by the British agent to the commission under the convention between the United States and Great Britain of February 8, 1853. It was heard by the commissioners, in the presence of the umpire, and the claimant himself was permitted to make a statement. The agent of the United States maintained that the case was finally settled between the two governments by Lord Ashburton and Mr. Webster in 1842.

Mr. Hornby, the British commissioner, thought that the adjustment made between the two governments was merely a settlement of certain national grievances, and that any claim on the part of McLeod for damages must be considered as one of the unsettled questions existing at the date of the convention. He was of opinion that, on the assumption of his acts by the British Government and due notice of this fact to the American authorities, McLeod became entitled to immediate release; that the case then became a subject of international controversy, and ought not to have been further prosecuted against an individual; that the detention was longer than was necessary in any event, and was rendered unduly severe on account of the public excitement, which it was the duty of the government to have repressed, and that the claimant was exposed to hardship and much expense, for which he was justly entitled to compensation.

The views of Mr. Upham, the American commissioner, were stated in the following opinion, adverse to the claim:

"The claim of Alexander McLeod, which has been presented for our consideration, renders it necessary to recite briefly the details of border collisions between the United States and the Canadas, which occurred some seventeen years since, and which are set forth in the documents presented in this case.

"On the 29th of December 1837 the steamer *Caroline*, belonging to a citizen of the United States, was lying in the Niagara River, alongside the wharf at Schlosser, in the State of New York, having on board a number of American citizens.

"A civil commotion at the same time prevailed in Upper Canada, and it was alleged that the *Caroline* had been used to

carry arms and munitions of war from the shores of the State of New York to an insurrectionary party on Navy Island, then in arms against the government of that province.

"While the *Caroline* was thus within the jurisdiction of the State of New York, a party of Her Britannic Majesty's subjects left the shore of Canada, came within the limits of the State of New York, seized the *Caroline*, and destroyed her. During the collision, arising from the seizure, Amos Durfee, a citizen of the United States, was killed, and was found dead on the wharf; and it was supposed the lives of other citizens were lost on board the steamer.

"Complaint was early made to Great Britain of the public wrong done to the United States by this invasion and violation of her rights of territory and the injuries there committed, but no satisfaction or apology had been made for such wrong for a period of three years after the event, when, in November 1840, Alexander McLeod, who was a citizen of Great Britain and a resident of Upper Canada, came to Lewiston, in the State of New York, and was there arrested on the charge of having been concerned in the seizure of the steamer *Caroline* and the wrongs connected with it. On examination he was committed to the jail in Niagara County, and in February 1841 the grand jury of that county found a bill of indictment against him for the murder of Durfee. The case was removed to the supreme court [of New York] for trial, and was afterward transferred to another county to avoid the local excitement on the Niagara border.

"The arrest of McLeod revived at once the consideration of the whole subject of the border difficulties. In March 1841 Mr. Fox, then minister of Great Britain to the United States, demanded, formally, in the name of the British Government, the release of McLeod, and set forth the grounds upon which this demand was made, alleging 'that the transaction, on account of which McLeod was arrested, was a transaction of a public character, planned and executed by persons duly empowered by Her Majesty's colonial authorities to take any steps and to do any acts which might be necessary for the defense of Her Majesty's subjects, and that they were not personally and individually answerable to the laws and tribunals of any foreign country.' It was thus contended that all liability of McLeod for the acts charged against him was merged in the national character given to the transaction by the British Government.

"Mr. Webster, in reply, on the 24th of April 1841, stated 'that the communication of the fact being formally made that the destruction of the *Caroline* was an act of public force by the British authorities, the case had assumed a different aspect,' and measures would be taken accordingly.

"The United States Government accepted at once the issue tendered in this form, and insisted on satisfaction or apology for the violation of its rights of territory in the seizure of the

Caroline; at the same time the government took immediate measures to communicate in a proper manner to the judicial authorities the evidence of the international defense thus set up by the British Government, that it might avail to the benefit of McLeod.

"The counsel for McLeod sued out a writ of *habeas corpus*, returnable before the supreme court of New York, and claimed his discharge on the ground thus interposed. It was holden by the court, however, as is stated by Mr. Webster in his letter to Lord Ashburton of August 6, 1842, 'that on this application, embarrassed as it would appear by technical difficulties, McLeod could not be released.' Further hearing was proposed on this subject by a transfer of the case to the United States court for the determination of this question, but McLeod objected to the delay necessarily attendant on such a proceeding, and requested in writing a trial by jury, a copy of which request was communicated to the British Government. Shortly afterward the discharge of McLeod was effected by the decision of a jury, and 'the further prosecution of the legal question,' as Mr. Webster says, 'was then rendered unnecessary.'

"Had the verdict of the jury been otherwise, McLeod had reserved to himself the right to a reconsideration of the decision of the supreme court of New York on the international defense interposed by him.

"Mr. Spencer, the attorney of McLeod, states in his argument before the jury: 'I have taken the precaution to *secure the right* which will enable me to review the decision of the supreme court elsewhere, so that in the event of McLeod's conviction, if the supreme court have been mistaken, if that decision should not be in accordance with the law of the land, it may be reversed and that established which I believe to be the law of the land, namely, that where there was such a war being carried on between the British Government and those who waged it on our side of the waters, the British Government might properly exert its powers to put down that war, and those who acted in obedience to the orders of that government discharged their duty as faithful subjects and citizens, and are not murderers.' (Gould's trial of McLeod, p. 251.)

"Such is a brief recital of the facts relative to this matter and of the respective issues raised by the two governments on the subject.

"The difficulties thus existing were early made the subject of further correspondence, and a final adjustment in regard to them was had between the governments. It becomes necessary, then, to examine the character of this adjustment, and to determine the effect of such settlement on the claim before us.

"Two questions arise in the case:

"I. Whether the settlement made by the governments precludes our jurisdiction over the claim now presented.

"II. Whether, independently of such exception, the facts show a ground of claim against the United States.

"The convention provides that we are to pass upon the unsettled claims of citizens or subjects of either government against the other, and we are to pass 'only on such claims as shall be presented by the governments,' and are to be confined 'to such evidence and information as shall be furnished by or on their behalf.' No claims can be sustained before us except those which the governments can rightly prefer for our consideration. With matters settled and adjusted between them, we have nothing to do.

"A settlement by the governments of the ground of international controversy between them, *ipso facto* settles any claims of individuals arising under such controversies against the government of the other country, unless they are especially excepted; as each government by so doing assumes, as principal, the adjustment of the claims of its own citizens, and becomes, itself, solely responsible for them.

"The controversies to which I have referred consisted of two grounds of complaint; the delay in the liberation of McLeod, on the one hand, and the violation of the American rights of territory in the seizure of the *Caroline*, on the other. These questions passed under the full consideration and revision of the two governments, in 1842, represented by Lord Ashburton, ambassador extraordinary and minister plenipotentiary, on the part of Great Britain, and Mr. Webster, then Secretary of State, on the part of the United States.

"The result of their conference I regard as a full and final settlement of these matters in controversy. In the closing letter of Lord Ashburton on this subject, he says: 'After looking through the voluminous correspondence concerning these transactions' (that is, the difficulty with McLeod), 'I am bound to admit there appears no indisposition with any of the authorities of the federal government, under its several administrations, to do justice in this respect in as far as their means and powers would allow.'

"He makes no complaint of want of diligence or promptness on the part of the United States Government, but says: 'Owing to a conflict of laws, difficulties have intervened, much to the regret of the American authorities, in giving practical effect to the principles avowed by them; and for these difficulties some remedy has been by all desired.' He then says: 'I trust you will excuse my addressing to you the inquiry, whether the Government of the United States is now in a condition to secure, in effect and in practice, the principle, which has never been denied in argument, that individuals, acting under legitimate authority, are not personally responsible for executing the orders of their government? That the power, when it exists, will be used on every fit occasion, I am well assured.'

"Lord Ashburton thus rested his claim, and in the same letter and spirit tendered an apology for the violation of the United States right of territory in the seizure of the *Caroline*, 'which transactions,' he says, 'are connected with each other.'

"His lordship then does not wait for the reply of Mr. Webster as to the adoption of a provision for more prompt means of redress, in cases like McLeod's, but, reposing confidence in advance in the proper action of the American government, closes his letter by saying, in reference to both these subjects of controversy: 'I trust, sir, I may now be permitted to hope that all feelings of resentment and ill will resulting from these truly unfortunate events may be *buried in oblivion*, and that they may be succeeded by those of harmony and friendship, which it is certainly the interest, and I also believe, the inclination, of all to promote.'

"Mr. Webster, in his reply to the subjects of this letter, adverting to the matter of McLeod, stated the reasons why delay had occurred in his case, and that 'in regular constitutional governments persons arrested on charges of high crimes can only be discharged by some judicial proceeding. It is so in England. It is so in the colonies and provinces of England.' He further says: 'It was a subject of regret that McLeod's release had been so long deferred;' and, in answer to the question proposed to him by Lord Ashburton, stated 'it was for the Congress of the United States, whose attention has been called to the subject, to say what further provision ought to be made to expedite proceedings in such cases, and that the Government of the United States holds itself not only fully disposed but fully competent, to carry into practice every principle which it avows or acknowledges, and to fulfil every duty and obligation which it owes to foreign governments, their citizens or subjects.'

"During the same month, on the 29th of August 1842, Congress passed a law by which immediate transfer of jurisdiction might be made to the courts of the United States of all cases where any persons, citizens, or subjects of a foreign State, and domiciled therein, should be held in custody on account of any act done under the commission, order, or sanction of any foreign state or sovereignty.

"The delay, therefore, attendant on the previous means of removal of such cases to the jurisdiction of the United States courts for their decision, which was the only ground of complaint, was thus provided against, and every suggestion which had been made on the subject was thus fully met and answered.

"In reference to the other grounds of complaint—the violation of the rights of territory of the United States in the seizure of the *Caroline*—Mr. Webster, in reply to the declarations of Lord Ashburton, thus disposes of the matter in the same letter: 'Seeing, he says, that the transaction is not recent; seeing that your lordship, in the name of your government, solemnly declares that no slight or disrespect was intended to the sovereign authority of the United States; seeing it is acknowledged that, whether justifiable or not, there was yet a violation of the territory of the United States, and that you

are instructed to say that your government considers that as a most serious occurrence; seeing, finally, that it is now admitted that an explanation and apology for this violation was due at the time, the President is content to receive these acknowledgments and assurances in the conciliatory spirit which marks your lordship's letter, and will make this subject, as a complaint of violation of territory, the topic of no further discussion between the two governments.'

"These subjects of difficulty and controversy between the two countries were thus fully and finally adjusted, so that the able and patriotic statesmen by whom this settlement was effected trusted, in the words of Lord Ashburton, 'that these truly unfortunate events might thenceforth *be buried in oblivion.*'"

"The question then arises, what was the effect of this settlement on the private claims of any citizen of either country against the other? It is quite clear that this settlement was not made, leaving the private wrongs of the owners of the *Caroline* to be pressed against the British Government for adjustment by an American agent; nor were the claims of McLeod to indemnity for injuries he may have received for supposed participation in these transactions to be set up through an agent of the British Government against the United States.

"Such a construction of the adjustment made between Mr. Webster and Lord Ashburton would be a violation of the whole tenor of the correspondence between the two governments, and of the international ground on which they both concurred in placing the collisions between the two countries. In my view the entire controversy, with all its incidents, was then ended; and if the citizens of either government had grievances to complain of, they could have redress only on their own governments, who had acted as their principles, and taken the responsibility of making the whole matter an international affair, and had adjusted it on this basis."

The umpire rendered the following decision :

"The commissioners under the convention having been unable to agree upon the decision to be given with reference to the claim of Alexander McLeod, of Upper Canada, against the Government of the United States, I have carefully examined and considered the papers and evidence produced on the hearing of the said claim.

"This case arose out of the burning and destruction of the American steamboat *Caroline*, at Schlosser, in the State of New York, on the Niagara River, by an armed force from Canada, in the year 1837, for which the British Government appears to have delayed formally answering the claims of the United States until 1840, when the claimant was arrested by the authorities of the State of New York on a charge of murder and arson, as having been one of the party which destroyed the *Caroline*. The British Government then assumed the

responsibility of the act, as done by order of the government authorities in Canada, and pleaded justification on the ground of urgent necessity.

"From this time the case of the claimant became a political question between the two governments, and the United States used every means in their power to insure the safety of the claimant, and to procure his discharge, which was effected after considerable delay.

"It appears by the diplomatic correspondence that the affair of the *Caroline*, the death of Durfee, who was killed in the affray, and the arrest of the claimant, were all amicably and finally settled by the diplomatic agents of the two governments in 1841 and 1842.

"The question, in my judgment, having been so settled, ought not now to be brought before this commission as a private claim. I therefore reject it."

Bates, umpire, case of McLeod, convention between the United States and Great Britain of February 8, 1853.¹

The case of McLeod was an incident of the rebellion in Canada in 1837, under the leadership of Wm. Lyon McKenzie, a printer, and certain other persons. This movement produced at various places in the United States, and especially along the Canadian border, a sympathetic commotion which led Mr. Forsyth, Secretary of State, on December 7, 1837, to address a letter to the district attorneys of the United States for Vermont, Michigan, and the northern district of New York, stating that it was "the fixed determination of the President faithfully to discharge, so far as his power extends, all the obligations of this government, and that obligation especially which requires that we shall abstain under every temptation from intermeddling with the disputes of other nations." On the same day Mr. Forsyth wrote to the governors of New York, Michigan, and Vermont, requesting their "prompt interference to arrest the parties concerned, if any preparations are made of a hostile nature against any foreign power in amity with the United States." Meanwhile the Canadian insurgents were defeated, and some of them sought refuge in the United States. On the 12th of December 1837, Mr. J. Trowbridge, mayor of Buffalo, addressed to Mr. Fillmore, who was then a member of the United States Senate, a letter in which it was stated that McKenzie and Dr. Rolfe, leaders of the insurgents, were in that city; that they had held three public meetings and were to hold another in the theatre that evening; that a strong feeling prevailed, and that he feared the organization of a force to aid them. This letter Mr. Trowbridge authorized Mr. Fillmore to show to the President and to the Secretary of War. On the 14th of December, however, he wrote directly to the President, stating that the meeting on the evening of the 12th was the largest assemblage ever held in Buffalo; that McKenzie addressed it, and asked for arms, ammunition, and volunteers to assist the reformers in Canada, and that on the 13th of December men were actively engaged in organizing a military force. Towards the evening of the 13th, said Mr. Trowbridge, a handbill was posted up "calling upon the volunteers for Canada to meet

¹ S. Ex. Doc. 103, 34 Cong. 1 sess. p. 327.

in front of the theatre, for the purpose of taking up their line of march. A number met, armed and equipped. A large assemblage soon gathered around the Eagle tavern, which had been the depot for arms through the day. A general was duly appointed to take command of the invading army. About 9 o'clock the people generally dispersed. The volunteers, with their friends and abettors, marched with their arms and colors out of the city, as was supposed for the night; about 1 o'clock this morning a portion of them returned and entered the court-house and forcibly took from the sheriff two hundred stand of arms belonging to the State arsenal at Batavia. They also took from the gun-houses two field pieces, and then marched to Black Rock, where they are now quartered. * * * The civil authorities have no adequate force to control these men."¹

The collectors of customs on the Canadian frontier were instructed to lend their aid in enforcing the neutrality laws, and the marshal of the United States for the northern district of New York was directed to proceed to Buffalo for the purpose of suppressing the violations of neutrality in that quarter. On the 28th of December 1837 he reported that on his arrival at Buffalo he found 200 or 300 men, mostly from the American side of the Niagara river, encamped on Navy Island, in Upper Canada, armed and under the command of Rensselaer Van Rensselaer, of Albany, who had assumed the title of "general." The encampment had received accessions till it numbered about 1,000 men, well armed. This expedition had been organized at Buffalo after McKenzie's arrival. Warrants had been issued for the arrest of the men, but could not be served.²

On the 29th of December occurred the destruction of the *Caroline*. This vessel was a small steamer employed by the men at Black Rock and on Navy Island in communicating with the mainland. According to the deposition of the master, the *Caroline* left Buffalo on the 29th of December for the port of Schlosser, which was also in New York. On the way he caused a landing to be made at Black Rock and the American flag to be run up. After the steamer left Black Rock a volley of musketry was fired at her from the Canadian side, but without injuring her. She then landed "a number of passengers" at Navy Island, and arrived at Schlosser about 3 o'clock p. m. Subsequently, in the same afternoon, she made two more trips to Navy Island, and returned finally to Schlosser about 6 o'clock p. m. During the evening about 23 persons, all citizens of the United States, came on board and "asked to be permitted to remain on board all night." At midnight about 70 or 80 armed men boarded the steamer and attacked the persons on board with muskets, swords, and cutlasses. The "passengers and crew," of whom there were in all 33, merely endeavored to escape. After this attack the assailing force set the steamer on fire, cut her loose, and set her adrift over the Niagara Falls. Only 21 of the persons on board had since been found, and one of these, Amos Durfee, was killed on the dock by a musket ball. Several others were wounded. Twelve were missing. After the *Caroline* was set adrift beacon lights were seen on the Canadian side, and cheering was heard, and it was not doubted that the assailants belonged to the British force at Chippewa.³ Such was the statement made by the master. It was generally reported and believed

¹ H. Ex. Doc. 74, 25 Cong. 2 sess.

² H. Ex. Doc. 64, 25 Cong. 2 sess.

at the time that the men said to be missing lay wounded in the steamer, and were sent with her over the falls. It was subsequently ascertained, however, on further investigation that of the persons on board the only ones missing were Durfee and the cabin boy, Johnson, popularly known as "Little Billy," both of whom were shot as they were leaving the steamer; that Van Rensselaer's forces had made some use of Grand Island, and had fired some shots into Canada while the main forces lay at Navy Island and before the *Caroline* went to Schlosser; that two persons from the *Caroline* were carried by the attacking force into Canada, but were afterward set at liberty, and that that force acted under the command of Col. A. N. McNab, of Chippewa, who was acting under the orders of his superior officer.¹

On the 30th of December the collector at Buffalo wrote: "Our city is in great alarm. The whole frontier is in motion, and God knows where it will end. An express has been sent to Governor Marcy to call out the militia." The collector feared that the laws could not be enforced without great loss of life. The revenue cutter *Erie* was placed at his disposal to aid in enforcing the laws; and he was ordered to seize any vessels or boats which might be engaged in carrying arms, ammunition, or military supplies to forces arrayed against the government on the Canadian side of the line.²

On the 4th of January 1838 Mr. Fox, the British minister at Washington, complained that a part of Upper Canada was actually invaded by a formidable body of men from the United States, composed partly of Canadian outlaws and partly of citizens of the United States, all under the command of Van Rensselaer, and that they had established themselves at Navy Island, on the Canadian side of the Niagara River, with artillery, arms, and ammunition.³ The 5th of January was the date of various acts and communications. President Van Buren sent a message to Congress, saying that the existing laws, as experience on the southern border and the events daily occurring on the northern frontier had shown, were insufficient to guard against the hostile invasion from the United States of the territory of neighboring and friendly nations, and recommending that the Executive be clothed with "full power to prevent injuries being inflicted upon neighboring nations, by the unauthorized and unlawful acts of citizens of the United States, or of persons who may be within our jurisdiction and subject to our control."⁴ Mr. Forsyth addressed a note to Mr. Fox, saying that the destruction of property and assassination of citizens of the United States on the soil of New York, when the President was endeavoring to allay excitement and prevent any unfortunate occurrence on the frontier, had produced "the most painful emotions of surprise and regret, and that the incident would be made the subject of a demand for redress."⁵ General Scott was sent to the frontier, with letters to the governors of New York and Vermont, requesting them to call out the militia.⁶ On the 6th of February Mr. Fox communicated to Mr. Forsyth

¹ H. Ex. Doc. 302, 25 Cong. 2 sess.

² H. Ex. Doc. 74, 25 Cong. 2 sess.

³ H. Ex. Doc. 64, 25 Cong. 2 sess.

⁴ H. Ex. Doc. 64, 25 Cong. 2 sess.; Autobiography of Lieutenant-General Scott, I. 307-317.

a letter from Governor Head, and while avowing that the force that destroyed the *Caroline* was under the command of Colonel McNab, declared that the piratical character of the *Caroline* seemed to be fully established; that the ordinary laws of the United States were not at the time enforced along the frontier, but were openly overborne; and that the destruction of the *Caroline* was an act of necessary self-defense.¹ On the 22d of May 1838 Mr. Stevenson, then minister of the United States at London, presented a demand for reparation. Its receipt was acknowledged by Lord Palmerston on the 6th of June, with a promise of consideration.²

“In the case of John Emile Houard against
Houard's Case. Spain, I find these facts established: The father of the claimant, a native of France, had been naturalized a citizen of the United States in Philadelphia in 1803. In or about the year 1822 he removed with his family, including the claimant who was then 6 years old, to the Island of Cuba, where he acquired an establishment, and died in 1828. The claimant was educated in Cuba after his father's death, remained there, when of age, until after 1840, then went to study medicine for three years in Philadelphia, and finally returned to Cuba where he settled. In the beginning of 1869, and again in November 1870, when his arrest was already determined upon by the Spanish authorities, he declared himself to the consulate of the United States at Cienfuegos to be an American citizen.

“The Government of the United States called the attention of the Government of Spain, in 1872, to a then recent judgment of a court-martial by which John E. Houard had been sentenced for treason, as a Spanish subject, to eight years' imprisonment with confiscation of his property. The question of the claimant's nationality, as well as of the alleged injustice of the sentence, were then treated in a diplomatic correspondence which is filed in the papers of this claim.

“The injustice complained of is hardly open to dispute, as it was expressly acknowledged in the decision itself that there was doubt of the guilt of John E. Houard.

“As to the question of nationality: Spain asserted that John E. Houard had lost his American citizenship by expatriation. On the part of the United States, it appears from the diplomatic correspondence that while the American Government was pressing the case upon the consideration of Spain, the then Secretary of State officially declared that if John E. Houard had desired to renounce his nationality of birth it was

¹ H. Ex. Doc. 302, 25 Cong. 2 sess.

² H. Ex. Doc. 183, 26 Cong. 1 sess. See further, Hall's Int. Law, 4th ed. pp. 283, 328; Webster's Works, v. 129; Wharton's Int. Law Digest, I. § 21.

not necessary for him to do more than he actually did in quitting the United States, establishing himself permanently in Cuba and making that island his residence without any declared or fixed intention to return to the United States, and without discharging during his long residence there any duty of a citizen of the United States. 'If there be circumstances to contradict this apparent throwing off of American citizenship (added the Secretary of State) they have not yet been fully presented.' The Department of State was then in possession of proof that the claimant had, as early as in 1869, declared himself an American citizen.

"Both questions, viz, of citizenship and of injury suffered, were left undecided by the two governments, when, by a voluntary act of Spain, accepted as such by the government of the United States, John E. Houard was released and his property restored. In fact Spain requested, as a condition of such pardon, that an end should be thereby put to all discussion concerning the nationality of John E. Houard, and the United States entirely agreed with Spain in regarding such spontaneous pardon, given in a spirit of amity and good will, as the best means of obviating the further discussion of the delicate questions involved, and at the same time of avoiding the possible contingency of a new trial of John E. Houard before a civil court.

"John E. Houard now comes before this tribunal claiming, as an American citizen, that he is entitled to indemnity for the wrong done him and the damages suffered in consequence of the above sentence.

"The umpire does not deem it consistent with the character of his office, nor required by the interests of either party, that the questions involved in the sentence, thus disposed of heretofore and intended to be closed by a conditional pardon granted as the result of an international agreement, should now be reopened.

"With this view of the case it is unnecessary to determine whether or not the alleged loss of claimant's nationality of origin by expatriation is sustained."

Baron Blanc, umpire, case of *John E. Houard*, No. 107, Span. Com. (1871). February 4, 1880.¹

¹For the diplomatic correspondence in this case see H. Ex. Doc. No. 223, Parts 1 and 2, 42 Cong. 2 sess. See also resolution of April 8, 1872, H. Mis. Doc. No. 174, 42 Cong. 2 sess.; letter of Sec. of State, April 11, 1872, H. Mis. Doc. No. 188, 42 Cong. 2 sess.; res. of Mr. Banks, April 11, 1872, H. Mis. Doc. No. 185, 42 Cong. 2 sess.

Bours' Case. "One Colonel Palacios imprisoned him in a comfortable home a few hours, August 1866, and until he paid a fine of ten thousand dollars, imposed upon him as a penalty for alleged complicity with the imperialists. Claimant left Alamos, Sonora, his place of residence, with his family, for prudential reasons and removed to Chinipas and stayed there till Palacios left Alamos. While residing at Chinipas claimant went to Chihuahua, where the government was then established, and appealed to President Juarez for redress.

"The President received him kindly and gave him an order on Pesquiera, the governor of Sonora, for repayment of the money exacted, and claimant recovered it with interest.

"I consider that an adjustment of the grievances by and between claimant and the government, and that he is not afterwards at liberty to make any reclamation against the government for the wrongs thus inflicted by Palacios.

"The claim is therefore rejected."

Mr. Wadsworth, commissioner, delivering the opinion of the commission, *Robinson Bours v. Mexico*, No. 710, U. S. and Mexican Claims Commission, convention of July 4, 1868, MS. Op. V. 419.

In the case of the schooner *B. L. Allen*, Isaac Morgan & Co., claimants, *v. Mexico*, No. 129, MS. Op. II. 317, the commissioners held that the settlement of the case by the American minister and the minister of foreign relations at the time of the release of the vessel, which was accepted as an act of favor coupled with the condition that no claim should be made against Mexico, precluded the allowance of a claim for her detention. The facts in the case are disclosed in the case of *Peter Jarr*, No. 391, and *James Hurst*, No. 393.

Indian Depredation Claims. By Article XI. of the treaty of Guadalupe Hidalgo the United States, in view of the fact

that much of the territory thereby ceded to it was inhabited by savage tribes which would thenceforth be under its exclusive control, agreed that all incursions by such savages into Mexico should "be forcibly restrained by the Government of the United States whensoever this may be necessary, and that when they cannot be prevented they shall be punished by the said government, and satisfaction for the same shall be exacted—all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory against its own citizens." It was further provided that it should not be lawful "for any inhabitant of the United States to purchase

or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two republics; nor to purchase or acquire horses, mules, cattle, or property of any kind, stolen within Mexican territory by such Indians." In the event of any person being captured in Mexico by the Indians and carried into the United States the latter pledged "the faithful exercise of its influence and power" to return the captive to his country or to deliver him to the agent of the Mexican Government. For the purpose of giving effect to these stipulations the United States by the same article agreed then and thereafter to "pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require."

These stipulations became in the course of a few years the subject of an acrimonious correspondence, Mexico alleging that the United States had not performed its obligations, while the latter maintained that it had. This circumstance led the two governments to endeavor to arrange the subject in the treaty of December 30, 1853, commonly called the Gadsden or Mesilla treaty. By Article I. of this treaty Mexico ceded to the United States the strip of territory known as the Mesilla Valley. Article II. provided as follows:

"ARTICLE II.

"ARTICULO II.

"The Government of Mexico hereby releases the United States from all liability on account of the obligations contained in the eleventh article of the treaty of Guadalupe Hidalgo; and the said article and the thirty-third article of the treaty of amity, commerce, and navigation between the United States of America and the United States of Mexico, concluded at Mexico on the fifth day of April 1831 are hereby abrogated."

"El gobierno de México por este artículo exime al de los Estados Unidos de las obligaciones del Artículo XI. del tratado de Guadalupe Hidalgo; y dicho artículo, y el XXXIII. del tratado de amistad, comercio, y navegación entre los Estados Unidos Mexicanos y los Estados Unidos de América, y concluido en México el día 5 de abril de 1831, quedan por este derogados."

By Article XXXIII. of the treaty of 1831, referred to in the article just quoted, the contracting parties engaged that they should, by all the means in their power, maintain peace and

harmony among the Indian nations inhabiting the lands adjacent to their boundaries; and the better to attain this object, they bound themselves "expressly to restrain by force all hostilities and incursions on the part of the Indian nations living within their respective boundaries." They also agreed to restore any captives taken by the Indians in the one country and carried into the other.

By Article III. of the treaty of 1853, the United States, in consideration of the stipulations contained in Articles I. and II., agreed to pay to Mexico the sum of \$10,000,000.

In a correspondence held at Washington in 1856 Mexico took the ground that the second article of the treaty of 1853 released the United States only from the obligation to execute Article XI. of the treaty of Guadalupe Hidalgo in the future, but not from the liability to make indemnity for any violations of that article in the past. The United States, on the other hand, maintained that the treaty of 1853 was intended to release the Government from all liability for the past as well as for the future.

When the commission met under the convention between the United States and Mexico of July 4, 1868, there were presented to it 366 claims, amounting to \$31,813,053.64½, for injuries to persons and property committed by Indians coming from the United States into Mexico between February 2, 1848, and December 30, 1853. All these claims were practically disposed of in the case of *Rafael Aguirre v. The United States*, No. 131.

The agent of the United States moved to dismiss this claim on three grounds, the last of which was in substance a recital of evidence in support of his second. The first and second grounds were (1) that it did not appear that the claimant had been injured "by the authorities of the United States," and (2) that the whole subject was disposed of by the treaty of December 30, 1853.

Mr. Palacio, the Mexican commissioner, *Views of Mr. Palacio*, maintained that the claimant was entitled to an award. An injury was, said Mr. Palacio, "everything causing a detriment to the rights of a person, either by a positive fact or by refusing him something to which he is entitled." The injuries in the present case arose from the failure of the United States to perform obligations derived from (1) the law of nature in its application to international relations; (2) international law, as established by the consent

of civilized nations and the opinions of writers; (3) the conventional law, as enacted by treaties; (4) the acknowledgment, express or implied, of the party whose obligation was alleged; and (5) the legislation of the United States. The law of nature, said Mr. Palacio, enjoined the maxim, *Quod tibi non vis fieri, alteri ne facias*. On this ground a nation must restrain incursions from its territory into the territory of another nation. The law of nations renders the territory of each nation inviolable. Hence, each nation must itself prevent and punish attempts within its territory against the territory of another nation. The conventional law between the United States and neighboring countries imposed this duty explicitly. By Article V. of the treaty between the United States and Spain of 1795, it was agreed that the contracting parties should "restrain by force all hostilities on the part of the Indian nations living within their boundary; so that Spain will not suffer her Indians to attack the citizens of the United States, nor the Indians inhabiting their territory; nor will the United State permit these last-mentioned Indians to commence hostilities against the subjects of His Catholic Majesty or his Indians, in any manner whatever." This stipulation, contended Mr. Palacio, remained in force "as inseparable from the sovereignty over the Mexican territory," and survived the war between the United States and Mexico. As illustrating the duty which it imposed, he cited the pursuit of Indians by the United States forces under General Jackson into Florida in 1816, and the justification of his act by his government on the ground that it was a proper measure of self-defense, Spain having failed to perform her obligations. On that occasion the United States also informed the Government of Spain that indemnity was justly due for the extraordinary expenses incurred in pursuing and punishing the savages.

But in reality none of the claims under consideration antedated February 2, 1848, when the treaty of Guadalupe Hidalgo was concluded. The obligations imposed upon the United States by Article XI. of that treaty Mr. Palacio defined thus:

- "1. Obligation to prevent incursions, by force, if necessary.
- "2. Obligation to punish the invaders severely, if the invasion could not be prevented.
- "3. To exact the responsibility from the same invaders.
- "4. To forbid in the most absolute and efficient manner the purchase of Mexican captives in the United States, as well as of animals or other stolen property.

"5. To take from the Indians the captives they might carry away from the Mexican territory to that of the United States, employing for that purpose either influence or power.

"6. To enact all laws which might be necessary in this matter, and enforce their execution.

"7. To see that the Indians should not be driven from the territory occupied by them, in order that they should not feel compelled to cross into Mexican territory in search of new homes."

In order to fulfill these obligations, Mr. Palacio said that the United States should have adopted and enforced the following measures:

"1. To send to the territory occupied by the Indians the military force necessary to pursue, overtake, and defeat them whenever they might move in the direction of the Mexican frontier.

"2. To establish on the frontier a line of military posts, in order to prevent the Indians from crossing it without being noticed, pursued, and defeated.

"3. To visit constantly the places inhabited by them, in order to know whether they have brought any stolen property or captives and to inflict upon them condign punishment.

"4. To force them to indemnify for all damages caused by them in Mexico, either with the pensions which some of the tribes receive from the United States or with other property they might possess. If, on account of their extreme poverty, the damage could not be satisfactorily repaired with the property taken from them, they at least would receive the lesson that they could not retain anything while making war on Mexico.

"5. To enact laws in which the purchase of Mexican captives or stolen goods brought from Mexico would be declared a grave crime deserving a severe punishment, and to give the political and judicial authorities most stringent orders for the prosecution and punishment of that crime.

"6. To force the Indians to promise, solemnly, not to invade Mexico, and to oblige them to deliver up the captives and stolen property, employing force, if necessary, no matter if some fears of a war against them might be entertained.

"7. To bring the Indians into civil life, furnishing them with means of subsistence, in order that they should not feel obliged to have recourse to pillage; and not to let them wander about out of the places assigned to them for their residence.

"8. To prevent white settlers from establishing themselves at their will in the places occupied by the Indians, and to see that these should not be driven out by force to the Mexican frontier.

"9. To watch carefully that trade should not be carried on with hostile Indians, and that they should not receive firearms, powder, lances, arrows, and other articles of war.

"10. To maintain with the Mexican authorities a constant correspondence in order to inform them of the movements of the Indians, specially when these would have crossed the frontier, eluding the vigilance of the American authorities."

Taking these measures as a definition of the duty of the United States, Mr. Palacio contended that that duty had been left wholly unfulfilled. In order to sustain this contention he resorted to various public documents of the United States, including the messages of Presidents Taylor and Fillmore to Congress, and reports both of civil and of military officers of the government, urging the adoption of more effective measures and the exercise of greater watchfulness to repress the Indian depredations.¹ The results of the neglect of the United States in this regard Mr. Palacio described thus:

"The obligations assumed by the United States, and the responsibilities incurred by failing to perform them, are consequently of two different classes. One of these classes relates to injuries sustained by Mexico as a nation, in her political capacity, and as an aggregate of common interests. The other class refers to damages sustained by private individuals, who, besides being affected by the general evils inflicted upon Mexico, experienced some others exclusively concerning their persons and property.

"For the only purpose of showing the truth of these assertions, I will make a very brief statement of the evils inflicted upon Mexico as a nation, by the incursions of the savage Indians:

"1. The loss of thousands of lives of Mexican citizens, who possibly would have personally contributed to the defense of the national independence and to the increase of public wealth and power.

"2. The necessity of imposing new taxes on ruined and impoverished portions of the country—which gave origin to a profound disaffection toward the government, and consequently to many of the insurrections and rebellions which have shed so much blood and demoralized the country.

"3. The necessity of constantly maintaining an army, which has served, as all the standing armies do, to oppress the people, oppose the progress of liberal institutions, and keep the country behind the age.

"4. To produce in the bordering states a situation of misery, languidness, and despondency, which exerted considerable influence in the creation of a political party favoring European intervention, and weakened the nation in her struggle against the iniquitous attempt of Napoleon III. to establish an empire in Mexico. * * *

¹ Ex. Doc. 31st Cong. 1st sess. vol. 1, p. 426; S. Doc. 33 Cong. 1 sess. vol. 1, pp. 256, 363, 434; S. Doc. 33 Cong., 2 sess. vol. 1, pp. 366-385.

"The responsibilities of this kind, notwithstanding that they are the greatest and most important ones, are not to be exacted at present from the United States. Nor can they be discussed in any way before this commission, whose only object is to examine and adjust private claims. * * *

"What it is impossible to doubt * * * is that after six years of the continued incursions of the Indians the inhabitants of the bordering Mexican states must have sustained considerable losses and damages; and that the United States are to be held responsible for all of them, and in justice bound to indemnify the claimants, because they were obliged to prevent the Indian depredations which certainly would not have been effected had the American Government complied with the stipulations of the treaty,

"I will make more palpable this truth by referring to some principles of law, which can be enunciated as follows:

"A. Every fault produces the obligation of indemnifying damages growing out of it.

"B. The failure to perform a specific obligation gives occasion to a claim for damages.

"C. The promise of indemnity binds the promisor to pay due remuneration for the whole detriment sustained.

"D. He who has promised to perform an act, in consideration of a positive value received by him as its equivalent, is bound to fulfill his promise or to return the value received.

"E. The profit obtained by failing to perform a duty arises out of an immoral fact and can not be retained."

As to the second ground of the motion to dismiss, Mr. Palacio contended that the release of the United States by Article II. of the Gadsden Treaty was altogether prospective. To support this contention he resorted to the Spanish text of the article. For the words "all liability on account of the obligations," the Spanish equivalent is "las obligaciones," which, said Mr. Palacio, imported a release from future obligations, but not from liability incurred by a prior failure of duty. He also adverted to the fact that the English text of Article II. of the Gadsden Treaty referred to the specified articles of the treaties of 1848 and 1831 as "abrogated," while the Spanish text referred to them as "derogados," which, he thought, implied a diminution of liability but not a total extinction of it. In this alleged conflict, Mr. Palacio argued that that construction should be adopted which was most consonant with reason and justice, and which would preserve individual rights rather than destroy them. In this relation he said:

"If I entertained any doubt in this matter, I would appeal to considerations of equity in order to satisfy my mind. The most important are the following:

"A. The right which Mexico is alleged to have given up, although acknowledged and explained in an international con-

vention, originates with the natural law and with the common and recognized duties of nations. It is therefore, according to its nature, one of those favorable matters which are to be construed in an ample manner; and so, the release of a right of this kind cannot be presumed, unless made in an indubitable manner.

"B. The claims which it is supposed were given up by Mexico are the private property of some Mexican citizens. The release of these claims is an act of occupation and the result of the exercise of the eminent domain, which being odious and in opposition to the ordinary law, can not be presumed in case of doubt.

"C. Mexico, by giving up the claims of her citizens, without providing anything for their payment, would have committed an act of great injustice, and incurred heavy responsibilities. Such an action is never to be presumed, either on the part of a nation or of a private person; and to think otherwise the most perfect evidence is required.

"D. Finally, it is against every principle of equity to leave clear obligations unperformed, and not to compensate in any way for the injuries therefrom arising; but instead of that, save and keep the money which should have been expended in the accomplishment of said obligation. An interpretation that implies such results, I would never prefer to another that points to the opposite side."

Mr. Wadsworth, the American commissioner, Views of Mr. Wadsworth. held that the motion to dismiss the claims should be allowed. At the outset he discussed the scope of the obligation to make indemnity for injuries committed "by the authorities" of the contracting parties, and in this relation said:

"As to the general principle, the commissioners have always been of one mind. Claims for injuries in person or property, caused by the omission of a duty plainly resting on the authorities of either government, we have always held are referred to us by the terms of the convention, as truly as any claims for injuries arising from acts of malfeasance or misfeasance. The failure to pay a debt justly due by the government, however arising, from contract or otherwise, or the refusal to pay it, we have held to be the omission of a duty and an injurious neglect; in short, an injury to the claimant 'by the authorities.' Those cases of loss occasioned by disorderly soldiery, in which awards have been made, must rest (many of them) on the ground, not that these disorders were committed by the authorities of the government (such soldiers are scarcely 'authorities') but that the authorities failed in the imperative duty of restraining and governing the armed men employed in the public service, or in punishing them and compelling reparation from the wrongdoers. * * *

"Many of the awards made by the learned umpire of this commission can be placed on no other ground than that of an omission by the authorities to discharge an incumbent duty. Such are the cases awarding against the Mexican Government for a failure to pay money due for goods sold and delivered to its agents (*Manasse & Co. v. Mexico*, No. 432; *Francis Yturria v. Same*, No. 553, etc., etc.), or the failure to restrain its disorderly soldiers from violence, or to punish them for such disorders (*Eigendorff v. Mexico*, No. 531).¹ Upon this ground of failure to perform a duty, we hold the United States responsible for the burning and plunder of Piedras Negras by a State volunteer force, though it must not be overlooked that these injuries were subsequently justified by the American Secretary of State (in the face of their condemnation by General Persifer F. Smith) and the Congress of that country, which appropriated a large sum of money to pay these and other troops of that State. The point is, that these volunteers cannot be considered as 'authorities of the United States,' that power nevertheless being manifestly responsible in the premises for a failure on the part of its authorities to restrain or punish the wrongdoers, or to make any effort in that direction. * * *

"But as these claims, meeting with an absolute 'no' from me, must go to the umpire, I do not wish to withdraw any question from his decision, and will let them go upon all the objections raised by the agent of the United States. For it now seems probable that the umpire may differ from me on this interpretation of the language of our convention. His views as expressed in the case of the widow and children of *Anderson Dorris v. Mexico*, No. 695,² indicate that such a result may be anticipated. He there places quite a strict construction on the language of the treaty. 'The charter of our international commission,' he says 'if I may be permitted to use the term, says, in so many words, that the commission shall occupy itself with cases only in which the complainant can show that he is a citizen of the country from which he claims, and that the wrong complained of was done to complainant by the authority or some authority of the country against which he complains,' etc. The unlawful killing of Dorris by Mexican soldiers, 'in their uniforms,' he says, was not an injury by the authorities of Mexico, but the act 'of enraged individuals.'

"As the soldiers who killed Dorris were the camp guard at Matamoras, called out by the adjutant of the camp, and under his orders placed around the house in which the unfortunate man lived (orders not specified in the record), and their colonel on the ground, the case goes a great way in restricting the

¹ These were decisions of Dr. Lieber. The opinions of Messrs. Wadsworth and Palacio in the case of Aguirre were prepared while Dr. Lieber was still umpire of the commission.

² Decided by Dr. Lieber November 17, 1871.

meaning of the convention. Soldiers in uniform, bearing the arms placed in their hands by their government, and under the orders of their officer, present with them, are not 'authorities,' nor is the omission of the officer to preserve discipline and restrain the unlawful use of their weapons a failure in any duty toward a citizen of the United States, which may be characterized as an injury by the authorities of Mexico.

"In view of this case it may be well argued that savage Indians without fixed habitations, like the Apaches, roaming over more than a thousand miles of plains, deserts, and mountains, situate in Mexican and American territory equally, are not authorities of the United States, nor was the failure of the United States to restrain their wanderings and wars an injury by the authorities of that country, within the meaning of our convention, and claims founded upon such injuries have not been referred to the commission. It is also held by the umpire that the total neglect by the authorities to prosecute or punish the soldiers who killed Dorris was not an injury by the authorities. From which it may be deduced that the assumed failure of the United States to punish its 'subjects,' the Apaches, etc., for raiding into Mexico, did not involve responsibility for the raids, and was not an injury referred to us by the convention. I may well let the question go to the umpire, and so I will, since the cases must most certainly go to him for his final decision upon radical differences of opinion between my much esteemed colleague and myself." * * *

Conceding, however, for the sake of the argument, that the omission of the authorities of the United States to prevent incursions into Mexico by savages inhabiting its territory constituted an injury within the meaning of the convention, and that claims arising from such injuries from February 2, 1848, to December 30, 1853, had been referred to the commission as unsettled claims, Mr. Wadsworth contended that the evidence did not show that any of the depredations complained of were committed by Indians subject to "the exclusive control" of the United States, or that the marauders even came from the territory of the United States. The Apaches, Comanches, and other savage tribes given to depredation did not, he said, dwell in either country, but ranged over the borders of both, having neither dwellings nor villages nor fixed habitations of any kind. Moreover, some of the principal haunts of the Apaches were in territory claimed by Mexico, and the depredations committed by them were usually far in the interior of Mexico. In this relation Mr. Wadsworth said:

"It was not the duty of the United States to follow the bands across the border. This border was over two thousand

miles in length, and the parties of Indians, usually very small, always mounted and moving secretly and quickly, easily crossed the imaginary line before they were discovered. Nothing could be more offensive to the government and people of Mexico than the entry of the troops of the United States into Mexican territory. Callahan's volunteers asserted that they had been invited into Mexico by the local authorities at Piedras Negras, to pursue and chastise the Lipan murderers. Yet they were ambushed, attacked, and driven back with loss by Mexicans and Indians. The Government of the United States has made repeated efforts to obtain the consent of the Government of Mexico to be allowed to pursue savages flying across the border before their troops, and always unsuccessfully (see published correspondence, entitled 'Foreign Relations of the United States, 1871,' pages 608, 9, 10, 11, 12, 18, et pas.); although giving notice of its own willingness that Mexican troops were at liberty to pursue savage foes into American territory. (Mr. Marcy to Senor Almonte, Washington, February 4, 1856.)"

But, said Mr. Wadsworth, admitting for the sake of the argument that all the losses in question were caused by incursions which the United States was bound to restrain, was there no obligation resting on Mexico? It was, said Mr. Wadsworth, admitted by Mr. Palacio that the people of Mexico had permitted themselves to be driven and robbed without the least resistance; that the government had, after the treaty of Guadalupe Hidalgo, undertaken to disarm the inhabitants, and had done nothing for their defense. Mr. Palacio had said: "The Indians could commit their fearful depredations with impunity." Replying to this, Mr. Wadsworth said:

"For such an abdication of its functions by the government, and of the obligations resting on them in virtue of their claims to the rank of organized communities by the people, there was no excuse, certainly none whatever to be found in the provisions of the eleventh article of the treaty of Guadalupe Hidalgo. My colleague says, indeed, that the people erroneously fancied themselves exempt from the necessity of taking up arms, organizing their forces in a proper manner, and constantly watching their terrible foe, because of the treaty engagement of the United States. For such a fatal error the Mexican people and government were alone responsible. * * * Nor was it possible for the United States to humble them (the Indians) by chastisements so long as they were allowed, when pursued, to secure themselves by passing this frontier."

Mr. Wadsworth maintained that Mr. Palacio's argument touching the treaty between the United States and Spain of

1795, and the treaty between the United States and Mexico of 1831, was wholly irrelevant. The fifth article of the former treaty referred only to the Floridas and never was applicable to Mexico, while the thirty-third article of the latter merely inculcated a duty on the part of both nations to restrain their savage tribes. But, so far as the duty of the United States was concerned, the eleventh article of the treaty of Guadalupe Hidalgo had, declared Mr. Wadsworth, rendered the consideration of former conventional stipulations or of the law of nations unnecessary and superfluous. "In my opinion," said Mr. Wadsworth, "the eleventh article under consideration contains the whole measure of the duty of the United States. So the Mexican Government thinks, and has always thought; for never has that government made, nor does it make now, any reclamation against the United States for any injuries committed by Indians prior to February 2, 1848, or post to December 30, 1853, neither under the treaties of 1795 or 1831, nor the law of nations, whatever that may be, as to the obligations of a nation for the acts of savages who roam over half a continent."

Mr. Wadsworth declared that the Mexican commissioner treated Article XI. of the treaty of Guadalupe Hidalgo as a contract of insurance against loss, founding this theory on the statement that the Indians occupying the ceded territory would be under the "exclusive control" of the United States. Such a measure of duty, said Mr. Wadsworth, could not be insisted on. In respect of his permanent subjects, a sovereign was required only to use "due diligence;" a harsher rule could not be exacted in respect of savages occupying a vast wilderness. The stipulation as to Indians occupying the ceded territory and being under the exclusive control of the United States meant Indians who, by virtue of a fixed habitation or presence, were excluded from any control of Mexico. Pursuing this thought, Mr. Wadsworth said:

"This exclusion of Mexico is founded on the fact of occupancy alone. Could that mean either Indians at the time occupying territory in Mexico as much, or more, than the ceded territory, and having no fixed home or habitation anywhere, but roving over a wide extent of wilderness on both sides of the line?
 * * * A decided negative must be given to these questions.
 * * * But there is no such responsibility resting on States for the conduct of persons living in their territories, under their exclusive (as to other powers) control, whether they be

civilized or savage persons, radicated or fugitive and transitory. I do not believe that the state is responsible at all for the acts of roving savages inside its borders under the circumstances which characterize the territories and Indians of the United States. The best indorsement of which belief is to be found in the fact that none of the different nations who from time to time have held territories adjoining those of the United States, and whose subjects have suffered from Indian forays, have ever made any reclamations against that country on that account, neither Great Britain, France, Spain, nor Mexico."

The obligation of the United States, said Mr. Wadsworth, was to employ the same means for the protection of the territory of Mexico against incursions as it used for the protection of its own people. It bound the United States to apply to the new territory its Indian policy. Even to do that required time; but the Mexican Government sought indemnity for every injury suffered by her people from the Indians since the moment of the conclusion of the treaty. Replying specifically to some of Mr. Palacio's positions, Mr. Wadsworth said:

"My respected colleague * * * places under ten distinct heads what he deems it was the duty of the United States to have done in virtue of her engagements. I present a brief answer to each:

"1. The United States did send to the territories the necessary force to pursue, overtake, and defeat all hostile Indians, all of which was done in a hundred instances. A million men could not have prevented the wild savages from moving over their deserts towards the Mexican frontier and crossing it if they wished, without permission to follow them, or opposition to them in Mexico.

"2. The United States did establish a line of military posts along to the frontier, many in number (perhaps fifty), in New Mexico and Texas and California. If it is insisted that these posts should have been so numerous that the savage could not cross without being seen, the demand is so unreasonable to my mind that I must let it pass in silence.

"3. To visit the places 'inhabited' by Apaches and Comanches (who did nearly all the mischief) 'constantly' was impossible. First, they had no habitation; next, they roved to and fro in the United States and Mexico, over a thousand miles of most difficult country, and the demand made to visit them 'constantly' is too exacting.

"4. The wild savages had nothing with which to indemnify sufferers. What they stole they usually ate. When often pursued and defeated, the captives were rescued and the property restored.

"5. There is no evidence in any of the 366 cases known to me that any captives or stolen property were ever traded in by Americans. There is no claim made for such an injury.

The officers of the United States would have broken up such a trade with a strong hand.

"6. The Apaches were forced to deliver up captives and property, and solemnly to bind themselves never again to invade Mexico. This is true of the Navajoes, and I believe of every tribe in reach of the United States or in its domain.

"7. The United States did use earnest, repeated, and expensive efforts to bring the Indians into civil life, furnishing them with food, clothing, seed, agricultural implements, mechanics, and teachers. In support of this policy they have paid out millions of money, and are now pouring out annuities and aids from the treasury, and instruction and help from the benevolence and Christianity of the land, in a manner worthy of the imitation of other nations.

"8. The United States did prevent white settlers from establishing themselves at will in the places occupied by Indians, nor allowed anyone to drive them by force to the Mexican frontier.

"9. That country carefully regulated and watched the trade with Indians and prevented the trade in the articles specified. But wicked men in both countries would sell arms to the Indians for money, as for the same pay they were ready to sell their souls to the devil.

"10. How was the United States to correspond constantly with the Mexican authorities in order to inform them of the movements of the Indians across the frontier? * * * But whenever there was a Mexican command accessible to the prompt and active officers of the United States, we are warranted from public documents * * * to say those gallant men did give notice of the foe."

Leaving this phase of the subject, Mr. Wadsworth contended that the claims could not be admitted, because they were intended to be and were disposed of by the treaty of 1853.

The decision. of the United States in respect of the present claims was delayed by causes which are narrated elsewhere,¹ and it fell to Sir Edward Thornton to make the final determination. In the mean time Mr. Ashton, the agent of the United States, submitted to the umpire a voluminous and exhaustive argument, in which he presented, among other things, the history of the negotiation of the treaty of 1853, of its amendment by the President and the Senate of the United States, and of the acceptance of those amendments by Mexico without question or discussion, the Spanish text of them being furnished by the representatives of Mexico, merely as the equivalent of the English.

¹ *Supra*, II., Chap. XXVII.

April 16, 1874, Sir Edward Thornton delivered the following opinion:

"In considering the case of *Don Rafael Aguirre v. The United States*, No. 131, and the motion of the agent of the United States of October 10, 1870, the umpire has carefully perused and studied all the documents which have been forwarded to him by the United States and Mexican Claims Commission. After due reflection he has become satisfied that the points upon which the question of the rejection or admission of the above-mentioned motion principally turns are the causes which led to the conclusion of the treaty of December 30, 1853, between the United States and Mexico, and the meaning of the words of that treaty. One of the causes, it is evident to the umpire, was the complaints constantly made by the Mexican Government to that of the United States, from an early date after the conclusion of the treaty of Guadalupe Hidalgo till near the end of 1853, that the stipulations of the 11th article of that treaty had not been fulfilled by the latter government and that it consequently owed indemnity both to the Mexican Government and to citizens of Mexico, on account of the damages incurred through this failure. The correspondence between the two governments was of an irritating nature and seemed likely to excite angry feelings on both sides. It was, therefore, the interest, as it was the desire, of both governments to put an end to this state of their relations, and the umpire can not doubt that this was one of the causes of disagreement which were referred to in the preamble of the treaty of 1853, and which the two nations desired to remove. It certainly could not be asserted that 'every cause of disagreement' would be removed until this question was settled, and the absence of a stipulation for that purpose would have had the effect that a false impression would have been given by that phrase; for 'every cause of disagreement' would not have been removed.

"By the unratified treaty of 1853, as negotiated by Mr. Gadsden in Mexico, that republic ceded to the United States a certain portion of territory and agreed that the 11th article of the treaty of Guadalupe Hidalgo should be annulled, and that the United States should be exonerated from all claims by Mexico or Mexican citizens, whether on account of the alleged failure to fulfill the obligations of the 11th article of the treaty of Guadalupe Hidalgo or on other accounts which might have arisen since the date of that treaty. In consideration of these stipulations the United States agreed to pay fifteen millions of dollars and further agreed to assume all claims of United States citizens against Mexico and to pay them to the extent of five millions.

"But the Senate of the United States altered the terms of this treaty, and the amendments proposed by that body were accepted by Mexico. By the amended treaty Mexico ceded a smaller portion of territory, released the United States from all liability on account of the obligations contained in the 11th

article of the treaty of Guadalupe Hidalgo, and agreed that that article and the 33rd article of the treaty of the 5th of April 1831 should be annulled. In this amended treaty no mention is made of the miscellaneous claims of Mexican citizens against the United States nor of those of United States citizens against Mexico.

"In consideration of these stipulations, i. e., the cession of a smaller portion of territory, the release of the United States from all liability on account of the obligations contained in the 11th article of the treaty of Guadalupe Hidalgo, and the repeal of that article and of the 33rd article of the treaty of April 5th, 1831, the United States agreed to pay to Mexico the sum of ten millions of dollars.

"It is contended on behalf of the claimant in the case now under consideration that the first sentence of the 2d article of the ratified treaty of December 30, 1853, does not release the United States from the payment of damages, if any were due, to Mexican citizens on account of the failure of the United States Government, if it did fail, to fulfill the obligations of the 11th article of the treaty of Guadalupe Hidalgo. The umpire holds that it does so release the United States, and that the government which accepted the amendments made by the United States to the former Gadsden Treaty so understood those amendments. It is inconceivable that, after all the correspondence and almost angry discussions which had taken place between the two governments upon the subject of the alleged nonfulfillment of the obligations of the 11th article of the treaty of 1848, and the consequent claims of Mexican citizens, the United States and the Republic of Mexico should have been satisfied with and should have ratified, and the Senate of the United States should have sanctioned, any treaty which did not provide for the settlement of one of the great questions at issue.

"It is argued that the 2d article of the treaty released the United States only from claims for which they might be thereafter liable on account of any future failure to fulfill the obligations of the 11th article of the treaty of 1848. But as by the 2d article itself the 11th article of the treaty of 1848 was annulled, there could thereafter be no failure to fulfill where there were no obligations, and consequently there could be no future claims. If there were any claims for which the United States were liable on account of the failure to fulfill the obligation from 1848 to 1853, they were certainly liable at the moment of the signature of 1853, and that present liability could not have been excluded from the term 'all liability' from which the Government of Mexico released the United States.

"The context of the 2d article also corroborates this view of the case. The second sentence of the article annuls the 11th article of the treaty of 1848. In doing so it of itself releases the United States from all future claims on account of failure

to fulfill the obligations, and the first sentence, if it refers only to those future claims, is clearly a pleonasm. In the second article of the unratified treaty of 1853 it was agreed that 'to remove all occasion of dispute on account of reclamations to the present date founded on alleged Indian incursions', the 11th article of the treaty of Guadalupe Hidalgo should be annulled. If, then, the abolition of this article had this effect with regard to reclamations to the present date, *a fortiori* it would have the same effect with regard to claims which in fact could not arise. Further, if it had been deemed necessary specially to release the United States from a liability which could never arise, the order of the two sentences in the 2d article would have been reversed, the abolition of the 11th article of the treaty of Guadalupe Hidalgo would have come first, and the release from future liability would have followed as the self-evident consequence of the abolition of that article.

"It is alleged that the meaning of the Spanish of the first sentence of the 2d article in question is different from that of the English version. The umpire is not of that opinion. The strict translation of the Spanish would be: 'The Government of Mexico by this article exempts that of the United States from the obligations of the 11th article of the treaty of Guadalupe Hidalgo.' One of the meanings of the word 'liable' found in Johnson's Dictionary is 'not exempt.' The verb 'eximir' may be translated 'to relieve from nonexemption or liability.' In the 3d article of the unratified treaty of 1853, it is stated that 'in consideration of the grants received by the United States and the obligations (*obligaciones*) relinquished by the Mexican Republic' the United States agreed to pay a certain sum of money. In the previous article one of the stipulations was that all occasions of dispute on account of reclamations to that date founded on alleged Indian incursions were removed by the abolition of the 11th article of the treaty of Guadalupe Hidalgo. The term '*obligaciones*' in the beginning of the following article must therefore include those reclamations. There is consequently no reason that they should be excluded from the meaning of the same word in the 2d article of the ratified treaty.

"But whether the translation into Spanish was correct or not, it was the Mexican Government alone which was responsible for it. The Spanish version was never submitted to the Senate of the United States, whose sanction to every treaty is necessary. It is true that Mr. Marcy states in his note to Mr. Robles of December 11th, 1856, 'that the amendment of the Senate was sent to General Almonte to be translated in advance of the exchange of the ratifications of the treaty.' But there is no proof whatever that the translation was sent back to Mr. Marcy, that he was consulted about it, or that he offered any opinion as to its correctness. On the contrary, General Almonte asked on the 4th of May 1854 that the Senate amendments might be sent to him, because he wished to dispatch his mail to Mexico on the following night. On the

following day, the 5th, Mr. Marcy forwarded the amendments to General Almonte. There could therefore have been very little time to discuss the correctness of the translation. Nor could there be any object in doing so, for the amendments of the Senate were final, and it was intimated that no modification of them would be admitted by the United States.

"General Almonte was known to be a complete master of the English language. He must have well understood, from his knowledge of the language and of the circumstances preceding the conclusion of the treaty, the real meaning of the English of the sentence in question, and the umpire believes that he correctly rendered it into Spanish.

"In the absence of any reasons having been put forward by the Senate for having reduced the sum to be paid to Mexico from fifteen to ten millions of dollars, the umpire considers it out of place to have recourse to suppositions. It is, however, a fact that according to the amended treaty a smaller portion of territory was to be ceded by Mexico than was stipulated in the unratified treaty, and that by the latter the United States were exonerated 'from all claims of Mexico or Mexican citizens which may have arisen since the date of the treaty of Guadalupe Hidalgo.' The release in the amended treaty was not so comprehensive. These two facts may account for the reduction made by the Senate in the amended treaty. Notwithstanding, however, this reduction, the United States still agreed in the 3d article to pay a substantial value in consideration of the stipulations contained in the 1st and 2d articles.

"The umpire holds that one of these stipulations, viz, that contained in the first sentence of the 2d article, released the United States from all claims of the nature of that advanced by Don Rafael Aguirre in the case No. 131, and he therefore awards that the motion of the agent of the United States presented to the commission on the 10th of October 1870 be allowed."

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"General Almonte was known to be a complete master of the English language. He must have well understood, from his knowledge of the language and of the circumstances preceding the conclusion of the treaty, the real meaning of the English of the sentence in question, and the umpire believes that he correctly rendered it into Spanish.

"In the absence of any reasons having been put forward by the Senate for having reduced the sum to be paid to Mexico from fifteen to ten millions of dollars, the umpire considers it out of place to have recourse to suppositions. It is, however, a fact that according to the amended treaty a smaller portion of territory was to be ceded by Mexico than was stipulated in the unratified treaty, and that by the latter the United States were exonerated 'from all claims of Mexico or Mexican citizens which may have arisen since the date of the treaty of Guadalupe Hidalgo.' The release in the amended treaty was not so comprehensive. These two facts may account for the reduction made by the Senate in the amended treaty. Notwithstanding, however, this reduction, the United States still agreed in the 3d article to pay a substantial value in consideration of the stipulations contained in the 1st and 2d articles.

"The umpire holds that one of these stipulations, viz, that contained in the first sentence of the 2d article, released the United States from all claims of the nature of that advanced by Don Rafael Aguirre in the case No. 131, and he therefore awards that the motion of the agent of the United States presented to the commission on the 10th of October 1870 be allowed."

CHAPTER LIV.

NATIONALITY.

1. CITIZENSHIP BY BIRTH.

Birth in the United States. "The umpire is of opinion that it is not proved that the claimant was a citizen of the United States. The ground that he is so, is his own statement that he was born at New York, together with a certificate of baptism of a child who was born at New York, Beniguo being one of the names which were given to him; but it is not proved that the child then born and baptised was one and the same person with the claimant. Nor would the mere fact of his having been born at New York be sufficient evidence of citizenship. It is clear that his parents were both aliens at the time of his birth, and it is not shown that they were naturalized or that they or the child remained in the United States. The inference is to the contrary, and the umpire believes that the child in question, even if that child was really the claimant, though born in the United States, was subject to a foreign power and cannot without further proof be considered to be a citizen of the United States."

Thornton, umpire, April 22, 1876, *Beniguo Santos Suarez v. Mexico*, No. 716, convention of July 4, 1868, MS. Op. VI. 416.

"The umpire must first take into consideration the citizenship of the claimants. With regard to Manuel de Barco, he does not consider that the mere fact of his birth within the United States is sufficient of itself to give him citizenship of the United States. It appears that his parents were both foreigners and that he was certainly not of age, and was still under the tutelage of his parents, when he left the United States, nor has he since that time taken any steps to acquire United States citizenship."

Thornton, umpire, June 10, 1876, *Manuel del Barco and Roque de Garate v. Mexico*, No. 748, convention of July 4, 1868, MS. Op. VI. 421.

Claimant was born in Texas of French parents, and at the age of 19 years removed to Matamoras, Mexico, with his mother, a widow, where they established a commercial house. When Maximilian was sent to Mexico by Napoleon III. to establish an empire, a treaty was agreed upon between the two by which the so-called Mexican Empire became bound to pay such claims of French subjects against Mexico as might be approved by a mixed commission. Claimant appeared before that commission and presented a claim in which was embraced the largest item in his claim before the present commission. The French and Mexican mixed commission considered him entitled to French nationality, admitted his claim, and made an award in his favor for \$1,000.

The commissioners, Mr. Palacio delivering the opinion, held that, as it did not appear that the parents of the claimant were naturalized during their residence in Texas, it was to be presumed that they retained their original French nationality; that the claimant, who left the United States before arriving at the age of 21 years, was entitled, according to the French code, to retain the nationality transmitted by his parents; that the laws of Mexico did not forbid such election; but that he was not entitled to renounce his French nationality and elect that of the United States, after he had abandoned the latter country to establish himself in another, and after he had made a valid act of adoption of French nationality.

Bernard J. Gautier v. Mexico, No. 958, United States and Mexican claims commission, convention of July 4, 1868, MS. Op. II. 343.

The children of Henry Stevens Schreck, a
Birth in Mexico. naturalized citizen of the United States, claimed, as his heirs, damages from Mexico for the seizure and sale in that country, in 1866, of certain goods belonging to the estate of their father, who died at Matamoras in 1862. It seemed that the children were all born in Mexico. The umpire decided:

"As children of a naturalized citizen of the United States, they [the heirs and claimants] may be considered to be citizens of the United States in the United States and in every other country except the country of their birth; but the fact of their being born in the republic of Mexico gives to the government of that country the right to claim them in Mexico as citizens of that republic. The umpire is therefore of opinion that as against Mexico the heirs of Henry Stevens Schreck, being born

in that republic, have no standing before the mixed commission, and can not claim, as citizens of the United States, against the country of their birth."

Thornton, umpire, *Heirs of Henry Stevens Shreck v. Mexico*, No. 768, Am. docket, Convention of July 4, 1868, MS. Op. III. 450.

It appears that the foregoing opinion was written at sea June 30, 1874. When it was filed, Mr. Ashton, agent and counsel of the United States, filed the following motion for a rehearing:

"The undersigned respectfully moves the umpire to grant a rehearing of this case; and in support of this motion he desires to submit the following observations:

"The undersigned is convinced the umpire is in error in deciding that the children of Henry S. Schreck, though they were born in Mexico, are citizens of the Mexican Republic.

"The undersigned understands that, by the municipal law of Mexico, persons born within the Mexican Republic are not natural-born Mexicans unless their *fathers* before them were Mexicans.

"Persons of foreign parentage, in other words, born within the territory and jurisdiction of the Mexican Republic, are not by its law deemed to possess the character of natural-born Mexicans.

"The Constitutional Code of December 30, 1836, the decree of Santa Anna of January 30, 1854, and the constitution of 1857 are all explicit upon this subject.

"The law of 1836, Art. I, provides:

"They are Mexicans:

"1st. Those born in the territory of the republic of a Mexican father, either by birth or by naturalization.

"2d. Those born in a foreign country of a Mexican father by birth, if, when they attain their majority, they are already established in the republic, or if they give notice that they determine to do it, and they do it within a year after they give the notice.

"3d. Those born in a foreign country of a Mexican father by naturalization, if they have not lost that quality, and have complied with the proviso of the preceding paragraph."

"The decree of Santa Anna, in Chap. II. '*Of Nationals or Mexicans*,' (art. 14) declares that the following persons, among others, are Mexicans:

"I. Those born in the territory of the republic whose fathers are Mexicans either by birth or by naturalization.

"II. Those born in the national territory, of a Mexican, mother whose father is not legally known according to the laws of the republic.

"III. Those born outside of the republic, whose father was a Mexican in the service of the republic, or was absent for purposes of study, or as a transient, but without losing his character of Mexican citizenship, according to the corresponding article of this law.

"IV. Those born outside of the republic, of a Mexican mother, whether spinster or widow, who, not having completed the twenty-fifth year of their age, inform their mother that they wish to be Mexican citizens."

"The constitution of 1857, tit. I, sec. II, art. 30, also provides:

"*They are Mexicans:*

"I. Who are born within, or without, the republic, of Mexican fathers.

"II. Strangers that are naturalized in conformity with the laws of the federation.

"III. Strangers who acquire real estate in the republic, or have Mexican children: *Provided, always, They do not manifest their resolution to preserve their nationality.*'

"There would seem, therefore, to be no doubt that, as Henry S. Schreck was a citizen of the United States, his children, though born in the jurisdiction of Mexico, were not by origin citizens of that republic.

"Were they citizens of the United States?

"This is answered by the act of Congress of February 10, 1855, which provides 'that persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States.' (10 Statutes at Large, 604.)

"The heirs of Schreck, therefore, not being claimed by the municipal law of Mexico as Mexican citizens, must be deemed to possess in that country the national character attributed to them by the law of the United States.

"Mexico is thus among the number of those States who derive nationality consistently from descent, which modern jurists appear to agree in regarding as the only natural and proper rule for determining citizenship.

"The only natural-born Mexican is the child of a Mexican father; and the principle is applied universally to the children of Mexican fathers, whether born within or without the jurisdiction of the republic.

"The rule of Mexican citizenship is thus the reverse of that adopted by the common law of England and the United States, which appears to have given no effect to descent as a source of nationality.

"The undersigned apprehends that the Mexican law in rejecting the principle, purely of feudal origin, of determining nationality by locality of birth, and not by descent, which prevails in the common law of England, and which, it has been truly said, was inherited, rather than adopted, by the United States, is in harmony with the general law of the States of Continental Europe, which makes the nationality of the child primarily depend on that of the father.

"The Code Napoleon eradicated this feudal rule from the law of France, and provided, as to children born in France, that they should be French if their fathers were French, and aliens if their fathers were aliens, allowing them, however, in the latter case, the right to claim French citizenship on attaining their majority.

"The example set by the framers of the French code has been followed by the nations who have adopted that code; so that the general rule throughout the European states is that the nationality of the child follows that of the parents, the place of birth being immaterial.

"The American statute of 1855, and the British statute of 4 Geo. II. c. 21, have adopted the '*règle Européenne*' of deriving nationality from the character of the father, in the case of the children of American citizens and British subjects born abroad.

"It only remains, therefore, in order to bring the municipal law of the United States and Great Britain into harmony with the general European code, to apply the same principle in the case of children born of foreign parents in those countries.

"If such persons were regarded by the English and American law as foreigners, the inconvenience and embarrassment of a twofold allegiance would be prevented.

"It was accordingly proposed by Mr. Vernon Harcourt and other members of the royal commission of 1868, on the subject of naturalization and allegiance, that the common law, in regard to the nationality of children of foreign parents, born in the realm of England, should be wholly abrogated.

"Mr. Harcourt justly observed that nothing would more solidly conduce to the peace of the world than that the same allegiance should be predicated of the same person by all governments.

"As respects the claimants in the present case, the heirs of Schreck, there is no shadow or shade of double allegiance, in the condition of the Mexican code, which regards them, we observe, as foreigners in the Mexican Republic.

"The undersigned accordingly requests the umpire to review his decision of this case, and to hold that the heirs of Henry Stevens Schreck, though born in Mexico, are not citizens of that republic, and, as citizens of the United States, by virtue of the nationality of their father, are entitled to present their present claim before this commission."

The umpire, September 30, 1874, made an award in favor of the heirs of Henry Stevens Schreck to the amount of \$24,625.45.

Maria Adelaide Morton, as a citizen of Mexico, presented a claim to the commission under the convention between the United States and Mexico of July 4, 1868, for the unlawful destruction of property in Mexico by United States military authorities. Various claims of Mexican citizens growing out of the transaction were allowed. A motion was made to dismiss the claim of Maria Adelaide Morton on the ground that she was not a citizen of Mexico. It appeared that she was born in Mexico in 1854 and was the daughter of George W. Morton, a citizen of the United States, recognized as such by the commission by an award in his favor. Her mother, originally a Mexican, was, at the time of her marriage with Morton, the widow of an Italian subject; but, by the Mexican law, the mother, on her marriage with Morton, followed his nationality, and the child, remaining under the parental authority until the age of 25, followed the father's condition and was also a foreigner. While Maria Adelaide was still very young, the Mexican constitution of 1857 took effect and defined the status of persons born in Mexico. It provided, as has been seen,

that persons were not native Mexicans unless born on Mexican soil, of Mexican fathers. The commissioners decided that the claimant was not a Mexican under the law of Mexico.

J. M. Ancira, attorney for numerous claimants, v. Mexico, No. 374, bis, United States and Mexican Claims Commission, convention of July 4, 1868, MS. Op. VI. 67.

The act of Congress of February 10, 1855 (10 Birth in the Spanish U. S. Stats. at L. 604), which provides that Dominions. "persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States," can not operate so as to interfere with the allegiance which such children may owe to the country of their birth while they continue within its territory.

Cases of *Lucien Lavigne*, No. 11, and *Feliz Bister*, No. 20; decision of arbitrators, Span. Com. (1871), April 27, 1878.

The claimant, in his memorial, alleged that he was born in Cuba in 1825 of American parents, and that according to the provisions of the acts of Congress of April 14, 1802, and February 10, 1855, and of section 1993 of the Revised Statutes of the United States, he was an American citizen; that his father, while "temporarily residing in Cuba," never did "the slightest thing to forfeit his nationality of origin," and that he himself, the claimant, had "always adhered to the nationality given him by law," and had not only "spent a great portion of his life in the United States, where he was educated, but while in Cuba (where he is now, merely on business, without any *animus manendi*) or elsewhere he never neglected to register his name at the proper office as a citizen of the United States." This memorial was filed in July 1877. The only other evidence as to the claimant's parents was an affidavit made by one De Wolf, at Providence, Rhode Island, in October 1877, in which the affiant stated that he had been on intimate terms with the claimant for forty years; that he became acquainted with the claimant's parents soon after their marriage, when they were residing in the town of Bristol, Rhode Island, and that thenceforth he was on intimate terms with them, "meeting and seeing them frequently, both in said Bristol and in the Island of Cuba."

The advocate for the United States contended that the claimant, though born in Spain, followed the nationality of his parents; that according to the law in force in Cuba in 1825, if the

parents were not domiciled there, but were there only temporarily, the children retained forever the nationality of their parents; that if the parents were domiciled in Cuba the nationality would be optional with the children, and that the exercise of this option must appear from some specific act; that the claimant, when born in Cuba of American parents, took their nationality, and that the preservation of it was a "presumption of law," which had "to be taken for granted" when there was "no proof to the contrary."

The advocate for Spain contended that the act of Congress of 1802 did not apply to the children of persons who were not citizens of the United States at the time of its passage, and that there was no evidence that the parents of the claimants were then citizens of the United States; that it was to be inferred from the evidence that they were at the time of his birth domiciled in Cuba; that the claimant had always lived in Cuba, and had elected the nationality of the country of his birth; that the act of Congress of 1855, which made foreign-born children of American fathers citizens of the United States, could have had no effect upon him, as he was then living and had since continued to live in Cuba.

Count Lewenhaupt, umpire, held that, "as stated by the advocate for the United States * * * , the Spanish law in force in 1825 stipulated that if the parents were foreigners, then the nationality of children born in Spain would be optional with them;¹ that in consequence the claimant is not a native-born Spaniard, and that for the reasons stated by the umpire in the case of *William S. Lynn v. Spain*, No. 104, the American nationality has not been lost." Count Lewenhaupt also said:

"It is further contended by Spain that the fact that the claimant concealed his American nationality is a bar to any

¹The authorities cited for the claimant's citizenship were Riquelme, *Elementos de Derecho publico internacional*, Book II. ch. 2, De los extranjeros; Zamora, *Biblioteca de Legislacion*, Primer Suplemento, 1849, non Extranjero; San Pedro, *Legislacion Ultramarina*; Felix, *Tratado de Derecho internacional privado*, Madrid, 1860. Counsel for the claimant, in another brief, quoted article 103 of the *Ley del Registro civil*, by which it was provided that "persons born in Spanish territory of foreign parents * * * shall, if they wish to be Spaniards, make a declaration of their desire to be such within the period of one year, to be counted from the date on which they became of age, if they are already emancipated, or from the date of their emancipation. They shall also renounce the nationality of their parents."

claim arising during the time that his nationality was so concealed.

"It appears from the papers in the case that Americans were warned, soon after the breaking out of the insurrection in 1868, to lay claim to American citizenship if they wished to seek any advantage from it. The claimant alleges in his memorial that he never neglected to register his name at the proper office as a citizen of the United States; but there is no proof that he ever was registered in any office as a citizen of the United States until October 17, 1876, and the testimony adduced that he was generally known as an American is unsatisfactory. In 1870 he was warned by the law for foreigners that, in order to be considered as a foreigner in the Island of Cuba, he must go through certain simple formalities. It is proved that he did nothing. Moreover, it is in evidence that in the following year, on the 27th day of June 1871, he presented a residence certificate in which he was described as a Spaniard, and that he obtained a passport as a Spanish subject for a voyage to the United States.

"In the official report of May 6, 1872, concerning the occupation of the farm, the military commandant states expressly that he has to recognize 'the patriotic sacrifice' of the claimant, and when the land was returned in 1872 the claimant waited three years, or until 1876, before he made any complaint whatever.

"The umpire is of opinion that the claimant either ignored or concealed his American nationality, and that in any case the fact that it was not before the 17th of October 1876 that the Spanish authorities were informed of his nationality is a bar to his claim to recover indemnification for the use of his property while it was used by Spain before that date. The claimant does not, however, according to the agreement of 1871, under the circumstances in the present case, lose his right to appear before the commission as an American citizen, even in case he should have concealed his nationality, and the fact that he did not state his nationality before 1876 is no bar to a claim for restitution of property seized, or, if destroyed, for a corresponding indemnity."

Count Lewenhaupt, umpire, case of *Joseph O. Wilson*, No. 121, Span. Com. (1871), November 12, 1881.

October 17, 1865, the steamer *Apure*, belonging to a New York corporation, while on her way from Ciudad Bolivar to Nutrias touched at San Fernando, capital of the State of Apure, where she took on board the president of the State, Gen. Juan Bautista Garcia, and a small military force of 9 officers and 50 men, intending to land them at a place which General Garcia should designate on the upper Apure. On the night of October 18

the steamer, while moored at the port of Apurito, was suddenly attacked by a force of rebels against the government of General Garcia, who had been advised of his presence on board. The attack was resisted, and in the ensuing fight the captain of the steamer, John W. Hammer, and the chief engineer, Julius de Brissot, were killed, and Joseph Stackpole, another engineer, was wounded. Subsequently claims were made against the Government of Venezuela, growing out of this transaction, and among them were claims on the part of Narcisa de Hammer and Amelia de Brissot, widows of Hammer and Brissot, and their respective children. These claims, numbered 27 and 30, were laid before the commission under the convention between the United States and Venezuela of December 5, 1885, and a question was raised as to the claimants' citizenship.

On this question, Mr. Andrade, the Venezuelan commissioner, said:

"No question has been raised as to the citizenship of * * * Joseph Stackpole, but not so in regard to that of Narcisa de Hammer and Amelia de Brissot and their respective children. As to the latter, there is no proof whatsoever regarding her marriage or the children issued from it, while such proof exists with respect to the former and her four children. However, I have no objection to treat both marriages as if legally proved, and before going further, will try to solve the doubt respecting their citizenship, in order to dispose at once of the question of jurisdiction therein involved.

"Every independent state has the right to determine who is to be considered as citizen or foreigner within its territory, and to establish the manner, conditions, and circumstances, to which the acquisition, or loss of citizenship, are to be subject. But for the same reason that this is a right appertaining to every sovereignty and independence, no one can pretend to give an extraterritorial authority to its own laws regarding citizenship, without violence to the principles of international law, according to which the legislative competence of each state does not extend beyond the limits of its own territory. Otherwise, anyone could be at the same time a citizen of two states, which is as inadmissible as not to be a citizen of any state at all.

"Each individual is by the rule a citizen of one state only, and has political rights only in one state' (Bluntschli).

"By virtue of that right, Venezuela declared in her constitutions of 1830, 1857, 1858, and 1864, a Venezuelan citizen by birth, every free person born in the territory of Venezuela, such, for instance, as Narcisa de Hammer and Amelia de

Brissot. The former was undoubtedly born in that republic, and there are strong reasons to think just the same about the latter.

"Through the force of the same right, the United States declared to be a citizen, by the law of 1855, 'every woman capable of naturalization, married, or who might marry thenceforward a citizen of the United States,' like Narcisa de Hammer and Amelia de Brissot.

"Therefore, if this question of citizenship were brought before a court of Venezuela, it could not be decided otherwise than according to the Venezuelan constitution, because only this law would have authority in that case to decide whether the above-mentioned women ought to be regarded or not as citizens of Venezuela. And for the same reason, if it were raised before a court of the United States, it should have to be decided in accordance with the law of 1855, because only that law could determine whether, by their respective marriages with John William Hammer and Julius de Brissot, they were to be considered or not as United States citizens. But they could neither invoke in Venezuela the law of the United States to repeal that of the place of their birth in respect to their citizenship, nor the law of Venezuela in the United States, to assert, against that of their country by naturalization, that they are Venezuelans; because, as already stated, it is impossible to admit in principle that the application of the domestic law may yield on this point, under any consideration, to the foreign law, nor that one state may arrogate the right of impeding another state in applying the laws it may have deemed convenient to enact in that behalf.

"In the foregoing instances the solution has been easy, because the question of citizenship was one of internal law and the juridical criterion applicable to them was certain. But the courts of a third state, Spain or England, for instance, before which those very same cases might be brought, would have to deal with a question of international law or of a double citizenship, or with a conflict between two different laws appertaining to two different states, in deciding whether Narcisa de Hammer and Amelia de Brissot were Americans or Venezuelans. And that difficulty is the same which this commission has now to deal with. How are we to overcome it? In our judgment, by applying to it the general principles of international law.

"Narcisa de Hammer and Amelia de Brissot were born in Venezuela, and both married there to citizens of the United States in 1853, before the law of 1855 had made them also citizens of the United States. So the citizenship which they afterwards acquired by operation of this law cannot be said to have been acquired consciously and voluntarily; while, on the other hand, they have, after becoming widows, continued to reside in Venezuela without having ever made any declaration whatever as to their desire of preserving such citizenship

or without having ever come to the United States, which seems to show not only by the fact of their birth but also by their own free will that they prefer the Venezuelan citizenship. To declare them citizens of the United States against their express or presumptive good will would be contrary to the general principles of right and to those of international law now prevailing.

“The *status civitatis* is a quite personal right of man, and it belongs to him before all the states of the world, for which reason it must be held as a maxim that every person should be permitted to belong to this or to that political body, and therefore that no sovereign can pretend to impose upon a man citizenship against his manifest or presumptive will or prevent those who may have acquired it from freely renouncing it and acquiring another.” (Fiore.)

“Supposing, finally, that an individual united in his person several nationalities, it would be necessary to apply the law *best agreeing with his actual position*, otherwise the question would be insoluble.” (Heffter.)

“Certain persons or families may by exception be under the jurisdiction of two or a greater number of different states. *In case of conflict the preference should be given to the state in which the person or family referred to actually has her domicile; her political rights in the states where she does not reside shall be considered as in suspense.*” (Bluntschli.)

“As to the children of Narcisa de Hammer and of Amelia de Brissot (admitting that she has any) they were also born in Venezuela, where they have been residing since the death of their fathers. Having attained their majority they have not claimed the paternal citizenship, nor have they fixed their domicile in the United States. This conjuncture of circumstances seems to clearly indicate that they, too, have renounced the citizenship of their filiation and chosen that of their birth-place and permanent domicile. According to the principles already invoked, that nobody can be a citizen but of one state, that citizenship is inherent in the person and cannot be imposed, and that in case of conflict between several citizenships that is to be preferred which is more in accordance with the actual position of the person, namely, that of the place of his actual residence and domicile, the said children as well as their mothers must be held to be Venezuelans and to have no standing before this commission.”

Mr. Little said:

“I cannot subscribe to all the reasoning of Mr. Commissioner Andrade.

“The question of citizenship here is not a federal or municipal one. Inasmuch as the legislation of the two countries on this subject does not conduce to the same result in this case, that of neither can be looked to as determinative of the issue.

This must be resolved from the standpoint of the public law. Thus considered, I think Mrs. Hammer and Mrs. De Brissot are not citizens of the United States, within the meaning of the treaty. (*Shanks v. Dupont*, 3 Peters, U. S., 243.)

"Their claims must therefore be dismissed for want of jurisdiction. This, of course, is not saying that the United States has no cause for reclamation on the account of the killing of her citizens—Captain Hammer and Mr. De Brissot. It is only holding that under the terms of the convention the question is not submitted to us. It would be to go beyond the limits of just interpretation and to enter the forbidden domain of judicial legislation to say that 'claims on the part of citizens' means or includes 'claims growing out of injuries to citizens.'

"It is true, there is not wanting in the diplomatic correspondence evidence of assertion that these claims fall within the jurisdiction of the commission. Such correspondence, however, is but the expression of a part of the treaty-making power. The treaty is the production of the executive and legislative departments of each country, and the opinion of one of these respecting its scope and meaning, while, as elsewhere observed, entitled to the highest respect and consideration, is not conclusive."

Mr. Findlay said:

"I quite agree with Commissioner Andrade that Mrs. Hammer and Mrs. De Brissot can not be considered citizens of the United States invested with the right of prosecuting a claim against the Government of Venezuela. There is no evidence in the record that either of these ladies was ever in the United States, and it seems to be conceded that both of them were natives of Venezuela, where they were domiciled at the time of the injury which is made the subject of this reclamation. Citizenship of the United States, therefore, can only be claimed by virtue of the law of that country which declares that foreign women married to citizens of the United States and their offspring shall likewise be citizens of the United States.

"The question in the case is, whether this law can have an extraterritorial operation and effect against the will and policy of another country, in which the persons, in whose behalf it is invoked, are and have always been domiciled since their birth; and, in my opinion, there can be but one answer to that question. Whatever rights the United States has in its power to bestow will unquestionably pass under the law establishing the status of citizenship in favor of nonresident aliens, including the right to take property by descent and succession and the right to prosecute any claim against the United States; but more than this cannot be done, without interfering with the rights of other states and involving them and herself in conflicting claims of the most absurd character. Children born of a marriage by a citizen with an alien are citizens also

under this law; and now suppose that these were claims of the sons of Captain Hammer and De Brissot, instead of their widows, and constituted a fit subject for reclamation by the United States or the Government of Venezuela, and that the United States had to resort to war in order to enforce the claims, what would ensue? On the one side we should have, perhaps, the claimants themselves drafted into the military service of Venezuela, for the purpose of resisting the United States in enforcing the claims of her citizens, and on the other, the army and navy of that country spilling its blood and wasting its resources in an endeavor to establish a right in favor of the very persons who were opposing her efforts with arms in their hands. A citizen ought to have but one political status, and, in my opinion, the law of the United States, which is appealed to as conferring upon the claimants the requisite character to give them a standing before the commission, creates a mere municipal civil status which, by the necessity of the case, must be limited to such matters as are clearly within the jurisdiction of the United States. At the same time I can see no reason why a citizen of the United States should be murdered under circumstances which would make a foreign country responsible, and yet there should be no redress. The injury in such a case is to the country whose citizen or subject has been killed, and provision should be made for indemnity to the country, or, as stated by Commissioner Little, the terms of the submission could be so drawn as to clearly include injuries to citizens, instead of being confined, as under the present convention, to claims of citizens. On the whole, I think that we have no jurisdiction as to these particular claims."

The claimant, a native of the United States, **Free Man of Color.** and a free man of color, complained of arbitrary and unlawful imprisonment by the Mexican authorities in Minatitlan, Mexico, in 1855. It seems that Mr. Gadsden, minister of the United States in Mexico, issued on June 28, 1854, a circular to the consuls of the United States, in which he disapproved their past recognition of persons of African descent, born in the United States, as citizens, and forbade them in future to extend the protection of the government to such persons, adding that they could not be acknowledged at the legation as citizens of the United States. The American consul at Minatitlan, however, took up the case of one Mateo, but the authorities, probably aware of the action of Mr. Gadsden, refused to recognize his right of interference. The case was then brought to the attention of Mr. Gadsden, who was still minister, and he decided to sustain the consul, on the strength of an instruction to the consul of the United States at Matamoras, dated January 18, 1855, in which

Mr. Marcy, then Secretary of State, said that while, in the view of high judicial authority (referring to the Dred Scott case), persons of African descent could not be regarded as entitled to full rights of citizenship, yet if they were free, of respectable character, and should apply for protection, they would be entitled to the consul's assistance. Although, said Mr. Marcy, the consul could not certify that they were citizens of the United States, he might certify that they were born in the United States and were free, and that the government would regard it as its duty to protect them, if wronged by a foreign government, when within its jurisdiction for a legal and proper purpose.

The commissioners made an award in favor of the claimant.

Lucien Mateo v. Mexico, No. 33, Am. Docket, convention of July 4, 1868; decision of November 7, 1871, MS. Op. II. 292.

An award was also made by the commissioners in favor of a native American free man of color, who, while living at Tampico, Mexico, in 1863, engaged in cultivating a small piece of land and in running a mill for the grinding of corn, suffered the wanton destruction of his property by the Mexican authorities. (*Joseph A. Howard v. Mexico*, May 1, 1872, No. 919, Mex. Docket, MS. Op. II. 519.) In a later case Mr. Zamacona, who had then succeeded Mr. Palacio as Mexican commissioner, contested the right of a negro, who was born in the United States, but who had emigrated to Mexico in 1857, to appear as a citizen of the United States, on the ground that he could not, as the law stood at the time of his emigration, be so considered. Mr. Wadsworth referred to the case of Lucien Mateo as having settled the question. Sir Edward Thornton, the umpire, held that, "at the time of the origin of the claim," which was about May 1867, "the claimant was a citizen of the United States." (*Richard Gagnet v. Mexico*, No. 546, Am. Docket, MS. Op. III. 214, IV. 614.)

Citizenship of Natural Child. "The claimant was duly naturalized as a citizen of the United States after the embargo of his property. It has been decided by the umpires that the commission is without jurisdiction in such a case.

"It is also alleged that the claimant is by birth a citizen of the United States, having been born out of wedlock in Cuba, in 1847, of an American mother. I am of the opinion that under the laws of the United States an illegitimate child born abroad of an American woman is not a citizen of the United States.

"If I am wrong in this view, there is another fact in the case which would prevent the claimant's recovery if the case had to be considered on its merits. It has been held by the

umpires that a claimant, to recover, must have given notice to Spain of his being a citizen of the United States. It does not appear that the claimant ever gave notice of his citizenship by birth. His citizenship, by naturalization, of which he gave notice, does not, as has been said, entitle him to recover.

"Further than this, the claimant, on February 20, 1872, addressed to the Captain-General of Cuba a letter in which, while referring to his naturalization, he, the claimant, disclaims the purpose of making any demand by virtue of it.

"I think that the claim should be dismissed for want of jurisdiction."

Opinion of Mr. Lowndes, arbitrator for the United States, concurred in by the Marquis de Potestad Fornari, arbitrator for Spain. (Case of *F. M. de Acosta y Foster*, No. 118, Span. Com. (1871), December 14, 1882.)

In the brief of Mr. McPherson, advocate for Spain, in the foregoing case, the following citations were made from Escriche as to the status of natural children:

"Escriche, Tit. Español, says that Spaniards are:

"1^o. Todas las personas nacidas en los dominios de España de padre y madre ó a lo menos de padre que haya nacido tambien en el reino.

"1. All persons born in the dominions of Spain of father and mother, or at least of a father also born in the kingdom.

"4^o. Los hijos espurios nacidos en España de madre que haya nacido igualmente en ella, ó de madre estrangera que haya contraído domicilio y vivido en el reino por tiempo de 10 años.

"4. Bastards born in Spain of a mother who was also born in Spain, or of a foreign mother who had acquired a domicile and lived in the kingdom for 10 years.

"Escriche, Tit. Hijo Espurio:

"En sentido riguroso es el nacido de mujer soltera ó viuda sin que conste del padre * * * y en sentido lato es todo hijo nacido de adulterio, de incesto ó de sacrilegio.

"In a strict sense it is one born of an unmarried woman or a widow without the father being known; * * * and in a broad sense it is every child born of adultery, of incest or of sacrilege.

"Escriche, Tit. Hijo Ilegítimo, says:

"Los hijos ilegítimos se dividen en naturales y espurios, y los espurios se subdividen en incestuosos, adulterinos, sacrilegos y mancebos.

"Illegitimate children are divided into natural and bastards, and the bastards are subdivided into incestuous, adulterous, sacrilegious and mancebos [ex scorto nati].

"Escriche (Madrid, 1874) ad vocem 'Hijo Ilegítimo.'

"Puede el padre hacer el reconocimiento del hijo natural por instrumento auténtico ó fehaciente. Se tiene por instrumento auténtico ó fehaciente:

"1º. La parte de bautismo en que el padre hubiese hecho expresar su nombre concurriendo por sí personalmente ó por persona fidedigna y de satisfacción á declarar su paternidad, *aunque algunos dicen que los libros parroquiales no presentan sino prueba semiplena.*

"3º. El testamento en que el padre instituyere por su heredero el hijo natural expresando que lo hubo de tal muger."

"The father can recognize his natural son by an autentico or fehaciente instrument. Are considered autentico or fehaciente instruments:

"1. The certificate of baptism in which the father has caused his name to be expressed, being present personally, or through a credible and satisfactory person, to declare his paternity, *ALTHOUGH THERE ARE SOME WHO SAY that parish books are only prueba semi-plena.*

"3. The will in which the father constitutes his natural son his heir, stating that he had him by such a woman."

The provisions of the statutes of the United States touching the nationality of children born abroad are as follows: By the act of Congress of March 26, 1790 (1 Stats. at L. 103), it is provided that "children of citizens of the United States that may be born beyond sea or out of the limits of the United States, shall be considered as natural-born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States."

By the act of January 29, 1795, section 3 (1 Stats. at L. 414), it is provided that "children of citizens of the United States born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States."

Section 4 of the act of April 14, 1802 (2 Stats. at L. 153), provides that the "children of persons who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never resided in the United States."

Section 1 of the act of January 10, 1855 (10 Stats. at L. 604), reads as follows: "That persons heretofore born or hereafter to be born out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered, and are hereby declared, to be citizens of the United States: *Provided, however*, That the rights of citizenship shall not descend to persons whose fathers never resided in the United States."

These provisions are now summed up in section 1993 of the Revised Statutes of the United States, the terms of which are: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

2. CITIZENSHIP BY NATURALIZATION.

Expatriation. "The claimant was born in the United States in 1814, was ordained a priest of the Protestant Episcopal Church in 1840, assumed a rectorship in the State of Mississippi, where he resided until September 1861, when, leaving his wife and all his children save one, he went with his eldest son to Scotland, where he placed him in college. The claimant then traveled on the Continent until 1862, when he returned to Scotland and received a living, which he held until 1864, when he was transferred to another. In October 1864 he received British letters of naturalization, which were enrolled on the 31st of that month. On the 3rd of November following he obtained a passport to travel, with his wife and two children, on the Continent and in America, and immediately sailed for the United States in order to fetch his family, who still remained in Mississippi. He landed at Portland, Maine, on the 22nd of November 1864, and, in proceeding south, was arrested, and suffered the injuries for which he claimed indemnity. He was put under a heavy bond to answer any charges which might be preferred against him, and was not released from this obligation until after the termination of hostilities. On being so released he found his own property and his wife's, in Louisiana, in the possession of the United States, and he alleged that he was forced to remain in the United States in order to prosecute his claim. It appeared that he had sought and obtained employment in his profession, and had never returned to England. In 1871 he procured from the foreign office a passport as a British subject. The case turned on the question of jurisdiction.

"The United States contended:

"I. That at the time of his arrest the claimant was, by the laws of the United States, a citizen of the United States; that down to the convention of 1870 no stipulation on the subject of naturalization existed between the two countries, and the United States never conceded, though they recognized the doctrine of expatriation, that a native-born citizen by taking foreign letters of naturalization could, having returned to his native country, claim foreign citizenship as against the United States. They claimed the right to treat him as an American citizen, and the same right, under like circumstances, as to British subjects had been approved and exercised by Great Britain.

"II. The right claimed by the United States in this case was recognized by international law, and could not be questioned in the absence of treaty stipulations to the contrary.

"III. The claimant was not, at the conclusion of the treaty of 1871, and was not at the date of argument, a British subject. His letters of naturalization contained the condition that he should reside permanently in the United Kingdom, such permanent residence being ended if at any time he should be voluntarily absent from the United Kingdom for a period of six months without license in writing under the hand of one of Her Majesty's principal secretaries of state. The passport given the claimant before his departure from England was never renewed, and the passport which he procured in 1871 could not change his *status*. He had ceased to be a British subject, and had been for six years permanently domiciled in the United States. The latter passport must have been given under a misapprehension of facts.

"IV. When the convention of 1870 was concluded, Mr. Boyd had for five years ceased to be a British subject, and had been, in fact, under the laws of both countries, an American citizen.

"On the part of the claimant it was contended:

"I. That Mr. Boyd was not voluntarily absent from England, but intended to return, the intention being frustrated by the United States authorities.

"II. He was held by a heavy bond to answer any charges that might be preferred against him, and this bond was not canceled until 1865. After his release he found his own property and his wife's in the possession of the United States, and was compelled to remain in the United States to prosecute his claims against the government. He always had the *animus revertendi*, and the passport of 1871 recognized the legality of his absence.

"III. By the first article of the treaty of 1870 the naturalization of the claimant was distinctly ratified and confirmed. The third article of that treaty provides that an American citizen naturalized in Great Britain can only be restored to his American nationality upon his own application.

"IV. Forfeitures are no more favoured under the international law than in municipal jurisprudence, and the claimant should not be held, under the circumstances, to have forfeited his British character by absence from Great Britain.

"The three commissioners decided that they had no jurisdiction, and dismissed the claim."

Frederick W. Boyd v. The United States, No. 54, Am. and Brit. Claims Com., treaty of May 8, 1871, Howard's Report, 12.

M., a citizen of the United States, concluded Service in the Mexican Army or Navy. a contract with the Mexican consul at New Orleans, February 28, 1856, to enter the service of the Mexican Republic as first engineer of the war steamer *Democrat*, for one year, at a stated salary. The agreement provided: "The undersigned engineer binds himself to obey the laws of the country and to submit himself to the discipline observed on board the Mexican men-of-war during the whole time he shall remain at service on board said vessels." He served on the *Democrat* for more than three years, when he went to New York on a military passport good for one hundred and twenty-seven days. He did not return to Mexico. Touching a demand for alleged unpaid salary, the commissioners, Mr. Palacio delivering the opinion, held that he was not entitled to claim as an American citizen. By the Mexican law of January 30, 1854, it was provided: "Art. 7. Aliens shall be considered as naturalized. 1. By accepting a public office of the nation, or entering her service in the army or in the navy." At the conclusion of a very elaborate opinion, Mr. Palacio said:

"It can already be said that all enlightened governments agree that it is an international duty to recognize the naturalization of their subjects in other countries. That duty, it is certain, has not been recognized in all legislations, because, perhaps, it is not in harmony with the national, political, and judicial institutions; but it has been accepted explicitly or implicitly in international transactions. Thus it has become a part of the law of nations, and now constitutes a rule to decide questions pending between sovereign nations. Consequently it ought to be accepted as a guide in the decisions given by this commission, whenever it may be deemed applicable, as it is, according to our opinion in the present case. John T. Martin, a native of North Carolina, acquired the Mexican citizenship according to the laws of that country; by that same fact he was deprived of the American citizenship; and, this being his condition at the time of acquiring the right alleged by him, it is evident that he has no legitimate personality to prefer a claim against the Republic of Mexico."

John T. Martin v. Mexico, No. 766, Am. Docket, convention of July 4, 1868, MS. Op. I. 69; decision rendered January 3, 1871. The same principle was applied by the commissioners in *Thomas H. Moustery v. Mexico*, No. 376, Am. Docket, September 29, 1870; and *Charles E. Norton v. Mexico*, No. 895, MS. Op. VII. 237.

"The umpire is of opinion that the claimant must be considered to have been a citizen of the United States at the time of the origin of the claims which he had presented. Indeed he believes that he never was otherwise, and that he never was actually in the military service of the Mexican Government or received a commission from it, but was merely employed as an artisan in the repair of gun carriages, etc. But even if at one time, and previously to the origin of his claims, he had served in the Mexican army, he had at the latter time entirely left that service, having previously revisited his native country. There can be little doubt that during the war of the intervention the Mexican Government did not consider the claimant to belong to the Mexican army, else he would undoubtedly have been called upon to serve in the army."

Thornton, umpire, July 15, 1876, *John Cole v. Mexico*, No. 948, Am. Docket, convention of July 4, 1868, MS. Op. VI. 497.

**Service in United
States Army.**

P., an Italian by birth, had served in the army of the United States as a private soldier. It was held that he was not entitled to appear as an American citizen. The commission, Mr. Palacio delivering the opinion, said that the law authorized the admission of foreigners into the military service of the United States, and the oath of allegiance required in that case was only a temporary one, covering the time during which they formed part of the national forces.

Ferdinand Pagliari v. Mexico, No. 521, convention of July 4, 1868.

**Ownership of Real
Estate in Mexico.**

The constitution of Mexico of 1857, Tit. I. Sec. II. article 30, provides: "*They are Mexicans: * * ** III. Foreigners who acquire real estate in the republic, or have Mexican children; Provided, always, they do not manifest their resolution to preserve their nationality." Various cases involving the interpretation and effect of this provision came before the mixed commission under the convention between the United States and Mexico of July 4, 1868. Mr. Ashton, agent and counsel of the United States, filed¹ the following argument:

"First. The first question is in regard to the true construction and effect of this constitutional provision.

"Although awkwardly expressed in the English version of the constitution, the meaning of the provision is not doubtful or obscure. It does not

¹*Antonio Milatoritch v. Mexico*, No. 395, Am. Docket.

purport to impose upon foreigners who acquire landed property absolutely, inevitably, and without exception, the character of Mexican citizens. It operates to confer the Mexican character *only* upon those foreigners who acquire such property, 'and do *not* manifest their resolution to preserve their nationality.'

"If foreigners acquire land and at the same time '*manifest their resolution to preserve their nationality*,' they are not invested with the Mexican character. Their national character undergoes no change or modification. In every case, therefore, in which it may be asserted that, by the acquisition of landed property in the republic, an alien has been converted into a Mexican citizen under the provisions of the constitution of 1857, the question will be whether the party *intended* to retain his original national character. If, in point of fact, he did intend to preserve and retain that character, he is without the constitutional provision, and is not affected by it. The act of purchase does not, in that case, bring him within the provision.

"The utmost that can be claimed in regard to the provision is that, upon the acquisition of real property by an alien, the presumption is that he intends to change his nationality, and that it lies upon him to show that he had a contrary intention, and meant to preserve his original character. It may be contended that the general rule of the constitutional provision is that the purchaser becomes a Mexican, and that if, in a particular case, the party claims that he falls within the exception in favor of those who intend to preserve their character at the time of the acquisition of landed property, it is incumbent upon him to bring himself within the exception. This is the strongest view of the effect of the constitutional provision.

"If that be the true construction and effect of the provision, the only question will be whether the party has shown in a satisfactory manner that he intended, although he became the purchaser of landed property, to preserve his native character. All the acts and declarations of the party before, at the time of, and subsequent to the purchase of the property are, upon the question of intention, subject to consideration.

"The nationality is not changed unless the purchaser intended to change it when he acquired the land. If he manifested his resolution to preserve his original character, he did not become a Mexican in the contemplation of the Mexican law. He has the right, then, to show, wherever and whenever it may be important, that he intended and did manifest the resolution to preserve his original citizenship, and to ask attention to all the circumstances connected with the act of purchase, the purpose and object for which it was made, and such of his acts and declarations as disclose his own view in regard to his nationality.

"Suppose an American merchant residing in a Mexican seaport town, under the protection of the treaty of commerce between his own country and Mexico, should find it necessary to take the conveyance of a tract of real estate to secure a debt, or should purchase the property of his debtor at a judicial sale under an execution, would anybody contend, upon the facts of such a case, that the party became a Mexican citizen, and lost his American nationality?

"The intention to preserve his character would be clear and manifest. Any legal presumption of Mexican citizenship would be rebutted by the facts attending the purchase, and the party would be entitled always to

show the circumstances under which, and the purposes for which, he acquired the property, in order to negative any inference that he meant to throw off his national character and assume Mexican citizenship.

"The case of the American citizen, residing in the United States and having no personal relation to or connection with the Mexican territory, who should acquire real estate for speculation or otherwise, would be, upon the facts showing his personal presence and continued residence in this country, free from any doubt or difficulty upon the question of Mexican citizenship.

"It would be absurd to claim that such a man did not intend to continue an American citizen, or had any notion of becoming a Mexican.

"The Constitution leaves open for consideration, therefore, the question of the party's intention, only attempting to fasten the Mexican character upon those who become the purchasers of real property and do not intend to preserve their native citizenship.

"It will be observed that the constitution does not prescribe any form or mode by which the purchaser shall manifest his intention to preserve his character or declare what shall be the test or evidence, conclusive or otherwise, of the intention of the party at the time of the purchase, in regard to his citizenship.

"Nor has any legislation of the Mexican Government provided a mode by which the party shall, for the purposes of the constitutional enactment, manifest his intention to preserve his nationality.

"It is doubtful whether any legislation which should attempt to prescribe a special and particular mode of evidencing or authenticating the intention of a party in such case, so as to exclude all other evidence of intention and prevent him from showing, in a manner different from that prescribed by the legislature, that he, in fact, intended to preserve his national character, would be in harmony with the constitutional provision, for it authorizes, by the clearest implication, the purchaser of real property to show in any way that he did manifest his resolution to preserve his character when he acquired the property. It may be doubtful, therefore, whether the legislature could prevent him from showing that intention in any manner in which the fact of the intention is ordinarily capable of being ascertained and proved.

"But it is unnecessary to consider this question, as no law has ever been enacted, so far as can be ascertained, which attempts to prescribe the mode and manner in which the intention of a party to preserve his nationality, upon the acquisition of real estate, shall be authenticated. The question is left to be determined upon the ordinary principles of law and evidence applicable to the subject.

"The object and effect of the decree of President Juarez, promulgated on March 16, 1861, and repealed in part in 1866, which we contend was not intended to apply to this constitutional provision, will be presently considered.

"2. In considering the true construction and effect of this constitutional provision it is to be remembered that by the treaty of commerce between the two governments of April 5, 1831, the citizens of one country are guaranteed the right of entering and remaining in the territory of the other, and of hiring and occupying houses and warehouses for the purposes of their commerce. (Article III.)

"In so far as the constitutional provision under consideration may affect the *status* of American citizens who exercise their right under the treaty of commerce, to lease landed property for the purposes of business, and may attempt to naturalize them forcibly and against their will, it is repugnant to the stipulations of that treaty and void. What effect has the constitutional provision upon Americans who have never been in Mexico and yet have become the owners of land? The constitution says *every* foreigner who acquires real estate in Mexico is thereby a Mexican citizen, unless he manifests his intention to preserve his nationality. This applies, of course, as well to a foreigner resident in Washington City, and a citizen of the United States, who happens to acquire by gift, marriage, or otherwise, real estate in Mexico, as to a foreigner residing in Mexico who does the same thing. There is no qualification in the terms. Is it to be said that to save his nationality an American must go to Mexico and register under the law of 1861? Of course not; all that is necessary is that he manifest his intention to retain his nationality. Remaining here will do that. And so, should he be in Mexico, any reasonable manifestation of his intention is sufficient. Citizenship is a matter of agreement. The consent of both parties is requisite, and a change of citizenship should never be held to occur except upon evidence that both parties, government and individual, freely consent.

"Second. If, then, the purchaser of real property has the right, under this constitutional provision, to show that he manifested his resolution to preserve his nationality, the next question is whether in the present case the claimant intended to retain his American character at the time of the acquisition of his land and manifested that intention.

"It clearly appears that throughout the entire period of his visits to Mexico, in connection with the business out of which this claim arises, his home was in the United States. There is no evidence, as the undersigned understands, that he ever intended to establish himself permanently in Mexico. He has certainly never in fact established himself in that country. His permanent residence is now, and has been since he came to America, in the United States, as the undersigned understands.

"In his intercourse with the Mexican authorities (see his petition, December 17) the claimant assumed that he was an American and not a Mexican. They treated him also as such in their intercourse with him. At the time he acquired the land he was prosecuting his intention to become a citizen of the United States. He had declared, under the law, his purpose to become a citizen, and it appears that he afterward carried that intention into effect.

"It has never been supposed that the ownership of land was by itself sufficient to constitute domicile; indeed, the contrary has often been held. Even in the prize courts, who hold the most stringent doctrines on the subject of domicile, landed estate alone has never been decided to constitute domicile or fix the national character of the possessor who is not personally resident upon it. (*The Twee Gebrøders*, 4 Robinson ad. Rep., 235; *Phillimore on Domicile*, p. 184; *Savigny on Private International Law*, by Guthrie, 55.)

"It often is some criterion of the *animus manendi* when the owner is personally resident upon it, but it has little weight where that is not the case. The claimant in this case, as in other like cases, is entitled to refer

to the facts and circumstances attending and connected with the acquisition of the property, and his own personal situation, acts, and relations as disclosing and manifesting his purpose to preserve his American character.

"Indeed, the claimant's declaration of intention to become a citizen of the United States, and his subsequent naturalization in this country, may be regarded as conclusive on the question of his intended national character at the time he acquired this property.

"Third. The next inquiry is in regard to the meaning, purpose, and effect of the decree of President Juarez of March 16, 1861, which is as follows:

"ARTICLE 1. In order that all foreigners residing in the republic may cause their nationality to appear, and may enjoy the rights conceded to them by the laws and by the treaties with the respective governments, there shall be opened in the office of the secretary of state and of foreign relations a register, that such foreigners may there enroll their names.

"ARTICLE 2. There is allowed the term of three months (and said term shall not be extended) from the publication of this decree in each place, that foreigners desirous of enjoying their rights as such may come forward and inscribe their names.

"ARTICLE 3. Those outside of the capital shall apply to the governors of the states and territories, etc.

"ARTICLE 4. Foreigners hereafter entering the republic are under the obligation of presenting themselves to the first political authority of the port of their destination, and of obtaining from said authority the certificate which will be spoken of hereafter.

"ARTICLE 5. (Captains of ports shall report all arrivals to the secretary of foreign relations.)

"ARTICLE 6. There shall be imposed upon foreigners who do not register themselves a fine of ten dollars, and one dollar per month besides for each month from the time they should have inscribed themselves in said register until they shall have done it.

"ARTICLE 7. No public authority, officer, or functionary shall recognize anyone as a foreigner unless he presents the proper certificate of registry (carta de matricula) issued by the office of foreign relations.

"ARTICLE 8. Tribunals and judges, before entering any claim presented before them by a foreigner, must first demand a presentation of said certificate, noting its date and number, and without such presentation no such claimant shall be heard in court or out of it.

"ARTICLE 9. No notary shall authenticate any document of a foreigner without said certificate being first presented; and special mention of said certificate shall be made in the authentication made of said instrument.

"ARTICLE 10. Neither shall there be admitted in any of the offices of the republic any claim or proceeding of foreigners, unless at the time of making the same the said certificate of registry be presented, of which due note shall be made in the proceeding in question.

"ARTICLE 11. Foreigners may obtain said document by proving their nationality by their passport with which they entered the republic, or by a certificate of the diplomatic or consular agent of their nation, without being obliged to make any written application for said certificate of registry to the office of foreign relations.

"ARTICLE 12. The functionary or authority who fails to comply with the provisions of this decree shall be suspended one month from his employ; if a notary, he shall pay a fine of \$50.

"ARTICLE 13. To persons thus registered, certificates will be issued by the office of foreign relations, to which alone belongs the power to issue them.

"ARTICLE 14. (Cost of certificate, \$1.)

"ARTICLE 15. (Local judges shall report monthly what changes occur in the civil status of foreigners.) (Archivo Mexicano, 1861, p. 596.)

"1. The first observation we make in regard to this decree is that it is plainly in contravention of the eleventh article of the constitution of Mexico of 1857, which provides that 'all men have the right of entering and leaving the republic, of traveling through its territory, and changing their residence without the necessity of letters of security, passports, salvo conducta, or other similar requisites.' This decree revived, under a new name, what the constitution of 1857 expressly abolished—the system of *cartas de seguridad*. The object undoubtedly was to raise revenue by imposing a tax and fine upon foreigners; but whatever was its object, it infringed the constitution, which declared that foreigners should not be required to have any 'letters of security, passports, salvo conducta, or other similar requisites.' There is no difference between a letter of security and a *carta de matricula* except in the name. The constitution meant to abolish everything of that sort, and the decree of March 16, 1861, is not even a subtle evasion of the constitutional provision, but it is in direct contravention of both its letter and its spirit.

"2. The second observation pertinent to this decree is that it nowhere requires foreigners to register themselves in order to avoid a forfeiture of their national character and to prevent them from becoming Mexicans. Whether they enroll their names conformably to the decree or not, they continue to be '*foreigners*,' and the penalty imposed upon failing to register consists of certain fines and loss of certain *civil rights or privileges* which as foreigners they may be entitled to enjoy under the laws of Mexico. No part of the penalty denounced consists of a forfeiture or deprivation of national character or citizenship. This is clearly the effect of the decree. The words are: 'In order that foreigners residing in the republic may cause their nationality to appear and may enjoy the *rights of foreigners*,' etc. The enrollment or registration is required as a condition precedent to the enjoyment of certain rights as *foreigners*. Let us look, then, at the penalties. We shall see that the object of the law was to raise revenue. It is a revenue statute, not a naturalization law. The penalties are:

"1st. A fine of \$10 if it is not done within three months.

"2d. A continuing fine of \$1 per month so long as it is neglected.

"3d. He shall not be recognized as a foreigner without the certificate. (This is not a denial of the *right* but of the *remedy*.)

"4th. He can not sue in law without the certificate.

"5th. He can not get a document authenticated without exhibiting the certificate; and

"6th. He can not prosecute a claim against the government without the certificate.

"Here is a long list of penalties imposed, specifically indicated, and carefully described. When the author of the decree extended his provisions so far as to say the person should not even be allowed to prosecute a claim or acknowledge a deed, can it be said that it was intended he should be held to be a Mexican citizen? Clearly not. The act would defeat its own purpose; for if he were a Mexican citizen he would of course have a right to do all these things. The very imposition of these disabilities proves most conclusively that he was not to be regarded as a Mexican citizen upon failure to register.

"As to foreigners residing in Mexico on the 16th of March 1861 there was not even a requirement of registration, but simply an invitation with defined penalties in case a party declined.

"As to foreigners entering Mexico *after* March 16, 1861, there was a requirement, but still with defined penalties in case of failure. But the act nowhere said in any case that failure or refusal should be held a declaration of intention to become a Mexican citizen.

"The act of 1861 merely requires registry. It does not say that if the party fails to comply he shall thereby be held to be a Mexican citizen. The other sections enact *not* that he shall henceforth be considered a Mexican citizen, but that he shall pay certain moneys and forfeit certain specified civil privileges.

"3. The penalties imposed for failing to register being specified by the decree, it is not within the power of any judicial tribunal, municipal or international, to add additional penalties. If the deprivation of national character be not imposed by the decree as a penalty in the case of failure on the part of a foreigner to register himself, such a penalty can not be imposed by construction.

"The decree, upon universal principles of jurisprudence, is to be construed strictly, and no penalties can be held to attach, upon neglect to comply with its terms, except those specifically denounced.

"4. It thus clearly appears that the decree of 1861 was not intended to have relation to or connection with the constitutional provision in regard to the citizenship of aliens acquiring landed property in Mexico; that failure on the part of an alien to register himself under the decree did not change or affect his *political status*, but simply his civil rights; that if he neglected to register he did not cease to be an alien and become a Mexican, but he continued an *alien*, without the ability, however, to exercise certain civil privileges which, in his character as alien, he was entitled to enjoy and exercise; and that if it should be held to be a requirement that the aliens acquiring real estate should register themselves under the penalty of becoming Mexicans, the anomalous result would follow that when they should thus become Mexicans they would be entitled in that character to enjoy all the rights and privileges which are expressly taken away from foreigners who neglect to take the benefit of the decree.

"In a word, therefore, the decree of 1861 is not a *naturalization law*, and is not *in pari materia* with the constitutional provision under consideration.

"There is nothing whatever to show that the author of the decree intended that aliens acquiring real estate should be concluded on the question of their nationality by failing to register themselves, or to prohibit them from showing that notwithstanding their failure or neglect to perform that act,

they manifested their resolution to preserve their national character when they acquired such property.

"Fourth. In construing the constitutional provision and the decree of 1861, it is to be constantly remembered that the right to acquire and hold real property is a *civil* and not a *political* right. The possession of it does not imply or presuppose citizenship. In England aliens are not permitted to hold real estate, but in France and many European countries aliens are under no such disability. It is now proposed to abolish in England this disability of alienage in respect to the holding and inheritance of land.

"But nobody supposes that aliens would become, should the disability be abolished, *British subjects* upon exercising the right.

"In most of the British colonies (Canada, British Columbia, Cape of Good Hope, Natal, Queensland, Victoria, South Australia, St. Kitts, Hong-kong, and Bengal) aliens are enabled to acquire land.

"In most of the States of the American Union aliens are expressly made capable of holding and transmitting lands without residence or other condition, and in other States they are authorized to hold such property upon conditions or with modifications.

"But wherever the right may be enjoyed, the exercise of it does not constitute the parties citizens. They acquire and hold in their character as *aliens*. It is a privilege which they are at liberty to enjoy without condition of political citizenship or change of nationality.

"A policy of permitting aliens who acquire real property to become citizens upon application, of making the ownership of land a qualification for citizenship, would be a wise policy; but a policy or plan of imposing political citizenship upon aliens exercising a civil right, which is enjoyed by them in nearly every country in the world, viz, of acquiring land, whether they desire or not to change their nationality, is not approved by considerations of national interest or private right.

"The difference between *civil* and *political status* of individuals is important to be borne in mind in construing the decree of 1861. That decree manifestly affected only the civil rights of aliens failing to register. It deprived them not of their *political status*, but of a portion of the rights which they enjoyed in virtue of their *civil* status under the laws of the republic. The constitutional provision related to the political status of a class of aliens.

"The two laws, the constitutional provision and the decree of 1861, are not laws therefore *in pari materia*.

"By the general law of Mexico aliens were permitted to acquire land. The constitution of 1857 made the acquisition of such property, where the party failed to manifest his intention to preserve his national character, evidence of citizenship. But such acquisition is no evidence of citizenship where the party manifested a contrary intention. The question of citizenship or alienage, therefore, depends upon the intention of the party.

"But under the decree of 1861 the question is, whether the party is entitled to enjoy certain civil privileges as an alien, and that depends upon the fact of registration.

"The question of intention, in the case of an alien acquiring land, can not therefore be made to turn or depend, under the constitutional provision, upon the fact of registration under the decree.

"It was plainly not intended that a failure to register under the decree should be conclusive evidence, in the case of a purchaser of real estate, that he did not intend to preserve his national character.

"The final proposition then is that a citizen of the United States who became the purchaser of real estate in Mexico, cannot be held to have become thereby a citizen of that country, if it appears that in fact he did not intend to throw off his native character, but intended, on the contrary, to preserve it, although it is not shown that he complied with the provisions of the Juarez decree of 1861 in regard to registration.

"In conclusion, it is proper to suggest the doubt whether Mexico or any other state could find warrant in the law of nations for legislation which should have the effect of naturalizing, without their consent, the citizens of other states not permanently resident or domiciled within her jurisdiction, upon the exercise by them of a mere civil right, such as that of acquiring and holding landed property. Mexico would undoubtedly have the power to derive aliens, temporarily or permanently in her territory, of the right to hold real estate, but so long as the right is not withdrawn, her power to forcibly naturalize citizens of other states, who may undertake to exercise it, may be seriously questioned.

"If Mexico deems it unwise to permit foreigners to own landed property within her territory, let her withdraw the right; but while she permits them to acquire such property, let her not, at least in the case of aliens who have not incorporated themselves into her body politic and who have no thought of doing so, attempt to impose upon them a nationality which they have not desired to acquire. It does not comport with the spirit of candor that she should permit them to suppose that they are exercising a purely civil right when in fact they are undergoing a process of naturalization; that they should labor under the belief that they are buying land, when in fact they are acquiring citizenship.

"It is doubtless the case that many Americans who have purchased landed property in Mexico did so under the honest belief that their nationality would not be affected unless they became naturalized and received certificates of citizenship.

"By the decree of Comonfort of February 1, 1856 (extracts from which are appended hereto), foreigners residing in the republic were authorized to acquire property, and by the same decree (Article 8) those who acquired such property were permitted to become citizens by application to the supreme government.

"The ownership of land was merely made a qualification for obtaining the rights of Mexican citizenship. Many Americans owning real estate in the republic have doubtless always so regarded it. * * *

"APPENDIX.

"OFFICE OF THE SECRETARY OF FOMENTO, COLONIZATION, INDUSTRY AND COMMERCE OF THE MEXICAN REPUBLIC.—SECTION SECOND.

"Decree of Comonfort, February 1, 1856.

"ARTICLE 1. Foreigners settled and residing in the republic may acquire and possess property in city or country, including mines of all classes of metals and stone coal, either by purchase, adjudication, preëmption, or by any other title established by the general laws or by the mining ordinance.

"ARTICLE 2. No foreigner may acquire, without previous permission from the general government, any real property in the border states or territories, except at a distance of twenty leagues from the line of the frontier.

"ARTICLE 5. Foreigners who by virtue of this law acquire real property, shall in all respects be subject to the laws now in force, or that may hereafter be enacted, concerning transfer, use, and preservation of said properties in the republic, as well as the payment of all taxes, without being allowed to plead at any time any privileges on these points by reason of their being foreigners.

"ARTICLE 8. In order for foreigners who have acquired properties in the republic to become citizens thereof, it shall be sufficient for them to prove this fact before the political authority of the place of their residence. This proof being presented in the office of the secretary of foreign relations, together with the proper petition, the certificate of citizenship will be issued.'

"(See for information in regard to naturalization laws, dispatch No. 99, of Jos. Ulrich, United States consul at Monterey, Mexico, February 24, 1870, filed in cases Nos. 351 and 515.)"

"The claimant, born in Louisiana, has resided in Mexico twenty-five years, married there a Mexican lady twenty-three years ago, acquired real estate there and filled different public offices in that country, sometimes as a member of the city corporation, at other times as a surgeon in the city hospital under the control of the government. But while performing all these acts which tended to impress upon him the Mexican citizenship, he always took care to set forth formally, officially, and opportunely that his intention was to retain the American character. These declarations were accepted by the Mexican authorities, who provided him with the documents required to show his foreign character, and agreed that such a circumstance was not an obstacle to his filling a public office. In view of these antecedents we believe that claimant has retained his original citizenship, and that he never acquired the Mexican nationality, since the acts which could have conferred it upon him were performed under the express and formal declaration that it was not his wish to acquire the citizenship emanating from or presupposed by the same acts."

Wadsworth, United States commissioner, delivering the opinion of the commission, May 22, 1871, *Emilio Robert v. Mexico*, No. 594, Am. Docket, convention of July 4, 1868, MS. Op. I. 341.

"Morton went to Mexico in the year 1854, acquired realty—a farm and tannery—has resided in Mexico, where he seems to have married a Mexican woman. This acquisition of real

property makes him, so it is claimed, a citizen of the Mexican Republic, for the constitution of Mexico declares that aliens become citizens of Mexico by naturalization, the acquisition of real estate, or paternity. * * *

"The original words of this remarkable and not very precise provision, are the following:

"'2. Los extranjeros que adquieran bienes raíces en la Republica ó tengan hijos Mejicanos siempre que no manifiesten la resolucion de conservar su nacionalidad.'

"No further hint is given how and where the alien purchasing real estate is to 'manifest his resolution to retain his nationality.'

"This last provision shows at all events that the fundamental law of Mexico does not consider the possession of real property as an unconditional imparting of citizenship, as for instance nativity does.

"The constitution, however, of which we speak, is of February 1857, and Morton went to Mexico in 1854, when no constitutional provision imparted the power of naturalization to the purchase of realty; on the contrary, Morton went to Mexico and settled there for a longer or shorter time under the treaty of 1831, between Mexico and the United States.

"The question now is: Has the provision of the Mexican constitution of 1857, that the acquisition of real estate shall *ipso facto* confer citizenship, unless the contrary be manifested by the acquirer, retroactive power on those aliens who had already acquired real property? Certainly not. The constitution of Mexico does not say, all who acquire real estate and do not openly declare that they do not mean to become citizens, and all aliens who have acquired real property, shall be citizens. In that case the earlier settler would not be as free as the later settler, for he had no choice left even to declare his negative, which is granted to the alien by the constitution of 1857.

"According to all rules of interpretation and all fairness of construction, according to public justice and public law, no such retroactive power can be ascribed to article 30 of the Mexican constitution of 1857. The constitution does not declare that 'all aliens having acquired realties, and all those who shall acquire real estate, not declaring that they desire to remain aliens, shall be citizens of the Mexican republic.'

"Nor can the umpire admit the argument, that the Mexican law of March 11, 1842, not allowing any alien to acquire real

property in any border State of Mexico, and Morton acquiring real property in such a border State, proves that he must have been a citizen of Mexico at that time.

"People do many things despite the laws, even in countries where the laws are strictly administered. If this purchase of land of Morton's previous to the year 1857 should prove anything it would be, so it seems to the umpire, that the purchase was null and void, from which the further conclusion would be inevitable that said purchase, invalid and illegal, could not have possessed the inherent vigor of naturalization.

"This appears to me decides the whole question. If Morton was a citizen of the United States previous to 1857, when the wrongs he complains of were sustained by him, it is not necessary to consider several minor considerations which have been urged in favor of his having been a citizen of the United States at the time; nor is there any reason given why he might not be a citizen of the United States now if he was an American citizen when he acquired real estate in Mexico and when he sustained certain wrongs at the hands of the Mexican Government, for no treaty and no law declares that an alien shall be considered and, in fact and reality, shall be a citizen of the United States *volens volens* after a residence of twenty-five years. The umpire's duty is not to express here what he thinks would be best concerning a protracted residence in a foreign country. Enough that no distinct law or treaty exists on this subject.

"The decision of the umpire is that George W. Morton was a citizen of the United States at the time when, according to his complaint, certain wrongs were committed against him, and that he was the same when he filed his claim against Mexico, so far as appears from the documents and papers before the commission."

Lieber, umpire, August 2, 1871, *George W. Morton v. Mexico*, No. 446, Am. Docket, convention of July 4, 1868, MS. Op. I. 548.

"Anderson and Thompson in 1863 went to Mexico, following the invitation held out by the Mexican authorities to foreigners to settle and cultivate some of the abundant and fertile but wild lands abounding in that country. Both were, when they went, American citizens and never changed their allegiance. They acquired land under the colonization law, paid for it, and raised it to a high state of cultivation, when in the autumn of 1864

they suffered greatly by the soldiers of General Corona, quartered in that portion of Sinaloa, in consequence of the French invasion. In the year 1867 they lost the plantation altogether by a proclamation of the Mexican President, declaring the Union Valley, in which their plantation was situated, public land.

"Moreover they were arbitrarily, as they say, and is very likely, arrested for a short time, for which arrest alone they claim \$50,000 indemnity.

"They claim in the whole \$88,962.50 for damages, including the indemnity of \$50,000 for arbitrary arrest, and moreover \$38,963 interest; total, \$127,925.50.

"The chief replies against this claim are twofold.

"Anderson and Thompson became citizens, it is asserted, of Mexico by acquiring land; for there is a law of the Mexican Republic converting every purchaser of land into a citizen unless he declares, at the time, to the contrary. This law clearly means to confer a benefit upon the foreign purchaser of land, and equity would assuredly forbid us to force this benefit upon claimants (as a penalty, as it were, in this case) merely on account of omitting the declaration of a negative; that is to say, they omitted stating that they preferred remaining American citizens, as they were by birth—one of the very strongest of all ties.

"It is, secondly, said that General Romero did no wrong in despoiling the plantation of the claimants in a most serious manner; for, and here our own instructions for the government of armies of the United States in the field are quoted, it is maintained that a general has not only the right, but the duty, to seize upon property even of his fellow-citizens if the same is necessary for the rescuing of his country. So be it; but we must not forget two considerations. The one is that the French never came near the region in which the soldiery of General Romero committed the depredations; and, secondly, though a general may be obliged to seize upon food and fodder and cause other injury, it is always understood that this is done with the understanding that the requisitions and forced loans will be made good in the proper time and as fairly as possible. Even hostile armies give receipts, which are expected to be accounted for in time.

"The umpire believing that for the present the question in the case of *Anderson and Thompson v. Mexico* presented to him

is whether they were *bona fide* citizens of Mexico, and not citizens of the United States, when they suffered the injuries complained of at the hands of the Mexican Government, decides that they were citizens of the United States, and that they have a full right, under the convention, to present their claims to the joint United States and Mexican Commission, who are bound to examine and dispose of them as justice and equity shall demand."

Lieber, umpire, April 24, 1871, *Fayette Anderson and Wm. Thompson v. Mexico*, No. 333, Am. Docket, MS. Op, I. 213.

"Claimant is a native of the United States of America, and although he declares himself that he emigrated to Mexico following an invitation given by a proclamation of the President of Mexico, with the intention of permanently residing within the dominion of the Republic of Mexico, this intention deprives him of the United States citizenship no more than the declared intention to become an American citizen makes an alien a citizen or inchoate citizen. Nor can it in equity be granted that the claimant's mere omission to state that he wanted to remain an American citizen when he acquired land in consequence of the inviting offer made by the Mexican President, made him forfeit his American citizenship. The citizenship of a free commonwealth is too weighty a matter to be lost or gained by mere implication or omission of a comparatively trifling act, or the registering of a mere declining of a benefit, which the coupling of Mexican citizenship with acquisition of land was undoubtedly intended to be. This argument is the same with that given in the decision of the umpire in the case of *Anderson and Thompson v. Mexico*, docket number 333.

Lieber, umpire, April 24, 1871, *Benjamin Elliott v. Mexico*, No. 480, Am. Docket, convention of July 4, 1868.

When Sir Edward Thornton, after the death of Dr. Lieber, succeeded the latter as umpire, the question as to the effect of the ownership of real estate in Mexico was again agitated. W., a citizen of the United States, had resided for eight years in Mexico, and had purchased real estate there without formally declaring an intention to retain his original nationality. Mr. Wadsworth, the United States commissioner, maintained that the prior decisions had determined the question. Mr. Zamacona filed an opinion prepared by his predecessor, Mr. Palacio, adverse to the view announced in those decisions. Sir Edward

Thornton held that W. was entitled to appear as a citizen of the United States before the commission, for the reasons stated in the previous decisions.¹

"The umpire considers that the claimants must be taken to be citizens of the United States, although holding land in Mexico. He is of opinion that that part of the constitution of Mexico which says that those are citizens who hold land is permissive and not obligatory; and as the claimants did not take any steps to avail themselves of that permission, that in itself was a sufficient proof that they did not wish to do so."

Thornton, umpire, November 5, 1874, *Fayette Anderson and Wm. Thompson v. Mexico*, No. 333, Am. Docket, convention of July 4, 1868, MS. Op. III. 582. This case came before Sir Edward Thornton for final decision on the merits, Dr. Lieber's opinion not having fully disposed of it.

"The umpire is satisfied that the claimant was an American citizen when he went to Mexico, and does not think that he forfeited his citizenship by his long residence and by acquiring real property in that republic, or by his not taking out a 'carta de seguridad,' although there is no positive evidence that he did not do so."

Thornton, umpire, *Smith Bowen v. Mexico*, No. 442, Am. Docket, convention of July 4, 1868, MS. Op. III. 586.

"The umpire is of opinion that with regard to Mexico the claimant can not be considered to be a citizen of the United States. The umpire has always held that the purchase of real property in Mexico gave a foreigner the right to call himself a Mexican citizen if he wished to be so, but did not impose upon him the obligation, if he did not wish it. There being no regulation prescribed for carrying out the law upon this subject, the foreigner's silence would imply that he wished to remain a citizen of the nation to which he previously belonged.

"But in this particular case the claimant asked to be allowed to become a Mexican citizen for the purpose of being able to consummate the purchase of land in the State of Tamaulipas, on the frontier. The permission was granted him, though his naturalization papers were not issued, apparently because he failed to pay the legal fees. But in the following

¹ *Stillman D. Willis v. Mexico*, No. 89, Am. Docket, convention of July 4, 1868, MS. Op. IV. 587; *Vicente Costanza v. Mexico*, No. 351, Am. Docket, MS. Op. III. 187, IV. 601; *John Jacob Wenkler v. Mexico*, No. 356, Am. Docket, MS. Op. III. 25, IV. 603.

year, 1863, he purchased real property; and not only did he purchase it, but it was on the frontier, where foreigners were prohibited by law from holding real property; he thus doubly became a Mexican citizen."

Thornton, umpire, June 26, 1876, *James B. L. Prim v. Mexico*, No. 834, Am. Docket, convention of July 4, 1868, MS. Op. VI. 473.

**Naturalization not
Retroactive.**

"Without discussing here the theory about the retroactive effect of naturalization for certain purposes, I believe it can be safely denied in the odious matter of injuries and damages. A government may resent an indignity or injustice done to one of its subjects, but it would be absurd to open an asylum to all who have, or believe they have, received some injury or damage at the hands of any existing government, to come and be naturalized for the effect of obtaining redress for all their grievances."

Bertinatti, umpire, December 31, 1862, *Medina & Sons v. Costa Rica*, convention between the United States and Costa Rica of July 2, 1860.

3. CITIZENSHIP OF MARRIED WOMEN.

**Paramount Effect of
Husband's Citizen-
ship.**

"Mr. Lizardi died, and the real claimant in the case is his legatee, the heir to the Mexican portion of the deceased's estate, of which the claim against Mexico forms a part. This legatee was Dona Maria de Lizardi del Valle, who claims through her husband, Don Pedro del Valle, as executor to Mr. Lizardi's will. It is not shown to what nation Sr. del Valle belongs, but the nationality of the wife must be that of the husband, and it is nowhere pretended that Sr. del Valle is a citizen of the United States. As therefore Mr. Lizardi's niece is not a citizen of the United States, and as she would be the beneficiary of whatever award the commission might make, the umpire is decidedly of opinion that the case is not within the jurisdiction of the commission. Even if the uncle, Mr. Lizardi, had been a citizen of the United States, which the umpire does not admit, whatever may have been the merits of the case the jurisdiction of the commission would have ceased on the death of Mr. Lizardi."

Thornton, umpire, August 31, 1875, *M. J. de Lizardi v. Mexico*, No. 146, Am. Docket, convention of July 4, 1868, MS. Op. VIII. 380.

Mary Biencourt, née Wilcoff, a native of Louisiana, married in 1850, at Brownsville, Texas, a French citizen by birth, and

afterward removed with him to Mexico. It appeared that as early as 1855 they were engaged in keeping a hotel at Monterey, and neither the husband nor the wife ever resided in France or in any of its dependencies at any time after the marriage. In 1865 the husband went to France and purchased a lot of goods for sale in Monterey. They were imported at Matamoras, and while being conveyed to Monterey were seized by the Liberal forces under General Escobedos, and confiscated. The wife claimed for half the value of the goods as an American citizen.

Mr. Wadsworth, the United States commissioner, observed in the first place that it might be held that the husband had, at the time of the marriage, lost his French nationality, since it might be inferred that he was then residing out of France *sans esprit de retour*. But, however this might be, he was of opinion that Mary Biencourt "did not lose her nationality by the fact of marriage in the United States." He criticised the statement of Phillimore that "the wife by her marriage acquires the nationality of her husband," if intended to apply to such a case as that of the claimant. Referring to Co. Litt. 31b; Com. Dig., Alien, C. 1, Dower A. 2; Bacon's Abridgment, Alien, Dower A.; *Kelly v. Harrison*, 2 Johns. Cas. 29, and *Shanks v. Dupont*, 3 Pet. 248, he said: "Where the marriage is within the jurisdiction of the sovereign and the residence there, the sovereign is interested in the question of allegiance, and it can not be dissolved without his consent, so long as the wife remains within the jurisdiction." Mr. Wadsworth held, however, that the claim was invalid, though the American citizenship of the wife should be conceded, on the ground that the goods when seized were engaged in a prohibited trade with the enemy.

Mr. Palacio, the Mexican commissioner, concurred in rejecting the claim on this ground. On the question of citizenship he said:

"I neither believe it necessary nor is it my intention to express my opinion on the general question whether the married woman has or has not acquired, by the fact of her marriage, the national character of her husband. There are in this case some particular circumstances which distinguish it from others and cause it to stand on its own grounds. It does not appear from the record what the nationality of Pedro Biencourt was at the time of his marriage or of the events which are now under consideration. It does not appear either that at the

moment in which the change of nationality is supposed as possible, i. e., at the time of the marriage, the municipal laws enacted in Mexico and in the United States concerning this matter were conflicting, and that consequently it was necessary to subject them to the superior authority of the law of nations. The American statutes then in force at the place of marriage were not contradicted by the statutes of another country, the enforcement of which might have been claimed as preferable. And, finally, the husband of this claimant did not take her to his own country nor give her there that domicile which is required to change the national character. Taking into due consideration the aforesaid circumstances, I do not form a separate opinion about the nationality of this claimant, and I admit that her claim could be submitted to us."

"Claimant is the wife of a French subject, and has been domiciled with her husband in France for more than five years. By the French law she is naturalized in France, and I am of opinion the consent of the United States must be inferred to this transfer of her allegiance. For the reason, therefore, that she is not a citizen of the United States the claim is dismissed."

Wadsworth, commissioner, delivering the opinion of the commission, *Eulalia Adorea de Bertherand v. Mexico*, No. 475, Am. Docket, convention of July 4, 1868, MS. Op. V. 10.

"Felix Maxan, with whom the claim originated, was a citizen of the United States, as was also his son, Nestor; but the daughter Lodoiska, being married to a Spaniard, is not a citizen of the United States, and the commission cannot take cognizance of her part of the claim in accordance with the terms of the convention by which it is limited to the consideration of 'all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of the Mexican Republic,' etc."

Thornton, umpire, Aug 19, 1875, *Heirs of Felix Maxan v. Mexico*, No. 182, Am. Docket, convention of July 4, 1868; 4 MS. Op. 301. S. P., Thornton, umpire, March 27, 1875, *Heirs of John Young v. Mexico*, No. 591, Am. Docket, MS. Op. IV. 618; Thornton, umpire, Aug. 31, 1875, *M. J. Lizardi v. Mexico*, No. 146, Am. Docket, MS. Op. VII. 380.

C., a native citizen of the United States, presented a claim against the United States as executrix and sole devisee and legatee of a British subject, who, at the time of his death, in 1868, had a claim against the United States for cotton alleged to have been destroyed or carried away by the military or

naval forces of that government in Louisiana and Arkansas in 1864. Counsel for the United States demurred to the memorial on the ground that the claimant had no standing before the commission by reason of the allegiance of her deceased husband.

Counsel for Great Britain, in answer to the demurrer, argued that C., by her marriage with a British subject, became, by international law, as well as by the municipal law of Great Britain,¹ a British subject; that the municipal law of the United States² gave to the marriage of an alien woman with a citizen of the United States the effect of naturalization; that while the act of parliament of May 12, 1870, provided for the readmission to British nationality of "a widow, being a natural-born British subject, who has become an alien by or in consequence of her marriage," the statutes of the United States contained no similar provision.

The commission, Mr. Frazer dissenting, overruled the demurrer.

Martha M. Calderwood, executrix, etc. v. The United States, No. 360, Am. and Br. Claims Com., treaty of May 8, 1871, Howard's Report, 18; Hale's Report, 18.

Hale says: "In the case of Mrs. Calderwood, No. 360, claimant was a native-born citizen of the United States, had intermarried with a British subject who was since deceased, and had always been domiciled in the State of Louisiana." Hale (Report, 17) also says: "In the cases of *Elizabeth L. H. Bowie v. The United States*, No. 320, *Martha M. Calderwood v. Same*, No. 360, *Martha M. Tooraen v. Same*, No. 184, and others, it was held that the national character of a married woman is governed by that of her husband in all cases, irrespective of domicile; and that on the death of the husband the national character of the widow acquired by marriage remains unchanged. From this conclusion Mr. Commissioner Frazer dissented in the case of a widow of American origin who had always remained domiciled within the United States, holding that in such case, upon the death of her British husband, her original national character reverted. In the case of Mrs. Bowie, No. 320, the claimant was by birth a British subject, but was at the time of the alleged injuries the widow of a citizen of the United States, and domiciled in the insurrectionary State of Virginia, and before the filing of her memorial had again intermarried with a citizen of the United States, who was still living and there domiciled. Her claim was disallowed, all the commissioners agreeing. In the case of Mrs. Tooraen, No. 184, claimant was by birth a British subject, her husband at the time of marriage being a subject of Sweden, but naturalized as a citizen of the United States subsequent to the marriage. Claimant and her husband were both domiciled from the time of marriage within the United States. Her claim was unanimously dismissed."

¹ Act of 7 and 8 Vict. c. 66, sec. 16.

² Act of February 10, 1855.

"In the case of Jane L. Brand, No. 180, which was a claim for alleged wrongful imprisonment and appropriation of the claimant's property at New Orleans, it appeared that claimant, a native of Ireland, had been for several years domiciled in New Orleans. She there married in 1838 a citizen of the United States, who died in 1849, and she had since remained his widow and continued domiciled in New Orleans. Her memorial alleged that, though married to an American citizen, 'she never in any manner adopted his nationality;' that after his death she uniformly claimed the character of a British subject; and that in August 1862, before the commission of the acts complained of, or a part of them, she had made proof of her character as a British subject before the British consul at New Orleans, and been duly registered as such.

"On the part of the claimant it was contended that at the time of the claimant's marriage and of the death of her husband, and up to the passage of the act of the United States Congress of 10th February 1855 (10 Stats. at L. 604), the claimant was not by the laws of the United States a citizen of those States, the act of 1855 being the first to give such status to an alien-born woman by her marriage to a citizen of the United States. That up to the conclusion of the naturalization convention of 13th May 1870 between the United States and Great Britain (16 Stats. at L. 775), and the supplemental convention of 23d February 1871 between the same nations (17 *id.* 841), no provision existed for the manner in which a British subject who had married a citizen of the United States should, upon becoming a widow, reclaim her original nationality. That the universal custom among nations, founded upon international comity, if not upon international law, allowed such widow to choose whether she would retain the nationality of her deceased husband or return to that of her birth. That Mrs. Brand, by always claiming, after her husband's death, the condition of a British subject, and by registering herself as such in the consulate at New Orleans in 1862, had done all that was necessary to enable her to reassume her original national character; and that it was not necessary for her to avail herself of the provisions of the conventions of 1870 and 1871 in order to disclaim and repudiate any alleged condition of American citizenship acquired by her marriage.

"Her Majesty's counsel cited the case of *Kelly v. Owen* (7 Wall. 496).

"On the part of the United States it was contended that, under the principles recognized by the commission in the cases of Mrs. Calderwood, No. 360, and others, it was settled that the national character of a married woman was in all cases determined by that of her husband; and that such national character, once acquired by marriage, continued on the death of the husband. That this doctrine had always prevailed in Great Britain, as well as elsewhere, where the domicile of the wife and widow had continued to be that of the husband's nationality; and that by no treaty stipulation or law, municipal or international, was the widow ever allowed to reclaim her original nationality while still domiciled within the nationality of her husband, until the conventions of 1870 and 1871; and that by those conventions she could only reclaim her original nationality in the form provided by the convention of 1871, which in the case of Mrs. Brand had never been done. That she was, therefore, both at the time of the commission of the alleged wrongs and at the time of the presentation of her memorial, a citizen of the United States.

"The commission unanimously sustained the doctrine maintained on behalf of the United States, and dismissed the claim for want of jurisdiction."

Jane L. Brand v. The United States, No. 180, Am. and Br. Claims Com., treaty of May 8, 1871, Hale's Report, 18. See also Howard's Report, 20, 337, 338.

Elise Lebret, a native of France, presented to the commission under the treaty between the United States and France of January 15, 1880, a claim (No. 173, French docket) against the United States for the appropriation and destruction of property by forces under the command of General Banks during the civil war. The agent of the United States demurred to the claim, on the ground that it appeared by the memorial that the claimant was married to a citizen of the United States, with whom she owned in community the property that was destroyed, and that her nationality followed that of her husband.

The admitted facts in regard to the claimant's citizenship were as follows:

"1. That the memorialist, Elise Lebret, was born at Metz, department of Moselle, France, the 24th day of March 1809.

"2. That she was married in the city of New Orleans, Louisiana, April 13, 1841, to Pierre Lebret.

"3. That at the time of the marriage Pierre Lebret and Elise Lebret were both citizens or subjects of France.

"4. That the said Pierre Lebret was naturalized and became a citizen of the United States in the year 1846.

"5. That he died May 15, 1879.

"6. That from the date of his marriage until his death he and his wife resided in the United States, and that the residence of the wife in the United States has continued to the present time.

"7. That the said Elise Lebret protested against the act of her husband in becoming a citizen of the United States, and declared her intention to remain a French citizen.

"8. That the said Elise Lebret, the 22d of January 1872, appeared before the French consul at New Orleans and made a declaration that she intended to preserve her nationality as a citizen of France, in conformity to the treaties between France and Germany of the 10th of May and the 11th of June 1871."

Counsel for the United States, in his opening brief, referred to the act of 1855, afterwards embodied in section 1994 of the Revised Statutes of the United States, which provides that "any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall become a citizen;" and to the case of *Kelly v. Owen* (7 Wallace, 496), in which the Supreme Court of the United States construed the statute of 1855 as conferring upon a married woman born in another country all the rights of a citizen whenever her husband had been naturalized under the laws of the United States.

Special counsel for the claimant admitted that by the law of the United States the memorialist was a citizen of the United States, but contended that the case should be governed by the law of France. He quoted the nineteenth article of the Code Napoleon, which provides that "a French woman who marries a foreigner accepts the condition of her husband," and cited authorities to support the position that this article was to be so construed as to refer to the condition of the husband at the time of marriage, and that no subsequent act of his by which his own nationality was changed could affect the wife. It was admitted that the French authorities were divided upon this question, some contending that upon the marriage of a French woman she was bound not only to accept the existing nationality of the husband, but also to accept any other nationality which he might subsequently assume.¹ But in answer to this contention counsel quoted Stoicesco, who, in his *Etudes*

¹ Prudhon, *Treatise on States and Persons*, T. 1, pp. 126 and 452; Félix Droit International, T. 1, p. 93; Massie Droit Comm., T. 1, p. 111, No. 48; M. Verambon in "Revue Pratique," T. 8, p. 50, *et seq.*

de Naturalisation, p. 278, denies the broad construction given to article 19 of the Code Napoleon, and maintains the doctrine that the "change of nationality which operates on the state of the woman by her marriage with a man of different nationality takes place the moment she is married. This change is supposed to be effected through the consent of the woman, and the presumption is justifiable, because she knows the nationality of her future husband at the time of her marriage. She can then judge whether the change suits her; but it is impossible to give to her consent a larger comprehension. It is not probable that the woman would accept blindly in advance all the conditions which her husband might please to take upon himself." Counsel for the claimant also referred to the case of Mrs. Preto, the wife of a subject of Spain but the daughter of Judge Griffith, a citizen of the United States and of the State of New Jersey. Upon the death of Mr. Preto, Mrs. Preto and her daughter returned to the United States and asserted a claim to citizenship, notwithstanding Mrs. Preto's marriage to a Spanish subject. Attorney-General Bates, in a letter to the Secretary of State dated the 6th of August 1862, sustained the claim of Mrs. Preto. Other authorities were cited in support of the same position.

Counsel for the United States contended that the only question before the commission was: Did Elise Lebret become a citizen of the United States by virtue of the citizenship of her husband? In the opening brief for the United States it was claimed that by the laws of the United States the memorialist was a citizen of the United States. That point was conceded by counsel for the claimant in reply. It was only necessary, therefore, to inquire whether the memorialist was at the same time a citizen of France. As there was no reference in the brief of counsel to any provision of the code of France on the subject, counsel for the United States assumed that no such specific provision existed. As to article 12 of the Code Napoleon, which declares that a foreigner who marries a Frenchman accepts the condition of her husband, and article 19, counsel for the United States maintained that it was the policy of the code to give unity to the family in the matter of citizenship and to make the nationality of the husband supreme. He declared that if Mrs. Lebret did not become an American citizen by the naturalization of her husband, then the wives of all French immigrants to the United States who had become American citizens since marriage were yet citizens

of France. He quoted the opinion of Chief Justice Cockburn in his work on Nationality (p. 211), in which his lordship considers the provisions of the Code Napoleon, and maintains that "the consent given by the wife on marriage to exchange her nationality for that of the husband may be taken as equally applying to any nationality which he may afterwards acquire in the place of the former one."

It was further contended by the counsel for the United States that the claimant had lost her French citizenship by long residence in the United States without the intention to return to France. Article 17 of the Code Napoleon provides that French citizenship shall be lost by domicile in a foreign country without intention of returning. The record showed that Mrs. Lebret had been a continuous resident of the United States for more than forty years. Upon these facts counsel for the United States contended that she was residing in the United States without the intention of returning to France. In conclusion, it was maintained by the counsel for the United States—

"1. That the burden is upon the memorialist to prove beyond a reasonable doubt that she is a French citizen.

"2. That by the naturalization of Pierre Lebret his wife became a citizen of the United States.

"3. That the Code Napoleon, and the views of commentators upon that Code, do not justify the conclusion that she is a citizen of France.

"4. That her continued residence in this country for forty years, and under circumstances justifying the conclusion that she had no intention of returning to France, has subjected her to the exclusion from French citizenship contemplated by Article XVII. of the code.

"5. That the true rule of construction is this: When the treaty pledges compensation by France to citizens of the United States it refers to those persons only whose citizenship in the United States is not qualified or compromised by allegiance to France, and that when the treaty pledges compensation by the United States to citizens of France reference is made to those persons only who are not only citizens of France, but who are also not included among the citizens of the United States.

"It can not be assumed of either government that it intended to compensate persons whom it claims as its own citizens, and that through the agency of another government."

The Marquis de Chambrun, counsel for France, made an oral argument before the commission, in which he supported the following propositions:

"1st. Article 19 of the Code Napoleon declares that the French woman who marries a foreigner accepts the condition of her husband. But the condition is his nationality at the time of the marriage. No subsequent

change of his nationality affects that of the wife unless she willingly joins in the act, or is naturalized separately. (Court of Appeals, Paris, June 21, 1818, S. 18, 2,358; Delmolomb, Zachariae, 226, 228; Valette on Proudhon, Note A, vol. 5, 126; Demangeat on Foelix, T. 1, page 93; Merlin Repertoire, Stoicesco, p. 278.)

"2d. By the laws of the United States, an American woman marrying an alien remained an American woman; only her civil status was changed. (Shanks v. Dupont *et al.*, 3 Peters, 246; Opinion of Attorney-General Bates in the case of Mrs. Preto, Attorney-General Opinions, vol. 10, p. 321; Attorney-General Taft in case of Mary d'Ambrosia, *ib.*, vol. 15, 600.)

"3d. The act of Congress, February 10, 1855, made no alteration in the law that marriage of an American woman to a foreigner did not change her nationality.

"And, further, the principles of international law as established by the Mexican Claims Commission do not recognize changes of nationality by mere operation of law on the part of the country where the alien resides. (Anderson and Thompson v. Mexico, opinion of Dr. Lieber, umpire.)

"4th. The United States has never adhered to the general rule of the continental nations that the nationality of the wife follows the condition of the husband at the time of marriage.

"But has only availed of that rule in the reception of new citizens, not admitting its force or effect as to its own citizens.

"5th. The rule of naturalization, in so far as it is public law and as it has been generally held and exercised by nearly all the continental nations of Europe, is that it must be actual, and by formal and solemn act. Nothing short of this will confer to all intents and purposes a new nationality, and at the same time destroy the old. Implied naturalization is not known or permitted. (Cockburn [p. 184] and the French authorities already quoted.)"

The demurrer of the United States was sustained by the decision of all the commissioners, in a naked opinion, without argument or reasons. An opinion was given, however, by M. de Geoffroy, commissioner for France, who placed his assent upon the ground that the claimant had lived in the United States for more than forty years; that she had not indicated any disposition to return to France; that she and her husband had accumulated a large estate, which had enjoyed the protection of the Government of the United States; that she had not in any manner contributed to the interests of France, and that her attachment to that country was too platonic to justify France in demanding compensation for the losses she had sustained.

The commissioner for the United States submitted an opinion, with authorities and arguments, in support of the position that Elise Lebret became an American citizen by the naturalization of her husband in 1846.

The opinion of M. de Geoffroy was as follows:

“La réclamation Lebreton soulève la question de savoir si une femme peut retenir une nationalité différente de celle de son mari, non pas au moment du mariage—sur ce point l’art. 19 du code civil français est formel, et la plupart des législations établissent aujourd’hui avec lui que la femme qui épouse un étranger suit la condition de son mari—mais plus tard, si celui-ci venait à acquérir une nationalité nouvelle et imprévue par la femme lorsque celle-ci s’est engagée.

“Mon Honorable Collègue est d’avis que cette naturalisation postérieure entraîne forcément celle de la femme, et que les effets en sont les mêmes pour elle que lorsqu’en se mariant et en connaissance de cause elle a accepté de suivre la condition de son mari. A l’appui de sa thèse il passe

Examen des législations diverses.

d’abord en revue et compare à celle de France les diverses législations des Etats-Unis, de l’Angleterre, de l’Italie, de la Russie, de la Prusse et de l’Espagne. Il ne me semble pas que les citations qu’il en fournit soient toutes également concluantes. La loi russe déclare, il est vrai, la naturalisa-

De Russie, d’Angleterre, de Prusse, d’Espagne.

tion forcée; mais la loi anglaise est ambiguë; le texte des lois prussienne et espagnole, comme celui du code français, ne s’applique clairement qu’à la condition du mari au moment du mariage; seule la loi d’Italie aborde la difficulté

D’Italie.

mais ne la tranche qu’à moitié et contre l’opinion de mon collègue, lorsqu’elle dit: *Codice civile, Lib. I, Tit. I, Art. II, “la femme et les enfants mineurs de celui qui a perdu la nationalité (italienne) deviennent étrangers à moins qu’ils n’aient continué à résider dans le Royaume.”* Qu’il s’agisse de la perte de la nationalité au moment du mariage ou postérieurement au mariage, la femme et les enfants italiens ne sont donc pas forcément naturalisés à la suite du père; ils peuvent éviter de l’être en continuant à résider en Italie; mais comme d’autre part le Code italien ainsi que tous les autres impose à la femme l’obligation de résider avec son mari, il s’ensuit que la séparation de nationalité ne doit pouvoir s’établir qu’avec le consentement de ce dernier, et que c’est seulement une facilité qu’on a entendu ménager dans la pratique aux nombreuses familles italiennes qui émigrent à l’étranger.

“Quant à la loi américaine elle fournit des arguments dans les deux sens.

Loi américaine, serait plutôt favorable à l’indépendance de la femme.

“Mr. le Juge Aldis nous dit: ‘The United States has no law upon the subject of American woman who marry foreigners, and does not say that they shall or shall not follow the nationality of their husbands.’ Mais si sur ce point comme sur beaucoup d’autres il n’y a pas de loi écrite aux Etats-Unis, la coutume y consacre, plus que partout ailleurs, cela est notoire, le principe de l’indépendance et des droits personnels de la femme; non seulement il y est admis que la femme américaine en contractant mariage ne perd pas

Oranck's Circuit Court Reports, I, p. 572.
Wendell's Rep., XVI p. 617.

sa nationalité américaine, mais encore le droit de se naturaliser de son propre chef et sans le consentement de son mari lui été reconnu en plusieurs occasions. (Washington Circuit Court, December, 1806; Marianne Pic; New York Supreme Court, 1837, Priests

v. Cummings.)

“Au surplus, la loi ou la coutume américaine utile à consulter pour l'étude de la question ne saurait pas plus que celles d'Angleterre, d'Italie ou de Prusse faire autorité pour la résoudre, et je lui demande la permission de la remarquer en passant, c'est l'erreur capitale de mon H^{ble} Collègue de prétendre en faire dépendre la décision que nous sommes appelés à rendre aujourd'hui. Continuant à chercher ses preuves dans la législation américaine, il invoque la loi qui règle la naturalisation et au nom du principe incontestable que chaque état a le droit de légiférer souverainement chez lui et de déterminer les conditions en vertu desquelles on y acquiert la nationalité, il en conclut que du moment où cette loi déclare que la femme de l'étranger naturalisé américain devient américaine la décision est finale, et qu'aucun Gouvernement n'a rien à y voir. C'est résoudre la question par la question. Un état ne peut légiférer que sur les personnes qui lui appartiennent et qu'à partir du moment où elles lui appartiennent; or nous nous trouvons ici en présence d'un ressortissant français qui veut rester français, appelés à décider s'il a ou n'a pas aliéné

la qualité de français. Il faut donc connaître avant tout ce que pense de lui la loi française. C'est à la loi et à la justice française seules que nous devons nous adresser pour savoir si une française, si la dame Lebret,

La loi française seule peut déterminer le statut personnel d'un ressortissant français. *adversus* aliéné ou conservé les droits de sa nationalité d'origine.

Loi Française pas plus décisive que les autres.

La question est controversée—3 théories en présence.

“Le code Napoléon est muet à cet égard, et la question est controversée. Dans l'opinion de jurisconsultes éminents, l'art. 19 s'applique seulement à la ‘condition’ du mari connue lors du mariage; il ne vise pas les

changements que cette condition pourrait subir par suite des déterminations postérieures du mari, et que la femme était dans l'impossibilité de prévoir lorsqu'elle a donné son consentement au mariage; ils soutiennent que la nationalité est personnelle et ne peut être changée que par un acte de la volonté personnelle de l'un comme de l'autre époux; répondant enfin à l'objection tirée de la situation anormale qu'une séparation de nationalité créerait dans la famille, ils assimilent cette situation à celle créée par la différence de religion, par la séparation de biens.

“La cour Impériale de Douai s'est prononcée dans ce sens dans l'affaire Hauël, C. Hauël, 3 août 1858.

“Attendu en droit que si aux termes de l'art. 19 du code Napoléon la femme française perd cette qualité et suit la condition de son mari en épousant un étranger parce qu'elle renonce alors volontairement à sa nationalité, il en est autrement lorsque son mari acquiert sa naturalisation en pays étranger; que dans ce cas l'épouse française conserve la qualité dont le fait personnel de son mari n'a pu la priver.”

“Mais plus loin poursuivant ses considérants la cour ajoute: ‘Attendu que la femme Hauël, née en France de parents français, n'a jamais cessé d'habiter la France et d'y résider,’ distinction importante à noter et qui semblerait impliquer la condition citée plus haut du code italien.

“Les partisans de l'unité de nationalité, allèguent le vieux principe qui fait du mari le chef et le représentant unique de la famille, l'obligation du domicile commun imposée à la femme, les inconvénients que présenterait au point de vue de la bonne harmonie entre les époux, de l'éducation et de

l'avenir des enfants une situation aussi étrange que celle d'un père et d'une mère appartenant à deux nationalités différentes peut être un jour en guerre et ennemies, etc. ; ils ont eux aussi des arrêts en leur faveur. (Arrêt de la chambre des requêtes du 14 avril 1818. Arrêt de la cour de Metz du 25 août 1826.)

“On peut choisir entre les deux théories, et comme on le voit, la loi française laisse en doute le point de droit et ne résout pas plus la difficulté que la loi américaine.

Pas de règle internationale.

La question ne peut être résolue qu'en 'équité.'

“De toutes ces législations également incertaines peut-on tirer une doctrine internationale? Evidemment non, et je m'étonne, je l'avoue, de voir mon Hon'ble Collègue rechercher la loi publique là où il n'existe pas de lois particulières.

“La question étant insoluble en droit c'est donc 'en équité' que nous devons la décider d'après les circon-

stances de fait.

“Or quelles sont ces circonstances?

Faits.

“La femme Lebre, d'après l'acte de naissance qui figure au dossier, est née le 25 mars 1809, à Alzey, département du Mont-Tonnerre, provinces Rhénanes, qui

faisait alors partie de l'Empire français.

“Elle est venue aux Etats-Unis à une époque indéterminée; antérieurement à 1841 elle était établie à Bayou Sara dans la Louisiane où elle avait un magasin de lingerie.

“Le 13 avril 1841, elle épousa à la Nouvelle-Orléans, Pierre Lebre, français, résidant également dans la Louisiane. Pierre Lebre possédait 5,000 dollars; elle apporta dans la communauté la valeur de son magasin, plus une somme de 1,300 dollars. Immédiatement après son mariage elle alla vivre avec son mari sur la paroisse de West Feliciana, où le Sr. Lebre forma une plantation au milieu des bois, nommée Fancy Point.

“Quatre mois auparavant, c'est-à-dire le 19 décembre 1848, Lebre avait fait une 1^{re} déclaration d'intention d'adopter le nationalité américaine. Donnait-il connaissance à sa future de cette démarche si importante pour l'avenir du ménage, ou, appréhendant ses objections, la lui a-t-il cachée? On ne le dit pas; quoiqu'il en soit, après 3 années révolues, le 23 mai 1844, il compléta sa naturalisation. Il est mort en 1879 citoyen américain.

“Madame Lebre affirme qu'elle n'a pas consenti, en ce qui la concernait à la naturalisation de son mari; qu'elle a toujours protesté de son intention de rester française et usé de tous les moyens en son pouvoir pour conserver sa nationalité d'origine; à cet effet, le 22 octobre 1862, elle s'est fait délivrer par le Vice-Consul de France à Baton Rouge, citoyen américain peu au courant des règlements consulaires français, un certificat constatant qu'elle était 'née à Metz, département de la Moselle,' et qu'en sa qualité de française elle avait droit à la protection du Gouvernement français. Ce certificat est incorrect et incomplet. On voit que l'agent consulaire le lui a délivré sur sa simple déclaration et sans qu'elle lui ait montré son acte de naissance. Elle craignait sans doute, à tort d'ailleurs, que la constatation de sa naissance sur un territoire n'appartenant plus à la France ne fit quelque difficulté à la délivrance du certificat, qui au surplus ne prouve rien, ni pour ni contre la nationalité.

" Le 23 janvier 1872, pour se conformer aux stipulations du Traité entre la France et l'Allemagne, la dame Lebreton opta en faveur de la nationalité française au Consulat de France à la Nouvelle-Orléans.

" Cet exposé des faits donne lieu à plus d'une observation.

" La femme Lebreton a-t-elle bien ignoré au moment de son mariage les projets de son futur mari? Admettons que celui-ci les lui ait d'abord cachés; la naturalisation accomplie elle l'a certainement connue; c'était après trois ans de mariage, lorsque la disposition aux concessions mutuelles dans un jeune ménage commence à s'amortir; la découverte d'ailleurs d'avoir été trompée n'était pas de nature à la prédisposer à la condescendance; l'acte de 1844 lui fournissait l'occasion de manifester et de formuler son opposition. Elle l'a fait, dit-elle, et s'est exprimée fortement à ce sujet en plusieurs circonstances; mais de simples propos, des objurgations conjugales rappelées au bout de trente années ne sont pas une preuve; on ne peut admettre comme preuve qu'une démarche légale, une protestation en forme; cette protestation la femme Lebreton pouvait la faire soit devant l'autorité américaine, soit au consulat de France; or ce n'est qu'au bout de 18 ans qu'elle s'en avise, la 2^{me} année de la guerre civile, lorsque les troupes fédérales reprennent possession de la Louisiane, que la plantation de Fancy Point est menacée et que la nationalité américaine de son mari, peut-être ses opinions seditieuses peuvent lui procurer des désagréments. Cette revendication de la nationalité française est un peu tardive. Je ne mentionne que pour mémoire l'acte d'option de 1872; il n'est que la conséquence de la position prise en 1862, c'est le caractère de l'acte de 1862 qu'il importe surtout d'apprécier; or cet acte ne me semble pas sérieux, pas plus dans la forme qu'au fond. Je n'y vois qu'un expédient. Il est trop clair qu'on a assez volontiers, sinon volontairement, subi la nationalité américaine tant que celle-ci a été profitable et qu'elle présentait des avantages, et qu'on s'est souvenu de la nationalité française uniquement lorsque la naturalisation américaine a amené des inconvénients, et qu'on invoque cette nationalité seule fin de protéger le mari américain et les biens de la communauté.

" Je ne voudrais pas toucher à la question de l'esprit de retour. Le Code Civil français accorde une très large marge à l'esprit de retour. Il faut cependant bien lui tracer une limite quelconque sous peine de déclarer vaines les dispositions de l'art. 17, mais c'est un point, n'en déplaise encore à mon hon'ble Collègue, que les cours françaises seules ont qualité pour définir; aussi tout en réservant expressément leur compétence et sans que cela puisse tirer à conséquence, me bornerai-je à remarquer que la revendication de la nationalité française par la femme Lebreton ne paraît nulle part accompagnée d'aucune manifestation d'intention de rentrer en France ni avant 1879, ni depuis cette époque où la mort de son mari l'a rendue libre. Il y a là un fait dont il faut, au moins moralement, tenir compte.

" Je me résume :

" Dans l'affaire qui nous est soumise, le point de droit me semble impossible à établir. Les législations étrangères, sauf celles d'Italie, fournissent peu de renseignements utiles; la législation américaine se contredit; la prétention de mon Collègue de décider uniquement d'après celle-ci du statut personnel d'un ressortissant français est complètement inadmissible; quant à la loi française qui seule serait décisive, elle ne se prononce pas; par suite de l'insuffisance des législations particulières il n'y a pas de

règle internationale. C'est pourquoi laissant de côté la discussion théorique et le point de vue légal controversé, je ne crois pas qu'on puisse juger autrement qu'en 'équité,' et uniquement d'après les circonstances de fait. Or il me paraît infiniment probable que la femme Lebret en épousant son mari, a connu son intention de se faire naturaliser américain; dans tous les cas, elle a bénéficié durant de longues années de cette naturalisation; les intérêts pour lesquels elle réclame aujourd'hui en sont le fruit; tout en invoquant la protection de la France pour ces intérêts foncièrement américains, elle n'a manifesté aucune disposition à se rattacher d'une manière effective à la mère patrie que depuis 40 ans elle n'a servie en aucune manière, ni en lui fournissant des citoyens au cas où elle a eu des enfants, ni en contribuant à ses impôts. Je ne la déclare pas dénationalisée, je n'en aurais d'ailleurs pas le droit, mais je ne considère pas la France comme tenue de protéger indéfiniment une nationalité aussi platonique, si je puis m'exprimer de la sorte, ni d'engager son action en faveur de tels ressortissants et de tels intérêts. En conséquence j'écarte la réclamation de la dame Lebret."

Opinion of Mr. Aldis. The opinion of Mr. Aldis, the commissioner of the United States, was as follows:

"THE FACTS.

"1. Elise Lebret was born at Metz 24th March 1809.

"2. She was married to Pierre Lebret at New Orleans, Louisiana, April 13, 1841.

"3. It does not appear when she came to America, but she was settled at Bayou Sara, Louisiana, and had a milliner's shop there before she was married—before April 1841.

"4. Pierre Lebret came to America at least as early as 1837, as he took his first step of naturalization on the 19th day of December 1840: that is, declared his intention to become a citizen of the United States, and he must have been three years in the country before he could take that first step.

"5. He declared his intention to become a citizen of the United States in 'open court' at West Feliciana 19 December 1840, and took the second step perfecting his naturalization on the 23d May 1844.

"It thus appears that he made his declaration of his intention to become a citizen of the United States December 19, 1840, *four months before his marriage* to the memorialist on the 13th April 1841. She doubtless knew that he had made such declaration of intention when she married him, and her statement in her amended memorial that 'when she married him he had never taken any steps to naturalize' is shown by the record to be untrue.

"6. Pierre Lebret died May 15, 1879.

"7. From the time they came to America (between 1837 and 1840) up to the present time (1882) they have for forty-five years resided in America; have never returned to France or shown any intention to return there; have bought and owned two plantations, viz: Fancy Point, of 500 acres of improved land, and Mulberry Hill, two or three miles from Port Hudson, and kept the largest wood-yard on the Mississippi river. Since the death

of Pierre Lebreton, about three years ago, she has continued to live in America and has not expressed any intention of returning to France.

"8. That memorialist claims that she objected to Lebrét's getting naturalized, and told him she would remain French. On the 25th October, 1862, she claimed to be a French citizen before the French vice-consul at Baton Rouge, and on the 22d January, 1872, she so claimed again before the French consul at New Orleans.

"Elise Lebreton claims that she is a French citizen. If upon these facts she is not a French citizen we must dismiss her claim.

"I.

"It is the right of every nation to prescribe by law the terms and conditions upon which, and the rules and forms of proceedings through which foreigners may become its citizens. These are the laws of naturalization. It is essential to the independence and sovereignty of a State that its right to determine for itself how foreigners may become its citizens shall be held sacred, and shall not be questioned by any other State.' * * *

"In the celebrated case of *Baufremont-Bibesco* (cited in Morse, pp. 88, 89, 90), it was decided that 'when naturalization is conferred upon a foreigner it is an act of sovereign authority, and no other government has the right to discuss its validity or to modify its effects. It is immaterial whether the naturalization is conferred by general laws or by special act of naturalization; if it be a legal naturalization, it is enough. It is the act of the sovereign power of the State, and can not be questioned elsewhere.'

"The reasons upon which this settled rule of international law is founded are obvious. Citizenship, in all republics and constitutional monarchies, is the primary source of political power. * * * The citizens choose directly or indirectly the president of the republic, the emperor (as in the plebiscites in France), and the great officials of the State. * * * Aliens are never allowed to share in these great privileges. Hence it is essential to the independence, sovereignty, and equality of each state that it shall determine for itself exclusively, and free from all foreign interference, who are its citizens and who are not.

"Hence its decisions on this subject—its laws—are binding on all who reside in its territory and are subject to its jurisdiction; and, in this respect, are held binding and are respected and not disputed by other States. Such laws do not operate extraterritorially. The naturalization laws of the United States do not operate within the territory of France upon persons resident in France, except so far as they are in harmony with and are recognized by French law. The naturalization laws of France, like the civil code of France, do not operate within the territory of the United States upon persons resident in the United States, except so far as they are in harmony with and are recognized by American law. * * * The United States has the right to enact a law that the nationality of the wife must follow that of her husband as well after as at the time of marriage if it deems such law wise and well founded in public policy. * * *

¹ Citing Dana's Wheaton, 142, note to § 85; Halleck on Int. Law, 697, § 4; Morse on Citizenship, 36, § 42, and p. 50.

"II.

"THE LAW OF THE UNITED STATES.

"The United States, in the exercise of its sovereign right to make such naturalization laws as it deems best, has enacted that if a man *after marriage* becomes by naturalization an American citizen, his wife thereby also becomes an American citizen *without her consent and without applying for letters of naturalization*.

"This law is binding on all who are residents of the territory and subject to the jurisdiction of the United States. * * *

"The cases referred to by claimant's counsel were decided, one (Marianne Pic) in 1806, the other (of Priest v. Cummings, 16 Wend. 617) in 1837, long before the act of Congress of 1855 was enacted. They have no bearing upon the question now under consideration. The act of 1855 supersedes the proceedings there had.

"The United States statute stands upon the ground of *public policy*, not on the ground of *the wife's consent*. * * * She may object to his naturalization and protest ever so formally that she will not become an American citizen, that she will remain a French citizen; it makes no difference. The law, founded on a wise public policy, requires her nationality to be the same as her husband's, and she becomes by operation of law an American citizen.

"There is reason for a distinction between men and women as to requiring their consent for becoming citizens. Men exercise political powers and privileges, and can vote and hold office, and are liable for military service. Women have no such powers and liabilities. By naturalization they get little or nothing, for, by the modern laws of nearly all civilized States, women enjoy all, or nearly all civil rights, whether naturalized or not. But to make men citizens without their consent might oblige them to bear arms against their native land, though such service would be revolting to their principles, sentiments, and sympathies. Neither the State they live in nor their native State would desire or tolerate such service.

"The wisdom of such a law as to married women, and even the necessity of it for the United States, are apparent.

"1. There are about six million of foreign-born persons in the United States, and probably about half a million of foreign-born married women, whose husbands have become United States citizens *after marriage*. To treat these married women as foreigners would be a great wrong to them. The vast majority intend to follow the nationality of their husbands—to make their home in America and become American citizens. They gladly consent—not one in a thousand objects—to following the nationality of their husbands. The law, in presuming their consent, presumes in almost all cases according to the real fact. To presume to the contrary would be unjust and against the fact.

"2. The intimate relation, the mutual affection, the common sympathies, the family, the education of the children in allegiance, fidelity, and love to the government, the common pecuniary interests, the obligation to live with each other as long as life lasts, and the tranquility and harmony of domestic life, all require that husband and wife should be of the same

nationality. These reasons, derived from the intimate relation of the husband and wife, are expressed with great force and beauty by Mr. Varambon, an advocate of Lyons, as cited by Stoicesco, p. 280. * * *

"3. Many and serious difficulties would arise from the contrary doctrine. If the husband is American and the wife foreign, in case of war between their countries she would be deemed to be an enemy, might be an object of suspicion, could reside here only by permission, and might be ordered to leave the country. The family might be broken up. Dower is regulated by the laws of the different States and not by the United States law. In several of the States aliens can not hold lands. If the widow be an alien and her husband a citizen, can she hold dower or the homestead? If the father be a citizen and the mother an alien, and there are minor children, perhaps born abroad, whose nationality do the children take? * * *

"4. It is important both for the governments and for citizens that there should be a plain rule by which it can easily be determined who are citizens and who are not.

"Marriage is a fact easily ascertained and rarely in doubt or dispute. If the rule is, that the wife is always of the nationality of her husband, then States and citizens have a rule free from doubt. But if the other theory is adopted, that if the husband after marriage change his citizenship it does not affect the nationality of the wife unless she consents to the change, then her citizenship becomes uncertain. * * *

"There is no law in any country directing how her consent may be proved. There is no rule of international law on the subject. * * * In the absence of all positive law nothing can be more vague and indefinite than proof of consent. * * *

"III.

"But whether these reasons are good or not the right of the United States to adopt such laws of naturalization and such mode of proceeding under them as it sees fit can not be questioned by any other state or tribunal. * * *

"The civil code of France provides, § 12: 'An alien woman who shall have married a Frenchman shall follow the condition of her husband.' Hence, if an American woman marries a Frenchman she becomes French. It is not necessary for her to take out letters of naturalization. She becomes French by marriage. The code says nothing about *her consent*. By French law, as held by some writers and courts, her consent is presumed. Even if in fact she does not consent, but protests most solemnly that she will not become French but will remain American, her protest is of no avail. Stoicesco (p. 325, sec. IV.) says: 'C'est donc en vain que la femme étrangère qui épouse un Français déclarerait vouloir conserver sa nationalité d'origine. Cette effet du mariage se produit non obstant toute stipulation contraire de la part de la future épouse,' etc. She is presumed to consent though she refuses to consent, and becomes French. * * *

"Let us suppose now that in the case of an American woman who has married a Frenchman and resides in France, the United State should say that the law of the French code is unreasonable; that she can not become French unless her consent is shown and that ought not to be *presumed*, but should positively appear from letters of naturalization applied for and issued to her. What answer would France give to such interference on the part of the United States?

"She would say: 'France enacts its own laws of naturalization to suit itself and they bind all who reside in France. You have no right to question them or to interfere with their operation upon persons who reside in France, and who by their operations are French citizens. You say the consent of the American wife to become French ought not to be presumed, and that she should be held to remain American until she applies for and obtains letters of naturalization. That is a matter for France to settle exclusively. France will not permit you or any foreign State to interfere in the matter, so long as the wife remains on French soil and is a French citizen by French law.'

"Such an answer would be sustained by public law. It is the exact answer the United States gives to France in this case of Elise Lebreton.

"IV.

"TWO OBJECTIONS ARE MADE TO THE AMERICAN LAW.

"1. The woman can not be made an American citizen without her consent. That *by public law* her consent is necessary to her naturalization.

"2. That consent can be shown only by her applying for and taking letters of naturalization.

"THE PUBLIC LAW.

"I will now proceed to show that by public law, by the practice of nearly all civilized states, the consent of the wife is not necessary for her naturalization, but that *if the husband after marriage change his nationality the wife's nationality follows his wholly irrespective of her consent.* * * *

"1. The United States of America.

"Such is its law. Nothing more need be said.

"2. Great Britain.

"By the act of Parliament of May 12, 1870 (For. Rel. 1873, p. 1252, sec. 10), it is enacted that 'A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject.' There is no ambiguity in these words. They plainly show that her nationality follows her husband whether she consents or not. This law was adopted after a most thorough and profound examination of the subject by a commission appointed by the Queen, and upon its recommendation. The commission embraced the highest authorities and most distinguished writers of England upon public law; such men as Lord Clarendon, Phillimore, Twiss, Roundell Palmer, and Vernon Harcourt. (For. Rel. 1873, p. 1242.) * * *

"The report of this commission and the act of Parliament adopting it, I deem the most recent and the highest authority on this question of international law. But before this time Mr. Phillimore (vol. 1, p. 350) had adopted the same view of the public law and cited Felix to the same point. And Chief Justice Cockburn concludes that 'the nationality of a married woman should always follow that of the husband, whether original or acquired.' (Cockburn on Nationality, p. 216.)

"3. Italy.

"The new and revised code of Italy of January 1, 1866, * * * provides (For. Rel. 1873, p. 1291, C. II. secs. 2, 3):

"1st. That the Italian loses his citizenship by naturalization in a foreign country.

"2d. 'The wife and minor children of one who has lost his citizenship become aliens, unless they have continued to reside within the realm.'

"Hence their *consent* is of no account. The naturalization of the husband abroad makes them aliens unless they *continue to live in Italy*. * * *

"In my judgment this is the law of France. *Every decision* up to this time of a *French court* has been where the married woman has continued to live in France. Such is the case in Dalloz, to which I have been referred.

"4. Russia.

"The words of the Russian law are (For. Rel. 1873, p. 1288, § 17): 'Foreign women marrying Russian subjects, and the wives of *foreigners who have become Russian subjects* are admitted as Russian subjects without taking oath of allegiance.' * * *

"Another provision of the Russian law shows the same principle, viz (For. Rel. 1873, p. 1288): 'Foreign married women can not become Russian subjects without their husbands.'

"It is the husband's consent, not the wife's, that governs.

"The Russian law is in substance the same as the United States law, viz, that if a foreigner becomes naturalized his wife's nationality follows his without applying for letters of naturalization.

"5. Prussia.

"An alien woman by marriage with a Prussian becomes Prussian, and a Prussian woman by marriage with a foreigner loses her nationality. Nothing is said as to her consent. Nothing as to the effect of a change of nationality after marriage, and I can not find any German decision upon the question. But when we reflect upon the vast number of German emigrants who bring their wives to the United States and afterwards become naturalized, we can not doubt but that Prussia must regard them as American citizens. So, too, the provision of the Prussian law that in time of peace a Prussian, upon request, is entitled to 'a discharge from his Prussian citizenship,' and that such discharge comprehends the wife and minor children, unless special exception is made, indicates that the general doctrine of Prussian law is that the wife's nationality follows the husband's.

"6. Spain.

"The royal decree of 1852 is in these words (For. Rel. 1873, p. 1292): 'A Spanish woman married to an alien is an alien.'

"The language is general; does not limit the change of nationality to the time of the marriage, but rather conveys the same idea as the American and English statutes, viz, that a Spanish woman 'who is in a state of marriage with an alien' is an alien. Neither consent nor residence in the foreign country is necessary.

"7. In France, Belgium, and in most of the other states on the continent of Europe, a native woman who marries a foreigner follows the nationality of the husband, and a foreign woman who marries a citizen becomes a citizen. * * *

"The argument on behalf of the claimant, that the law of the United States must be held invalid by international law, because the wife's consent is necessary to her change of citizenship after marriage, is fully answered by the practice and laws of the great powers. Indeed, this

legislation of the great civilized States of the world establishes the doctrine that by public law the consent of the wife is not necessary, and that such laws of naturalization are valid, bind all subject to their jurisdiction, and are to be respected by all other States.

"It may be added that no State in the world has ever declared by *express legislation* that the wife's consent is necessary. * * *

"THE LAW OF FRANCE.

"It is urged for claimant that she is a citizen by the law of France, and that the law of France must be held paramount in determining her citizenship, even though she resides and has for forty years permanently resided in the United States and by United States law has become without her consent a United States citizen. This obliges us to investigate the law of France.

"The Civil Code, ch. 1, § 12, of civil rights, says: 'An alien woman who shall have married a Frenchman shall follow the condition of her husband;' and section 19 says: 'A French woman who shall marry an alien shall follow the condition of her husband.'

"It is argued that these provisions of the code apply only to the change of nationality effected *at the time* of marriage; that the wife's consent is presumed from her act of marriage; and that the husband's naturalization in another country *after marriage* does not affect or change her citizenship; and thus, that Pierre and Elise Leuret being French by birth and at marriage, his subsequent naturalization could not change her citizenship, and her French citizenship would continue until she by her own act or consent should change it.

"a. The civil code of France enacts that the wife's nationality *must* follow that of her husband *at the time* of marriage. It is silent as to whether her nationality *must* follow her husband's if he change his nationality *after marriage*.

"b. There has not been any legislation on the point since the code was adopted.

"c. The cour de cassation has not decided the question.

"The words of the code will be open to contrary constructions until the question is settled in France by express legislation or by the decision of the cour de cassation. In the absence of such legislation and decision we are obliged to consult the opinions of eminent French writers. They are very conflicting.

"Félix, Proudhon, Massé, Zachariæ, Maillan de Chassat, and Varambon in 1859, are referred to as sustaining the doctrine that the wife's nationality always follows the husband's.

"On the other hand, Demangeat in his notes on Félix, Valette, Demombe, Demante, Aubry et Rau, and Stoicesco, pp. 278, 279, are cited as sustaining the contrary doctrine. Stoicesco presents his view of the result of these conflicting opinions thus: 'Les arguments de premier système sont assurément très graves, et les noms des partisans de ce système sont de ceux qui font autorité dans la science. Néanmoins ce système n'a pas prevalu et la majorité des auteurs, de même que la jurisprudence se rattachent au système contraire.'

"Conflicting decisions of inferior courts are cited by Demolombe and Demangeat. The decision in Dalloz of the cour imperial of douai of August 3, 1858, is only in a case where the wife always lived in France ('n'a jamais cessé d'habiter la France'), and when the only question was whether in such case French courts had jurisdiction over her. There is a long note to that case which says: 'La question est controversée.'

"But I respectfully insist that *the reason* for the provisions in the code that if a foreign woman marry a Frenchman she becomes French, and if a French woman marry an alien she becomes an alien—*the reason* stands on the same grounds of *public policy* as do the laws of the United States, of England, and of the other States already named, and does not stand on the ground of 'consent.' For in such cases under the code the wife's change of nationality is the result, the *legal* result, of her marriage. She may object ever so strongly to this legal result of her marriage; she may insist that she will remain a citizen of her native State and will not consent to a change of nationality, but her protests are all in vain. * * *

"Now this same reason of public policy operates with the same force *after* marriage as *at* the time of marriage. If *consent* should be necessary *after* marriage to change the wife's nationality, why not equally necessary *at* marriage? Doubtless, if women were free to object, as many would object to the change *at* marriage as *after*.

"I do not think there is any settled French law that would make the claimant a French citizen, even if she had returned to France, but had not complied with the provisions of art. 19, still less while she resides here and shows no intent to return to France. * * *

"VI.

"Nor is it necessary for her to have applied for and have taken out letters of naturalization.

"1. This is expressly decided in *Kelly v. Owen* (7 Wall. 496). Marriage is in lieu of letters of naturalization.

"2. In France, marriage of a foreign woman to a French citizen makes her French without any application to be naturalized. Marriage has the same effect as letters of naturalization.

"3. In all the states of Europe, where marriage changes the nationality, it is expressly declared that the married woman need not apply for letters of naturalization or take the oath of allegiance. (For. Rel. 1873, Russia, p. 1288.) The marriage is enough.

"The law on this point is well stated by Stoicesco, p. 211. He says:

"'En prenant le mot "naturalisation" dans une acception large, nous allons recherche quels sont les autres moyens par lesquels les étrangers pouvaient devenir Français. Eh bien, nous reconstruis à cet égard trois autres modes qui opéraient dans la condition des étrangers *le même changement que les lettres de naturalité*. Ce sont; le mariage, les traités, et l'annexion d'un territoire étranger à la France.'

"5. The law of the United States is as supreme and paramount to all others in regard to the *mode of proceeding* to be naturalized as to the terms and condition of naturalization.

"Elise Lebet by marriage is just as much a citizen of the United States as if she had taken out letters of naturalization.

"VII.

"CONFLICT OF LAWS.

"If we admit that there is a conflict of laws in this case, that she is American by American law and French by French law, then the rule of decision is, that she is deemed to be a citizen of the country in which she has her domicile; that is, the United States.

"The authorities of international law support this rule.

"Bluntschli Int. Law, sec. 394 (cited by Morse, p. 160), says: 'Certain persons may in rare instances be under the jurisdiction of two different states. In case of conflict the preference will be given to the state in which the individual or family in question have their domicile; their rights in the States where they do not reside will be considered as suspended.'

"Twiss Laws of Nations, pp. 231, 232: 'According to the law of nations, when the national character of an individual is to be ascertained the first question is, in what territory does he reside. If he reside there permanently he is regarded as adhering to the nation to which the territory belongs and to be a member of the political body settled there.'

"In case of conflict of laws, as neither country can claim superiority over the other, the only reasonable way of settling the difficulty is to hold him subject to the laws of the country where he resides. The British act of 1870 and the Italian code of 1866 recognize residence as the turning point in such cases. In *Alexander v. The United States*, No. 45, before the British and American Claims Commission (Hale's Rep. pp. 15, 16), where the claimant was by British law a British subject and by American law an American citizen, it was held that his claim as a British subject could not be allowed, for that would be giving the laws of one country (Great Britain) superiority over the laws of the other (the United States). See the opinion of Judge Frazier, in which Count Corti concurred.

"VIII.

"The British and American Claims Commission held in *Bowie v. The United States*, in *Calderwood v. The United States*, and in *Tooraen v. the same* (see Hale's Rep. p. 17) that the national character of a married woman is governed by that of her husband in all cases. In this decision *the commissioners all agreed*. See also the case of *Jane L. Brand*, No. 180 (Hale's Rep. pp. 18, 19), where it was held that the national character of a married woman was in all cases determined by that of her husband, and continued on the death of the husband; 'That this doctrine had always prevailed in Great Britain, as elsewhere, where the domicile of the wife had continued to be that of the husband's nationality.'

"IX.

"I have considered this case thus far solely in the aspect of public law.

"EQUITY AND JUSTICE.

"The husband has declared his intention to become an American citizen *four months before the marriage*, and she must have known it before marriage. They have lived in this country forty-five (45) years. Before

marriage she had, as she says, \$1,300 in money and a millinery shop at Bayou Sara. They accumulated a large property, owned two large plantations on the Mississippi, and the largest wood-yard on the river. They have never returned to France, and have never shown the least intention of returning there; have never contributed anything to aid France in peace or war. Her husband has been dead three years. She is seventy-three (73) years old, and all her interests and relatives appear to be in this country. She does not pretend that she thinks of going back to France. She did not claim to be a French citizen (or at least no proof of it but her alleged verbal declarations—the most worthless and dangerous kind of proof), till twenty-one (21) years after marriage, in October 1862, when the war was raging in their vicinity, and it was convenient for her interests to claim to be a French citizen, as her husband was naturalized and was American.

"I can not see that there is any equity or justice in calling her French. She is really an American citizen and nobody can believe she will ever return to France.

"In my judgment the claim should be dismissed."

4. CITIZENSHIP OF CHILDREN.

· Oscar Chopin presented a memorial in behalf of himself and three other persons, all children and heirs at law of Jean Baptiste Chopin, who was a French citizen and a resident of Louisiana, where he died in 1870. Subsequently counsel for the French Republic withdrew so much of the claim as represented the interest of one of the four children, Jean Baptiste Chopin, who, as it appeared, had married a citizen of the United States; and the situation was further changed by the demise of the memorialist, Oscar Chopin, who died leaving as his heirs at law a widow and five minor children. These children were born in the United States, as also were Oscar Chopin and the three other children of Jean Baptiste Chopin, but it was shown that the latter's children had visited France and had resided there for brief periods, while no such thing was shown as to the children of Oscar Chopin, who were grandchildren of Jean Baptiste Chopin.

On these facts counsel for the United States maintained that all the claimants, having been born in the United States, were by the fourteenth amendment citizens thereof, and that this was especially true of the children of Oscar Chopin. The result of the case is stated as follows:

"An award was made by the united action of the commission in the sum of \$2,111. There was, however, no order as to the distribution of the sum so awarded, nor any indication of

opinion on the part of the commission as to the citizenship of the children of Oscar Chopin. It may, however, be assumed fairly that the commission were of opinion that the children of Jean Baptiste Chopin, although born in this country, were citizens of France, and that inasmuch as the death of Oscar Chopin occurred after the ratification of the treaty and after the presentation of the memorial, his right to reclamation had become so vested that it descended to his children independently of the question of their citizenship in France."

Oscar Chopin v. United States, No. 592, Boutwell's Report, 88; commission under the convention between the United States and France of January 15, 1880.

G. was a native of Prussia. His father died *Goldbeck's Case*. when he was quite young and his mother married again. When he was 13 years of age his mother and stepfather emigrated to Texas, before its annexation to the United States. Mr. Wadsworth said:

"The stepfather became a citizen of Texas before annexation, and the mother also, claimant still a minor.

"By the annexation the stepfather and the mother became citizens of the United States, but it is said the minor child did not. That is too unreasonable and inconvenient. The United States, in taking Texas, took its citizens. It could not take the father and mother and leave the minor child out in the cold. Claimant's domicile and home was in Texas at date of his injury, and he was a citizen of the United States claiming Mexican hospitality while the rebels held Texas. The umpire in such a case held the party a citizen. (See *Eigendorff v. Mexico*, No. 581, vol. 2, p. 266.)

"I think claimant should have an award for the use of his property by Cortina, the damage done to it while in use, the property taken by the troops, etc., but not the remote damages he claims."

Mr. Zamacona held the opposite view, filing as his opinion a draft left by his predecessor, Mr. Palacio. In this opinion it was said that claimant was born in Prussia in 1840. The other facts are stated substantially as Mr. Wadsworth had stated them. Mr. Palacio, however, said that it was doubtful whether the stepfather had complied with the law of Texas as to naturalization. But, admitting that he had, he held that claimant was not an American citizen. Mr. Palacio said that it was generally held that the naturalization of the father communicated the effect of naturalization to the minor child, but the rule did not extend to stepsons. These had never been comprehended in the *fili* of the Roman law or the lawful children of the Spanish or English or American law.

The umpire doubted the sufficiency of the evidence of naturalization in Texas, and said:

"But even if the stepfather had really become a citizen of that republic, the umpire can find no law of that republic which enacts that even the minor children, much less the minor stepchildren, of a naturalized citizen should be considered to become citizens in consequence of the naturalization of their father or stepfather.

"It may possibly be objected that as the stepson, Frederick Goldbeck, was under age when Texas became one of the States of the Union, the question of his citizenship when he became of age would be decided by the laws of the United States. But, according to these, the umpire cannot discover that the stepson becomes a citizen through the naturalization of his father.

"On the contrary, the statute of April 14, 1802, merely says that 'the children of persons duly naturalized,' etc., shall be considered as citizens of the United States, and adds the proviso 'that the right of citizenship shall not descend to persons whose fathers have never resided within the United States.'

"The fact that the United States vice-counsel at Monterey gave a certificate that Goldbeck was a citizen of the United States cannot be regarded; for it is not pretended that the claimant produced any documents to support that pretension, nor could the vice-consul previously to that date, April 15, 1865, have obtained information from the authorities of the State of Texas as to Goldbeck's status. He probably formed his opinion from Goldbeck's own statements.

"Still less can the umpire admit as proof that the witnesses in their depositions have joined the title of a 'citizen of the United States' to the name of Goldbeck. It is very likely that they supposed he was so, and that even he himself considered himself to be so. But the umpire is of opinion that he had no right to that title at the time of the origin of his claim, and that he has therefore no standing before the mixed commission."

Thornton, umpire, November 9, 1874, *Frederick Goldbeck v. Mexico*, No. 474, Am. Docket, convention of July 4, 1868, MS. Op. III. 310, 588.

The effect of a father's naturalization upon the rights of his minor children was discussed in the case of *Arthur Levy v. The United States*, No. 359, before the mixed commission under the convention between the United States and France of January 16, 1880. The claim was for the seizure by the military authorities of the United States of the property of Marguerite Cleoptine Decuir, who died in 1870, leaving as heirs her husband, Arthur Levy, and three children. In 1874, the children

then being minors, Arthur Levy was admitted to citizenship of the United States. Counsel for the United States, citing Revised Statutes, sec. 2172, and *Campbell v. Gordon*, 6 Cranch, 176, demurred to the claim on the jurisdictional ground that the act of naturalization in question deprived all the heirs of their French nationality and rendered them incapable of prosecuting their demand as citizens of France. On motion of counsel for France testimony was taken, but it failed to show that two of the children, who had attained their majority prior to the presentation of the claim to the commission, had, within a year after coming of age, declared their intention to be citizens of France. Special counsel for the claimants, however, contended that the statutory provision that "the children of persons duly naturalized under any law of the United States, being under the age of twenty-one years at the time of their parents' naturalization," should, "if dwelling therein, *be considered* as citizens of the United States" was not mandatory; that it only created a privilege in favor of such children, to be exercised or not by their parents or legal representatives, of being *considered* as citizens of the United States during their minority, and that if the privilege was not taken advantage of during their minority the children retained their foreign character, and were entitled on coming of age to all the rights incident to that character.

The claim was disallowed, but the question of jurisdiction was not passed upon by the commission.

Boutwell's Report, 70, French and American Claims Commission, convention of January 15, 1880.

5. CITIZENSHIP BY ANNEXATION.

By the Treaty of Guadalupe Hidalgo, signed Treaty of Guadalupe February 2, 1848, it was provided (Article Hidalgo. VIII.) that "Mexicans now established in territories previously belonging to Mexico," and which were to "remain for the future within the limits of the United States, as defined by the present treaty," should, if remaining in such territories, elect within a year from the date of the exchange of the ratifications of the treaty whether they would "retain the title and rights of Mexican citizens, or acquire those of citizens of the United States," but that those who remained "in the said territories after the expiration of that year, without having declared their intention to retain the character

of Mexicans," should "be considered to have elected to become citizens of the United States."

Two claimants, natives of Mexico, who had remained in New Mexico after the ratification of the treaty, without having indicated an election to "retain the title and rights of Mexican citizens," complained of acts committed by the authorities of the United States prior to the date of the conclusion of the treaty. It was held by the commissioners, without reference of the question to the umpire, that the claimants in question had no standing as Mexicans before the commission.

Melquiades and Josefa Chavez v. The United States, No. 141, Mex. Docket, convention of July 4, 1868.

A., a native of Mexico, where he was born in 1833, was taken by his father in 1851 to California, whither the latter had gone in March 1848. It was held by the commissioners that the phrase "Mexicans now established," as employed in Article VIII. of the treaty of Guadalupe Hidalgo, applied only to those who were established in the ceded territories at the date of the conclusion of the treaty, and not to those who came subsequently; and that neither the father, nor consequently the son through him, acquired under the treaty the citizenship of the United States.

Jesus M. Ainsa v. Mexico, No. 126, Am. Docket, convention of July 4, 1868, MS. Op. III. 87.

The constitution of California of October 1, 1849, Article II. section 1, provided: "Every white male citizen of the United States and every white male citizen of Mexico who shall have elected to become a citizen of the United States, under the treaty of peace exchanged and ratified at Queretaro on the 13th day of May 1848, of the age of twenty-one years, who shall have been a resident of the State for six months next preceding the day of election, and of the county or district, in which he claims his vote, thirty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law." The commissioners held that neither this article, nor anything in the act of Congress admitting California into the Union, helped claimant's case.

"The umpire considers that the claimant must be considered to be a Mexican citizen, the contrary not having been proved by the defence. The witnesses testify that he was born in Mexico, and it is not shown that he had divested himself of that nationality. The umpire does not think that Article VIII. of the treaty of Guadalupe Hidalgo applied to the claimant, though he might have been a resident of Texas at the time of the conclusion of that treaty and for a year afterward. Texas

was not, in the meaning of that article, one of the territories previously belonging to Mexico, and which remained for the future within the limits of the United States. Texas had been independent since 1836, and a State of the Union since 1845. It was claimed by the United States that the strip of territory between the Rivers Nueces and Bravo was a part of Texas, and had always been so. It must therefore be supposed, nothing to the contrary having been proved, that the claimant was a Mexican citizen residing in Texas."

Thornton, umpire, July 7, 1876, *Agapito Longoria v. The United States*, No. 515, Mex. Docket, convention of July 4, 1868, MS. Op. VI. 332.

Egle Aubry, a person of color, presented to the commission under the convention between the United States and France of January 15, 1880, a memorial (No. 25, French Docket) in which, in the character of a citizen of France, she claimed damages from the United States for the occupation of buildings by General Grover in the parish of St. Tammany, Louisiana, in February 1864. In this memorial it was set forth, as the ground of the claimant's French citizenship, that she was born in the territory of Orleans January 3, 1803, while that territory was a French colony.

Counsel for the United States demurred on the ground that, as the claimant was an inhabitant of the territory in question when it was ceded by France to the United States by the treaty of April 30, 1803, she thereby became a citizen of the United States, inasmuch as the treaty of cession transferred to the United States full and complete jurisdiction over the inhabitants resident upon the territory without any reservation whatsoever on the part of the French Government. In support of this position, counsel cited Wheaton's *Elements of International Law* (6th edition, p. 627), where, in treating of "collective naturalization," the author mentions the convention of April 30, 1803.

Counsel for the memorialist relied upon the third article of the treaty, which is in these words:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

As memorialist was a person of color, whose citizenship was not recognized by the United States till the ratification of the fourteenth amendment, her counsel contended that she had not, at the time her claim arose, enjoyed the advantages and immunities of a citizen of the United States, but that she remained a citizen of France, and as such was entitled to be "maintained and protected" in the "free enjoyment" of her "liberty, property, and religion." In support of this position he cited the case of one Decuir, whose father, a free negro, was an inhabitant of the territory of Louisiana when it was ceded to the United States. The son having been impressed into the Confederate service was discharged by the superior court of Alexandria on a writ of *habeas corpus* upon the ground that he was not a citizen of Louisiana, and, consequently, that he was protected as a French subject under the third article of the treaty of 1803.

Upon the issues thus presented, the demurrer was sustained by the following decision of the commission:

"The claimant, Egle Aubry, a colored woman, was born on the 3d day of January 1803 in the territory of Louisiana, then a French colony, and therefore was by birth a citizen of France.

"On the 30th day of April 1803 the territory of Louisiana was by treaty ceded by France to the United States. The treaty 'cedes to the United States forever and in full sovereignty the territory, with all its rights and appurtenances, *as fully and in the same manner* as they have been acquired by the French Republic in virtue of the treaty with Spain.' Spain had ceded the territory to France in October 1801, and the cession did not affect slavery, which then existed there.

"The treaty of cession contains no provision by which the inhabitants could remain, or by their option choose to remain, French citizens. On the contrary, the third article of the treaty obviously contemplates that they were to be American citizens. Article III. of the treaty is as follows: [Here follows the article as above quoted.]

"There is nothing in the treaty, therefore, to indicate that it was the intention either of France or of the United States that the inhabitants, or any of them, were to remain citizens of France. On the contrary, it was intended that they should be citizens of the United States.

"The demurrer is sustained, and the claim is disallowed."

A claim against the United States, for the seizure and destruction of property by military authorities, was made in behalf of the heirs of Louis Frederic Foucher, Marquis de Circé, who died in France in 1869. It appeared that Foucher was born in

1798 in New Orleans, province of Louisiana, then a possession of Spain, and that he was residing there with his father in 1803, when the territory of Louisiana was ceded by France to the United States. He remained at New Orleans till 1836, when he removed to France, where he continued to reside till his decease. In France he exercised the rights and enjoyed the privileges of a citizen, owned a chateau, and assumed his inherited title; but there was no evidence of record that he was ever reinstated or naturalized in conformity with the French code.

It was claimed by counsel for the United States, on the authority of the decision of the commission in the case of Egle Aubry (No. 25), that Foucher became a citizen of the United States by the treaty of cession in 1803; that his residence in France, even with the attending circumstances, did not entitle him to be considered a citizen of that country; and that consequently the commission could not take jurisdiction of the case; but it was admitted that the supreme court of the State of Louisiana, in a case entitled *The State of Louisiana v. The Succession of the Marquis de Circé*, had held that he was at the time of his death a French citizen within the meaning of both the French law and the law of Louisiana.

Counsel for the French Republic maintained that, inasmuch as the father of Louis Frederic Foucher was born in Louisiana when that province was within the jurisdiction of France, his descendant, Louis Frederic Foucher, was a citizen of France and not affected by the cession of the territory of Louisiana by France to Spain, then by Spain to France, then by France to the United States. It was also claimed by counsel for the French Republic that the opinions of certain French lawyers, whose words were quoted in the brief, should be accepted as the evidence of experts in regard to the law of France. M. Harri-
risse, speaking of the French law, said: "Citizenship is conferred in the forms given in my first cross-interrogatory. It is evidenced by public notoriety and enjoyment and practice of certain political rights which are conferred on French citizens only, such as the registry of voting at elections or inscription on the electoral lists. But as the law does not prescribe the rules of evidence for such cases, it springs from circumstances." The certificate of the minister of the interior was also relied upon. He said in substance that Louis Frederic Foucher, Marquis de Circé, born at New Orleans, had been, in

view of the evidence produced, considered to be French and inscribed on the electoral list of the seventh arrondissement of Paris for the years 1864 to 1869, and that his inscription on that list established, until the contrary was proved, that he was French. M. Jason, a French lawyer, who was examined as an expert, said: "I consider the French nationality of Louis Frederic Foucher, Marquis de Circé, as proved, first, by the judgment of the tribunal of the Seine of April 11, A. D. 1851, ordering the rectification of the birth certificate of his son, and the addition of the name of Circé, which had been omitted—an addition which the tribunal could order only after the Marquis de Circé had established his quality of French citizen; second, by the inscription of L. F. Foucher de Circé on the electoral lists of the seventh arrondissement on presentation to the competent municipal officers of documents establishing his quality of French citizen."

The commission unanimously awarded \$9,200. Counsel for the United States in his final report, referring to this award, said:

"This act was a recognition of the citizenship of Foucher in France; but whether the conclusion was reached upon the ground that the father of Foucher was a citizen of France, and that the son, although born in the territory of Louisiana, then a province of Spain, followed the condition of his father, or whether the commission were of opinion that the removal of Foucher to France in 1836 and his continuous residence there for a third of a century and during his life, coupled with the fact that he was recognized as a citizen of France, although formal proceedings, as required by articles 9 and 10 of the French code, had not been complied with, justified the conclusion legally that he was a citizen of France, does not appear."

Arthur Denis, Testamentary Executor of L. F. Foucher, Marquis de Circé, v. United States, No. 603, Bontwell's Report, 89; commission under the convention between the United States and France of January 16, 1880.

Henriette Levy, widow of Jacob Levy and
Treaty of Frankfort, 1871, a native of Alsace, filed, in her own right, and
 as tutrix of her six minor children, a memorial (No. 253) before the commission under the treaty between the United States and France of January 15, 1880, for damages for the seizure of cotton by the United States forces in Louisiana in 1863. The cotton in question belonged to the firm of Isaac Levy & Co., then doing business in Louisiana. This firm was composed of Jacob Levy and Isaac Levy, citizens of France; and Marx Levy and Benjamin Weil, citizens

of the United States. In 1866 Jacob Levy purchased the interests of Marx Levy and Benjamin Weil in the property and assets of the firm, and subsequently removed to Strasburg, in Alsace, then in the jurisdiction of France, where he died March 1, 1871. The memorial filed by Henriette Levy embraced both the original and the acquired interest of Jacob Levy in the property and assets of the firm.

On this state of facts, counsel for the United States demurred to the memorial on the following grounds:

"1. As to the whole case: That it appears that the claimant and her children, about the year 1871, became citizens or subjects of Germany, and have ever since remained and are now such citizens or subjects, and have not since that year been citizens of the republic of France, and that this claim is therefore not presented by or on behalf of the citizens of that republic.

"2. As to the interest alleged to have been assigned by Benjamin Weil: That as it appears that said Weil was at the time of the acts complained of a citizen of the United States, the claim is not one arising out of acts committed against the persons or property of citizens of France."

In support of so much of the demurrer as related to the claim derived from Benjamin Weil, counsel for the United States referred to the case of Archbishop Perché.

In support of the demurrer to the whole case, counsel for the United States invoked the treaty of Frankfort of May 10, 1871, by which Alsace was ceded to Germany. By Article II. of this treaty it was provided that French subjects, born in the ceded territory and actually domiciled therein, who desired to preserve their French nationality, should be allowed till October 1, 1872, to declare their intention to do so, before competent authority; and to remove their domicile to France.¹

As there was no allegation in the memorial that Henriette Levy had availed herself of this privilege, counsel for the

¹ "Les sujets français originaires des territoires cédés domiciliés actuellement sur ce territoire qui entendent conserver la nationalité française, jouiront jusqu'au premier octobre 1872 et moyennant une déclaration préalable, faite à l'autorité compétente, de la faculté de transporter leur domicile en France et de s'y fixer, sans que ce droit puisse être altéré par les lois sur le service militaire, auquel cas la qualité de citoyen français leur sera maintenue. Ils seront libres de conserver leur immeubles situés sur le territoire réuni à l'Allemagne. Aucun habitant des territoires cédés ne pourra être poursuivi, inquiété ou recherché dans sa personne ou dans ses biens à raison de ses actes politiques ou militaires pendant la guerre."

United States maintained that it was a reasonable presumption that she had omitted to do so and had in consequence become a German subject. Counsel cited in this relation the case of Archbishop Perché, and moved that the memorialist be required to amend her memorial and state whether she had availed herself of the privilege secured by Article II. of the treaty of Frankfort. He further moved that in default of such a statement the case be dismissed.

Special counsel for the memorialist contended (1) that the case was not analogous to that of Archbishop Perché, since in that case the claimant had voluntarily renounced his allegiance to France and become a citizen of the United States, while Jacob Levy, the husband of Henriette Levy, was born in France, lived in France, and died a citizen of France, and (2) that, as Jacob Levy was a citizen of France when the loss was sustained, and continued to be a citizen of France during his life, the claim was by a citizen of France, and that the commission should take and maintain jurisdiction. In support of this position the first, second, and fourth articles of the treaty were quoted. The attention of the commission was also called to the seventh article of the treaty of February 23, 1853, between France and the United States, in which it is provided that "Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter."

It was also contended that any change in the nationality of the country of their nativity could not affect the rights acquired by the heirs of Jacob Levy while the country was an integral part of France and they were citizens thereof; that the repeal of a law, or change of a treaty, or a cession of territorial domain subsequent to the date when the right of inheritance attached, could not affect any right acquired under the treaty, or such law or cession of territory. Several authorities were cited in the brief in support of these positions, and especially the decision of the Supreme Court of the United States in the case of *Dawson's Lessee v. Godfrey* (4 Oranch, 321). It was also claimed by counsel for the memorialist that the nationality of the father was transmitted to his minor

children; that neither the mother nor guardian could change it during their minority; that when the minors attained their majority they had the right to elect whether they would adhere to the country to which their father owed allegiance at the date of his death, and that until that period arrived they continued citizens of France. The cession of Alsace, it was alleged, did not affect in any particular the private rights of the citizens to property, or claims for injuries committed, prior to the cession.

Counsel for the United States, in reply to the contention of private counsel that there was no analogy between the case of *Perché* and the case at bar, maintained that the question for the commission to consider was one solely of the fact of citizenship; that the motive, or reason, or the attending circumstances, in the case of a change of nationality ought not to be considered and could properly have no weight; that, assuming the position of counsel for the claimant to be a tenable one, it was true that she had the option tendered to her by the treaty of 1871; but that she was then called upon to make her choice, either to remain in Germany and become a subject of the German Empire, or to accept the privileges of the treaty and retain her citizenship in France. She chose to remain in the German Empire, and thus voluntarily fixed her character as a German subject.

The commission sustained the demurrer in these words:

"The commission, in this case, judges well-founded and admits the demurrer interposed by the agent of the United States to the claim or memorial. In its opinion, it is beyond doubt that the claimant and her children, being natives of Alsace, and having always resided there, and not having made choice of the French nationality during the interim granted by the treaty of May the 10th, 1871 (which applied to persons of full age as well as to minors), are included in the collective naturalization, real as well as personal, which resulted to that country in consequence of its annexation to the German Empire, sanctioned by that treaty. And as German subjects, which they have become, they cannot in any manner have recourse to a commission created solely for the settlement of certain claims of French or American citizens.

"The French nationality of *Jacob Levy*, whose rights the claimant and her children have inherited, cannot be included in this inheritance. Possessed by him alone, it does not satisfy the requirements of the convention, which demands French nationality in those who actually present themselves before the commission.

"Benjamin Weil and Marx Levy never having been French, the rights which they transferred to Jacob Levy can not, *a fortiori*, be taken into consideration, nor can they render any better the legal condition of the claimant and her children.

"For these reasons the commission sustains the demurrer of the United States counsel and declares the claim outside its jurisdiction."

The judgment of the commission sustaining the demurrer was dated the 25th of June 1881. The 20th of September 1881, the claimant, by her attorney, filed an amendment to the memorial, in which she declared that she and her minor children were then residents and citizens of France, and that her post-office address at that time was in Paris, France. Documentary evidence was also produced, showing that Henriette Levy, the claimant, was, upon a proper application to the authorities of France, reinstated as a French subject on the 3d of June 1882.

Counsel for the United States maintained that the amendment was in effect an admission that Henriette Levy and her minor children were subjects of Germany at the time the treaty was ratified, and that citizenship in France acquired after the date of the treaty could not give jurisdiction to the commission over parties so acquiring citizenship.

The case was dismissed finally for want of jurisdiction.

Boutwell's Report, 65, French and American Claims Commission, convention of January 15, 1880.

6. DOUBLE ALLEGIANCE.

Double Nationality; The claimants stated in their memorial that **Exterritoriality;** they were British subjects and not Mexican **Subjection to the** citizens, and that they were subjects of Great **Local Law.**

Britain when their complaint arose; that they were surviving partners of the firm of Barron, Forbes & Co., all British subjects; that one of them, William E. Barron, resided in San Francisco, California, and the other in Mexico, and that they so resided at the time of their injuries. They based their claim upon the proceedings of the United States in respect to the rights and titles which they asserted to the New Almaden quicksilver mine, situate in the county of Santa Clara, California. These rights and titles were transferred and assigned to the firm some time prior to February 2, 1851. They complained of the act of Congress of March 3, 1851 (9

Stats. at L. 633), requiring them to submit their titles to the investigation of a land commission provided to investigate and pass upon titles of all persons claiming lands in California under Spanish or Mexican grants. Also of the refusal of the United States to make proper legal provision to enable them to procure the necessary evidence to prove the genuineness of their titles. Lastly, of the judgment of the Supreme Court of the United States, rendered at its December term 1862, in the case of the *United States v. Andres Castillero* (2 Black, 1-371), pronouncing the title under which Barron, Forbes & Co. claimed the mine to be null and void.

Mr. Wadsworth, the American commissioner, held that the claim should be rejected, and argued the subject at considerable length.

Mr. Palacio, the Mexican commissioner, took the ground that there might be a double allegiance; that, according to international law, all persons having a domicil and fixed residence in a country, being *de facto* under its jurisdiction, enjoying the protection of its laws and contributing their property and industry to the public wealth of the state, "are to be considered as citizens of the same country, with all the rights and obligations of such according to the treaties." Continuing he said:

"Persons thus situated are a part of the nation. Their property is liable to seizure and reprisals in time of war, equally with that of the natives. They share with the native citizens the character of belligerents, allies, or neutrals, assured by the country in which they live. The law of war is applied to the one and the other without any distinction. All kinds of agreements of truce, armistices, exchange of prisoners, freedom or restriction of commerce, and finally of treaties of peace, are applicable to them exactly the same as they are applicable to the citizens of the state deriving their national character from the municipal law. The nation is responsible for the violations which said persons may commit of the rights of another nation; and resents the injury to those persons, as if they were inflicted upon her political body. Nothing could be more natural. Those persons form part of a society, and while this society secures for them the advantages of its organization and the respect of other nations, she is also to be held responsible for the transgressions they may commit."

In support of this position, Mr. Palacio referred to the decision of the British-American claims commission under the treaty of 1853, in the case of the Messrs. Laurent. Mr. Palacio

declared that the circumstances of that case and of the one before him were identical. It might perhaps be said that an especial circumstance of the claim of the Messrs. Laurent was that it grew out of the act of a belligerent, done in actual war and by virtue of the powers emanating from a state of war, and that the designation of the nationality of the person, according to the place of his domicile during the war, was an application of a special law to the case. Mr. Palacio, however, thought that the same circumstance distinguished the case before him. The laws of war placed the mine of the Barrons in the possession of the United States. The fact that the United States was a belligerent in regard to Mexico had resulted in the courts of justice of the former country reconsidering and rejecting the titles issued by the latter; and nothing but the laws of war ought to be consulted when the question was to decide whether the Government of the United States in annulling the title obtained under a sovereign with whom they were at war, was valid or invalid.

The commissioners, being unable to agree, referred the case to the umpire, Dr. Lieber, who rendered the following decision:

"The commissioners on July 19, 1871, referred this case to the umpire to say 'whether the claimants have a right under the convention of July 4, 1868, to appear here and claim as Mexican citizens against the United States.'

"The question proposed to the umpire is one of jurisdiction, and the claimants, Wm. E. Barron and William Barron, calling themselves English subjects, it would appear that they cannot 'claim as Mexican citizens against the United States,' according to the familiar passage in the convention of the fourth of July 1868, with which Article I. begins. The words of the convention are these: 'All claims on the part of corporations, companies, or private individuals, *citizens of the United States*, upon the government of the Mexican Republic arising from injuries to their persons or property by authorities of the Mexican Republic, etc., which may have been presented to either government for its interposition with the other since the signature of the treaty of Guadalupe Hidalgo between the United States and the Mexican Republic of the 2nd of February 1848, and which yet remain unsettled, etc., shall be referred to' the claims commission.

"Various reasons are urged with more or less fitness, and sometimes with apparent profoundness, that the two Barrons have a standing before the commission despite of their own declaration that they are subjects of the Queen of Great Britain; and that they actually are Mexican citizens in the meaning of the convention.

"The first of these reasons is that, according to high authority as well as important decisions, a man may be a citizen of two different countries or possess two distinct citizenships. The word citizen is taken in the English language in very different meanings and to designate various degrees of connexion of the individual with a certain polity or country. I do not believe that the word *citizenship* is used in correspondingly different meanings. Whether it is, however, or not, so much is certain, that when we include in the word citizen (or subject) the idea of paramount allegiance, the notion of a double citizenship is necessarily excluded by the very term of allegiance, and nowhere in the wide sphere of human thought can the great maxim that no man can serve two masters find a more direct application than in this province of allegiance. In the involved feudal system, where the idea of a *graduated allegiance* prevailed, and in which allegiance had come to be twisted and tangled, a double allegiance was imaginable; not however, in the modern *national state*, the type of modern politics, and especially not in the law of nations. An alien becomes, for the time, and in a certain degree, an enemy along with the subjects or citizens of the country which he inhabits, toward those with whom that country is at war; but who would say that this *enmity* confers *citizenship*? It might be said that it confers temporary nationality, but not real and full citizenship. I think this answers the arguments derived from the decision of the commission of claims between the United States and Great Britain. It remains to answer this question: Does or does not our instrument take the word 'citizen' in the quoted passage, in its fullest sense, including the idea of allegiance?"

"The argument so far refers to aliens, in case of war between the country in which they have taken their domicil and the government of another country. As to the mere domicil conferring citizenship the question has been often discussed, and I desire simply to add that Bluntschli, in his *Modern Law of Nations*, presented as a *Code*, 367, has a few pertinent remarks on this subject; and also Heffter, in the *European Law of Nations of the Present Time*. (Both Bluntschli and Heffter have been translated into French.) Bluntschli gives as text the following: 'It is possible that a person possesses a permanent dwelling place and domestic establishment (domicil) in a country and has settled there, without entering as a member into its political society, and in the same manner a person may possess real property in a country and cultivate the land without necessarily becoming a citizen.' In his explanatory notes he refers to the French *Code Civil*, paragraph 17, which distinctly lays down that a business establishment in a foreign country shall not be considered as *emigration*, and that such establishment does not prove an absence of intention to return (*esprit de retour*).

"Let us return to the question, In what sense are we obliged to take the English word 'citizen' and the Spanish 'ciudadano'?

in the convention? I would have thought that the Spanish 'ciudadano,' like the French 'citoyen,' is used in a much closer sense than the English 'citizen,' but from the arguments of the learned commissioner of the republic of Mexico it would appear that there is no difference.

"Even if the true purpose of the eighth article of the treaty of Guadalupe, of which more will be said, was to protect Mexican titles, in whosoever hands they might be at the date of the treaty, even that would not prove that the terms 'Mexican citizen,' used in the convention of 1868, could mean foreigners, for instance Englishmen, merely because residing in Mexico. We have no right to ascribe such want of knowledge as well as skill to the framers of our convention, and to suppose that they meant aliens or sojourning foreigners when they said 'citizens of Mexico,' in a passage of the treaty of the last importance. The first rule of hermeneutics, legal or otherwise, is that interpretation means finding in good faith that meaning of certain words, if they are doubtful, which those who used the words must have desired to convey, according to the usage of speech (*usus loquendi*), the existing laws, common sense, and the general intent of that whole of which the doubted passage forms a part; and does not mean what ingenuity may apparently succeed in forcing into a passage. Thus tested, the umpire cannot well see how it can be advanced that the convention of July 4, 1868, in some, to him unintelligible, manner, deprives an alien of his alienship by restricting the jurisdiction of our commission to claims of Mexican citizens against the United States, and vice versa. I am convinced that the word *citizen* is taken in the convention of 1868 in its full and definite sense, and not in its conditional and limited sense. But no one can be a citizen in the complete sense of the word (in which it means, indeed, absolute and exclusive incorporation in, and assimilation with, a political society) of two states or governments at one and the same time. The very object of the beginning of Article I. is plainly and emphatically to limit and restrict the field of action of the commission. The two nations concluded a treaty, or agreed to settle certain difficulties between their citizens and governments. They could have no idea of inviting subjects of all possible governments, though they might reside in either of the countries, to bring their complaints before the commission.

"But it is argued on the part of the claimants that the property in question (the mines of New Almaden, situated in California) was acquired, as indeed all Upper California was, by war; that by the law of war an alien residing in the hostile country becomes a citizen of the hostile country; consequently the Barrons have a right to appear before the commission. This argument involves two errors. The one has been exposed; war did not confer Mexican citizenship upon them; the other error is that California passed over to the United States by war

alone, which conferred the citizenship as claimed upon the two Barrons. California was conquered indeed, but became a portion of the United States by a treaty of peace, which is a perfectly peaceful act, dragging no law of war and its peculiar effects, as law of war, along with it. California became part of the United States by treaty, and the treaty concluded the war.

"Here, however, we arrive at the argument which, it seems, appears to those who argue for Mexico against the United States the strongest, or one of the strongest at all events. It is argued: The treaty of Guadalupe Hidalgo of February 1848 guarantees protection to rights of private property in the ceded territory of California; but by the action of the Government of the United States (including Congress and the United States courts of law) Mexican private property has been violated in declaring the title of the property of the Barrons in the mines of New Almaden deficient and vicious. Moreover, the present and claiming proprietors of the mines of New Almaden claim for and represent a company originally established by Castillero, a Mexican citizen, and others, a company receiving its legal being and 'personality' from the Mexican Government; this 'Mexican personality' of the company imparts Mexican citizenship *pro tanto* to its members, and thus gives them, even though they declare themselves to be subjects of quite a different power, a legal standing as Mexican citizens before the claims commission, in order to claim damages for the breach of the treaty of Guadalupe on the part of the United States (damages to the amount of \$16,000,000). I hope I have stated this argument fairly and correctly; I know it has been my desire to do so.

"The mining company of New Almaden was of course a Mexican company when established. The establishing authority, the recipients of the benefits, the grantees, and the property of the Mexican Government (the minable land) all were Mexican. All the world knows that California was Mexican before the treaty of Guadalupe and subject to the laws of the Republic of Mexico, just as Mexico had been subject to the laws of Spain before the independence of Mexico. But it is quite a different question when a claim is made arguing that there is an indelible Mexican personality in this *legal person*, and a power of infusing partial Mexican citizenship into its members, even though they should consist only in two members claiming English allegiance.

"Enough has been said in this paper on the subject of citizenship, and I allow that particular subject to pass, however tempting the agents and counsellors of the Mexican Republic have made this opportunity to say a few more words on the nature of citizenship and of its occasionally supposed essence. Suffice it here to say that the Mexican company can not and could not claim inherent Mexican personality, so far as New

Almaden is concerned, after the land and mines were placed under the sovereignty of the United States, and that consequently it could not impart corresponding citizenship. To suppose the contrary would ascribe to the mining company what is called in the law of nations *extritoriality*, and is now allowed only to ambassadors and ministers plenipotentiary. The modern law of nations of the Europeans and their descendants in other portions of the globe, that great legal dispensation under which modern civilization has its being, allows of no extritoriality among the members of this ever-widening family of nations. We often claim and establish extritoriality in countries of barbarous or semibarbarous people, or of people whose whole civilization lies out of the sphere of ours, but we do not allow it even to foreign sovereign persons. (Phillimore, II. 23.) If a monarch establishes a mercantile business in a foreign country, he carries no exemption from the law of the land along with him, but is simply subject to the general laws of the land. This has been repeatedly decided in interesting cases. (See Bluntschli's Code, etc., paragraph 40, and Phillimore, II, App. IV., page 589.) Even a sovereign himself, if he goes into foreign service, which frequently happens where there are large empires surrounded by many little sovereignties, even such a sovereign carries no extritoriality along with his person, but is subject to the laws of the land. When he travels he carries extritoriality with him, but not otherwise.

"We are, however, told that the treaty of Guadalupe guaranteed this exemption. The answer is, It did not do so, *because it could not do it*. No modern power can give away by treaty the right and necessity of ruling over the whole land by the law of the land, and especially not the United States. Who can imagine the Senate of the United States ratifying a treaty which establishes extritoriality within the country? The United States could never give away the right and duty to try and determine titles to land granted by Mexico, if there is strong suspicion against the validity of these titles, just as the Mexican Government itself would have tried and adjudged titles against which there was strong suspicion either of fraud or other illegality. Not long after our taking possession of California such a mass of fraudulent land titles and corruption in fictitious grants was discovered that Mr. Stanton, later the great war minister of the country, was sent thither, and with rare skill and sagacity proved so much fraud that the government commenced corresponding procedures. There was no breach of the treaty of Guadalupe in this. The Government of Mexico would have been obliged to do the same had California not been ceded to the United States and had frauds become known. 'Protecting private property' implies exposing invalidity wherever discovered and endeavoring to discover them wherever suspected.

"After very convulsive revolutions it has sometimes been found necessary to pass laws which free titles of landed property beyond a certain date from any inquiry and trial. It is simply a measure of extreme expediency. Such was not the case concerning titles of Mexican property in California, and was never stipulated for in the treaty of Guadalupe.

"My decision under the order of the commissioners of July 19, 1871, is that neither William E. Barron nor William Barron has a standing before the United States and Mexican Claims Commission according to the convention of July 4, 1868, and that the whole claim must be dismissed accordingly without further arguing."

Lieber, Umpire, August 16, 1871, *William E. and William Barron v. The United States*, No. 633, Mex. Docket, convention of July 4, 1868, MS. Op. II. 63.

Barron, Forbes & Co., as British subjects, laid their claim before the American and British Claims Commission under the treaty of Washington of May 8, 1871. Mr. Hale, the agent of the United States, gives the following report (Report, 164) of the case before that commission:

"The memorial disclaimed all imputation of intentional wrong by the Supreme Court of the United States, but alleged that their final judgment was erroneous; and further alleged that, immediately after the decision of the Supreme Court, an order was issued by the President of the United States, to the United States marshal for California, directing that the memorialists be ejected from their property, and that it be placed in the possession of an agent of the United States. That, 'while thus under pressure and duress, and threatened with eviction from their property,' by the United States, the claimants gave a quitclaim of their interest in the entire property to a Pennsylvania corporation—the Quicksilver Mining Company—receiving for this conveyance the sum of \$1,750,000, and that their grantees had since remained in possession of the mine, 'undisturbed by any claim of the United States;' and had received, and still continued to enjoy, a revenue of about \$1,000,000 per annum from the mine. It also alleged various acts of unfairness and oppression by the attorneys, agents, and officers of the United States during the pendency of the litigation in the lower courts, before the final appeal to the Supreme Court. The claimants claimed an award for about \$16,000,000, besides interest. A demurrer was interposed to the memorial, on behalf of the United States, on the following grounds:

"1. The said memorial sets forth no acts committed against the property of the claimants within the time limited by the treaty for which the United States are responsible, or on account of which reclamation lies in favor of the claimants against the United States.

"2. The allegations in the memorial of the alleged injuries to the claimants' rights by the passage of the law of 3d March 1851, as alleged in paragraph 15 of the memorial; and by the alleged wrongful and oppressive acts of the United States and of their officers and agents in their opposition to the allowance of the claimants before the commissioners, as set forth in paragraph 20 of the memorial; by the appeal and other alleged unjust and oppressive proceedings set forth in paragraph 21, and by the proceedings set forth in paragraphs 22, 23, 24, 26, 27, 28, 29, 30, 31,

and 32, show all of said transactions to have taken place before the 13th day of April 1861; and thereby the said transactions are not the subjects of reclamation before this commission.

"3. The decision of the Supreme Court of the United States upon the claims of the memorialists in the year 1863, as set forth in paragraphs 33, 34, 35, and 36, of the memorial, and the alleged acts of the President of the United States in execution of the judgment of said court, as set forth in paragraph 37, do not constitute an act or acts against the persons or property of subjects of Her Britannic Majesty within the provisions of the twelfth article of the treaty, by occasion of which reclamation lies against the United States.

"4. The only acts alleged in the memorial as occurring within the time limited by the treaty are the judgment of the Supreme Court of the United States upon a cause duly and lawfully pending before them, and the proceedings in due course of law for the enforcement of execution upon the said judgment; the memorial distinctly negating any allegation of fraud or willful injustice in the said court, no reclamation lies on behalf of the claimants before this commission by reason of such judgment, or the lawful proceedings in execution thereof. This commission has no jurisdiction to review the judgments of the regularly constituted judicial tribunals of the United States or of Great Britain, at least in the absence of allegations of fraud, corruption, or willful or intentional injustice or injury.

"5. The memorial shows (paragraph 39) that the claimants or their predecessors, before eviction from their said property under the said judgment, voluntarily sold and conveyed to another party, to wit, the Quick-silver Mining Company, all their rights in and to the premises in question; and that their said grantees have since remained in undisturbed possession of the property in question. The claimants therefore appear to have never been disturbed in the possession of their said alleged property; and no injury is shown to them or their rights, on account of which reclamation lies against the United States.

"6. No reclamation lies on behalf of the claimants against the United States on account of any alleged infraction by the United States of the provisions of the treaty of Guadalupe Hidalgo, the provisions of that treaty protecting the rights of property only of Mexicans, citizens of the Republic of Mexico, and not of subjects of Her Britannic Majesty.

"7. The allegations in the memorial do not show any infraction by the United States of the provisions of the treaty of Guadalupe Hidalgo.

"8. The allegations in the memorial show no infraction by the United States upon any rights of the claimants or their predecessors under the law of nations.

"9. The allegations in the memorial show a case simply of adjudication by the regular judicial tribunals of the United States having jurisdiction of the subject-matter, and of the persons of the parties, concerning property lying within the limits of the United States, without fraud, corruption, oppression, or willful injustice. Such adjudication is not reviewable by this commission, and the parties to the same have no standing for reclamation against the United States.

"10. The allegations in the memorial fail to show the claimants British subjects, or entitled to a standing as such before this commission.

"11. The allegations in the memorial fail to show the present claimants to have succeeded to any alleged title of Andres Castellero in or to the property in question, or to any title of the original firm, so-called, of Barron, Forbes & Co., to the said property.

"12. The allegations in the memorial fail to show any title in Andres Castellero, the alleged source of title in the claimants in or to the premises in question.

"13. The allegations in the memorial fail to impeach the judgment of the Supreme Court of the United States upon the said case pending before them, or to show said judgment in any respect erroneous."

"On the argument it was contended, on the part of the United States:

"1. That all the allegations in the memorial touching the unjust action of the United States by its statutes and legal proceedings prior to the

13th April 1861 were outside the jurisdiction of the commission as established by the treaty; and if the United States or their authorized agents had been guilty of any wrong in these respects, such a wrong was not within the jurisdiction of the commission.

"2. That the only act of the United States or any of their officers alleged in the memorial to have been committed within the treaty time is the adjudication by the Supreme Court of a case regularly pending before it on appeal by both parties from an inferior tribunal; that this decision is in express terms admitted by the memorial to have been honestly rendered without corruption or partiality; that such action of the court is not an act committed against the persons or property of subjects of Her Britannic Majesty within the meaning of the twelfth article of the treaty.

"3. That the claimants were never, within the treaty time, disturbed in their possession of the property which they claim, or evicted therefrom; that at the conclusion of the litigation they voluntarily parted with all their pretended title to the property and surrendered its possession to their grantees, who have since remained in undisturbed possession.

"4. That the claimants have no standing to claim for any alleged infraction by the United States of the provisions of the treaty of Guadalupe Hidalgo; that that treaty provided only for the protection of the rights of property of Mexicans, and that the vindication of the rights of Mexico and her citizens under that treaty does not lie with the British Government, and is not a subject submitted to the decision of this commission.

"5. That under the rules of international law no ground of reclamation by Great Britain against the United States, on behalf of these her alleged subjects, appears from the memorial. They became parties litigant before the Supreme Court, a judicial tribunal of the United States, in respect of lands lying within the United States, and in a case in which the court had unquestioned jurisdiction. Their rights were, as they themselves admit, honestly and fairly, but (as they allege) erroneously, adjudicated there. Without awaiting eviction from the premises, they voluntarily parted with their entire claim to the lands, mining privileges, and all enjoyments and profits of the same; that if their grantees had been evicted from possession, the claimants could not be the parties to claim redress, having voluntarily surrendered all their rights; but their grantees had not been evicted; the whole estate, with its vast revenues, had continued to be enjoyed by the parties to whose enjoyment the claimants voluntarily ceded it.

"On the part of the claimants, it was insisted by Her Majesty's counsel that the annulling of the title of the claimants by the decree of the Supreme Court in 1863, and the direction by the President of the United States to the United States marshal in California to expel the claimants from their property, constituted acts against the property of British subjects, bringing them within the jurisdiction of the commission; that the conveyance by the claimants to their grantees was a conveyance under duress of these acts, and did not discharge the liability of the United States, except so far as the amount received by the claimants from their grantees as purchase money might go to reduce the amount of their loss; that it was within the jurisdiction of the commission to review the judgment of the Supreme Court, and if found erroneous to award compensation

to the claimants for their losses by occasion of it. Her Majesty's counsel cited *Calvo Derecho Internacional*, vol. 1, c. 9, §§ 206, 292, 797, page 391; *De Felice Droit de Nature et des Gens*, vol. 2, p. 9; *Burlamaqui Droit de Nature et des Gens*, vol. —, p. 3, C. I.; *Phillimore*, vol. 1, § 168; *Rutherford*, vol. 2, book 2, c. 9, §§ 12, 13, 19; *Manning's Law of Nations*, 383; *Lawrence's Wheaton*, 673, 674, 679 to 682; *Halleck's Int. Law*, §§ 15, 16; *Story's Conflict of Laws*, §§ 591, 592.

"The commission unanimously disallowed the claim."

A report of the case is also given in *Howard's Report*, 83, 573, 577.

"In the case of *Joseph W. Scott v. The Election of Nationality-United States* No. 226, for damages for wrong-

ful imprisonment, and for appropriation and destruction of property, the proofs showed that the claimant was born in the British province of New Brunswick in 1813. His father, Daniel Scott, was born in the then province of Maine, in March 1768, and continued to reside in Maine after the recognition of the independence of the colonies by Great Britain, and after he became of age, which was in March 1789. The time of Daniel Scott's removal to New Brunswick was left somewhat uncertain, ranging from December 1789 to 1794.

"On the part of the United States it was claimed that Daniel Scott, the father, having been a citizen of the United States, the claimant, Joseph W. Scott, was by the naturalization laws of 1802 (2 Stats. at L. 155, § 4) also a citizen of the United States, and was debarred from a standing before the commission within the principle held by the commission in the case of *Alexander*.

"At the time of the alleged injuries, and for many years previous, he was domiciled in the State of Florida, one of the insurrectionary States.

"The counsel for the United States cited the first article of the treaty of peace between the United States and Great Britain, concluded September 3, 1783 (8 Stats. at L. 80, 81), and the cases of *Inglis v. The Sailors' Snug Harbor*, 3 Peters, 99; *Shanks v. Dupont*, id. 244; *Doe v. Acklan*, 2 B. & C. 779, and *Marryatt v. Wilson*, 1 B. & P. 430.

"On the part of the claimant it was contended that Daniel Scott, being a minor at the time of the conclusion of the treaty of peace between Great Britain and the United States, was entitled, within a reasonable time after attaining his majority, to elect to which government he would adhere, and that he did make such election within such reasonable time by his removal to New Brunswick.

"Claimant's counsel cited the cases of *Jephson v. Riera*, 3 Knapp's P. C. R. and Count Wall's case, id.

"An award was made in favor of the claimant, Mr. Commissioner Frazer dissenting. No written opinions were read. I am advised that the decision proceeded upon the ground that Daniel Scott's removal to New Brunswick constituted an election, within a reasonable time, to adhere to his British allegiance."

American and British Claims Commission, treaty of May 8, 1871, Art. XII., Hale's Report, 16.

In the case of the *Executors of R. S. C. A. Alexander's Case. Alexander v. The United States*, No. 45, before the American and British Claims Commission under the treaty of Washington of May 8, 1871, a claim was made for the occupation of and damage to real property in Kentucky by the forces of the United States during the civil war. The United States demurred to the memorial on the ground that "the claimant's testator was born within the United States, and was, by the laws of the United States, a citizen thereof, and therefore not entitled to the standing of a British subject within Article XII. of the treaty."

The memorial alleged that the testator was born in Frankfort, Kentucky, in 1819, and that he was the "son of Robert Alexander, esq., a native of Scotland, and a natural-born subject of the British Crown;" that he had always held and claimed himself to be a liege subject of the British Crown, and that he had always been so held and regarded by all others; that in his early youth he had returned to Scotland, and there for many years held office in the commission of the peace and other posts of trust under the British Crown; that during the war his residence was partly in Scotland and partly in Kentucky; and that he died in Kentucky in December 1867.

In support of the demurrer it was argued that by chapter 15, Article I., section 1, Volume I. of the Revised Statutes of Kentucky, the testator was a citizen of that State; that apart from any statutory provisions, his birth in Kentucky, no allegation being made that his parents were other than permanent residents there, would constitute him a citizen of the United States; that if it should be held that he had at birth a double allegiance, he could not assert, as against the United States, the character of a British subject; that the United States had

the right to regard him as a citizen, and that against this right no foreign government could set up a claim founded on its municipal law.

Counsel for Great Britain contended that testator had been recognized by both governments as a British subject, the War Department having appointed a special board to examine the claim, which had been referred to it by Mr. Seward, to whom the claim had been presented by Sir Frederick Bruce; that the allegation that testator was the son of a native-born British subject must be taken in its natural import, viz, that the father was a British subject at the time of his son's birth; that by the laws of Kentucky, Alexander, as a resident alien, was permitted to hold property, and by a special act was empowered to hold property in Kentucky, notwithstanding his alienage and residence in Scotland; that the article of the Kentucky code cited by United States counsel never could have been meant to assert any right of the State to impress upon Alexander, against his will, the character of a citizen of the State of Kentucky; that, besides, no State could change the nationality of aliens and convert them into citizens of the United States, the Federal Government having exclusive control over this subject; that if, on the theory of a double nationality, the United States had the right to treat testator as an American citizen, Great Britain logically must have the right to treat to him as a British subject, and to stipulate for the adjustment of his claim along with those of other British subjects; that the case of Drummond seemed to have been misapprehended by counsel, and did not strengthen his position, since the Drummonds *sufficiently indicated by their conduct their intention to accept the character of Irish subjects, and Alexander never did indicate his intention to become an American citizen, but, on the contrary, always claimed to be a British subject, and was recognized as such by the special legislation of Kentucky.*

The following decision was rendered:

"We are of opinion that the commission has no jurisdiction of this claim, and therefore the demurrer is allowed.

"L. CORTI,

"JAMES S. FRAZER,

"Commissioners."

Commissioner Gurney, although he did not sign the award, did not file a dissenting opinion.

Mr. Frazer, besides signing the award, read the following opinion:

"The testator was by British law a British subject, but he was also by the law of the United States an American citizen, by reason of his birth in Kentucky; and he was not capable of divesting himself of his American nationality by mere volition and residence from time to time in Scotland and holding office there.

"Being, then, a subject of both governments, was he a British subject within the meaning of the treaty? The practice of nations in such cases is believed to be for their sovereign to leave the person who has embarrassed himself by assuming a double allegiance to the protection which he may find provided for him by the municipal laws of that other sovereign to whom he thus also owes allegiance. To treat his grievances against that other sovereign as subjects of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no government would recognize the right of another to interfere thus in behalf of one whom it regarded as a subject of its own. It has certainly not been the practice of the British Government to interfere in such cases, and it is not easy to believe that either government meant to provide for them by this treaty. In Drummond's case the terms of the treaty were quite as comprehensive as those of this treaty, and yet it was there held that the claimant was not within the treaty, not being within its intention. This was held even after it was ascertained that he was not a French subject, he having merely evinced his intention to regard himself as a French subject."

Mr. Hale, the agent of the United States, referring to this opinion (Report 16), says: "I am advised that in this opinion the presiding commissioner (Count Corti) concurred."

7. PROOF OF CITIZENSHIP.

By an order of January 21, 1870, the commission under the convention between the United States and Mexico of July 4, 1868, required all persons claiming to be native citizens to state the place and date of their birth. A claimant called himself a native of Reynosa, but gave no date of his birth. It was held that his citizenship was not sufficiently proved.¹ So objection was made to the statement that a claimant was born in the

¹ Thornton, umpire, *Juan M. Trevisco v. The United States*, No. 553, Mex. Docket, Md. Op. VI. 314.

State of Missouri.¹ In the case of William Wilkinson and Samuel Montgomery, No. 105, Am. Docket, the umpire, Sir Edward Thornton, said (MS. Op. IV. 35):

"No proof is given of the nationality of Wilkinson, which ought to have been done, considering that he was a partner of Montgomery when the claim originated. But upon the question of citizenship the umpire asks permission to make a few general observations. The order of the commission, dated January 21, 1870, instructed claimants what steps they were to take with regard to their citizenship. It will therefore be inferred that if they complied with the terms of that order they had done all that was required, and the commission would be precluded from making any objection unless their statements could be proved to be false. In the present case Montgomery seems to have complied with the terms of that order. He takes oath in his memorial 'that he is a native citizen of the United States, born in Gallatin County, State of Kentucky, on or about the 1st day of November, in the year 1810;' that is, in the wording of the order, 'he discloses the time and place of his birth.' Unless this statement can be proved to be false the umpire thinks he must be considered to have proved his citizenship."

These observations were referred to and confirmed by the umpire in *Francis Rose v. Mexico*, No. 344, Am. Docket, MS. Op. IV. 38.

Certificates of Nationality. "Although the governor of a State may not be officially authorized to issue certificates of nationality, the certificate of such an officer (paper E) is respectable evidence of the citizenship of claimant. The Mexican consul-general at New York also calls him a citizen of Mexico in paper G; and he himself, in paper H, styles himself a native of Vera Cruz, the capital of the State of that name. Although this evidence may not be in the exact form laid down by the rules of the commission, the umpire thinks it sufficient to entitle the claimant to be considered a citizen of Mexico."

Thornton, umpire, June 28, 1875, *Ramon Garay v. United States*, No. 280, Mex. Docket, convention of July 4, 1868, MS. Op. VI. 265.

Warner's Case. "In the case of *Tomas Warner v. The United States*, No. 890, the question of citizenship is the first matter to be taken into consideration. In this case the um-

¹ Thornton, umpire, *William H. Nelson v. Mexico*, No. 558, Am. Docket, MS. Op. III. 387.

pire can not admit that it is sufficiently proved that the claimant was a Mexican citizen; he thinks on the contrary that he was not so. His claim to be a Mexican citizen is founded principally upon a certificate signed by Manuel Clemente Rojo, sub-political chief of the frontier of Lower California. This certificate is not sworn to and is signed by an inferior authority. The umpire can not consider that the same faith is to be given to this unsupported certificate as to that of an officer of so high a rank as the governor of a State, to whose certificate, accompanied by other evidence, the umpire has in some cases given its due weight. The certificate in question founds the right of the claimant to be considered a Mexican citizen upon the assertion that in 1827 he served as a seaman by order of the governor, Echeardia, rendering public services (*prestanda servicios publicos*); that he never had a letter of naturalization, but that from the beginning he manifested his wish to be a Mexican, and that he had always been considered as such, and that his personal services had been accepted as a soldier in defence of the frontier against the depredations of the Indians; and that for these reasons he was comprised in articles 14 and 15 of the law of April 14, 1828.

“But such a certificate is no proof that the claimant actually served either in the army or navy of the Mexican Republic, and even if he did it did not make him a Mexican citizen by the law of April 14, 1828, for the fifteenth article of that law imposes certain conditions upon foreigners who, being in the naval service, wish to be naturalized. There is no proof that the claimant fulfilled these conditions; indeed, there can be little doubt that if he had done so he would have received a letter of naturalization; but the certificate expressly says that he never had a letter of naturalization.

“The fourteenth article of the same law, which is also referred to in the certificate, is to the effect that colonists who come to settle on lands which may be colonized shall be held as naturalized after a year from the time of their settling. But there is no proof that the claimant was a colonist of this class, a proof which ought to have been easily furnished, for there must doubtless have been a register kept of such colonists who settled upon government lands.

“The citizenship of the claimant not being proved, it is needless to enter upon a discussion of the merits of the claim; and the umpire accordingly awards that it be dismissed.”

Thornton, umpire, *Tomas Warner v. The United States*, No. 890, United States and Mexican Claims Commission, convention of July 4, 1868. The same ruling was applied in the cases of *Guadalupe Menendez v. The United States*, No. 891, and *Pedro Gastelum v. The United States*, No. 892.

"The umpire can only refer to the observation he has already made in cases Nos. 890 and 891 upon the citizenship of the claimants. The unsupported certificate of the sub-gefe politico of the frontier of Lower California is not more satisfactory in this case than in the others. It may be further observed that in none of these cases is there any proof of the identity of the claimant with the person in whose favor the sub-gefe politico signed the certificate."

Thornton, umpire, September 11, 1876, *Pedro Gastelum v. The United States*, No. 892, Mex. Docket, convention of July 4, 1868, MS. Op. VII. 353.

It was shown that a claimant, who was seized with other persons on an American vessel in a Mexican port, and who was subsequently released on the joint intervention of the ministers of the United States and Great Britain in Mexico, came on the vessel in question from California to Guaymas, and from Guaymas to Mazatlan; that the consul of the United States at the latter port recognized him as an American citizen, and took his oath as such, together with those of his fellow-prisoners, all signing and swearing as citizens of the United States. The commissioners differing in opinion, the umpire, Sir Edward Thornton, held that there was not sufficient proof that the claimant was at the time of the origin of his claim such a citizen. Claims of other prisoners, arising on the same occasion, were dismissed on the same ground.

G. E. Brockway v. Mexico, No. 324, Am. Docket, convention of July 4, 1868, MS. Op. III. 498.

Claimants' Unsupported Assertions. "It is not clearly proved that the claimants are citizens of the United States. They claim to be so, because they were born in Upper California, resided there when the treaty of Guadalupe Hidalgo was signed, and became citizens of the United States through that treaty. But these facts depend upon their own assertions, unsupported by other evidence. These, in the umpire's opinion, are not sufficient proof of their citizenship. They should have at least proved by independent evidence that

they were residents of Upper California at the time of the signature of the above-mentioned treaty."

Thornton, umpire, June 19, 1876, *M. G. Vallejo v. Mexico*, No. 822, Am. Docket, convention of July 4, 1868; 6 MS. Op. 467.

Conflict of Testimony.

"The umpire can not agree with the commissioner from Mexico that the claimant had complied with the rule of the commission by swearing in his memorial that he was born in Matamoras in 1825. The memorial is signed for the claimant by his agents, Moore & Co., or rather it is not signed at all, for there is no written signature to it. It purports to be sworn to by Clarence Key, and the date and place of birth of the claimant are matters which Mr. Key could not have known of his own knowledge, but could only state them from information and belief and believe them to be true. * * * Three witnesses answer in the affirmative to the question whether the claimant was a citizen of the Mexican Republic. But a witness for the defense, Werbiski, swears that the claimant always passed in Texas as an American citizen and voted at elections. The proof in favor of his being a Mexican citizen is not so strong but that it was incumbent on him to rebut this testimony as to his having voted as an American citizen; he was at liberty to do so if he could, but he has failed to do it. With this doubt the umpire does not consider the claimant's citizenship to be sufficiently proved, and therefore awards that the claim be dismissed."

Thornton, umpire, July 8, 1876, *Rafael Barrios v. United States*, No. 538, Mex. Docket, convention of July 4, 1868, MS. Op. VI. 335.

"The memorials severally set forth that at the time of this occurrence [the capture of the American schooner *Julius Caesar* by a Mexican cruiser, in April 1837, and subsequent imprisonment of the crew] the said parties were respectively domiciled in Texas, which had before that time declared and maintained its independence. Although no very active operations were then going on, Mexico and Texas were still at war, and all the citizens of the latter might justly be regarded as adhering to the cause of their adopted country, unless their neutral character were set forth and established. The memorials do not set forth for how long a period the said persons had been resident in Texas, nor whether it was their purpose

to make it a permanent residence. They do, however, state that no oath of allegiance had been taken by them to Texas, and that they had not changed their citizenship. These memorials were presented by a person who has been appointed administrator of the estates of the deceased, and whether they had taken any oath of allegiance or done anything to manifest a change of citizenship could not be known to him. He has, therefore, made statements of the truth of which he could have no personal knowledge. Besides, it is well known that Texas admitted all persons to citizenship without any oath of allegiance who were residing there on the day of its declaration of independence, March 2, 1836. (Art. 7, sec. 10, const. Texas.) For anything that appears in the case these persons became citizens under this provision of the constitution of Texas. No oath of allegiance could then be required of them. The presumption arising from the fact of residence that the parties intended to make Texas a permanent domicile and had thereby ceased to be citizens of the United States, should be repelled by clear proof. The board is of opinion that the memorials do not set forth a valid claim against Mexico, and they are accordingly rejected."

Case of Barclay, administrator of Bolling et al.: Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 7, 1851, under the act of Congress of March 3, 1849.

Citizenship of
Seamen. McC. was a seaman on board of the American whaling vessel *Rebecca Adams*, which was seized in connection with the so-called Zerman expedition to Mexico, the circumstances of which are detailed elsewhere. A question having arisen, the umpire made an award in McC.'s favor, saying:

"There is no direct evidence that he is a citizen of the United States, and the umpire considers that some allowance should be made for a seafaring man if he has not strictly observed the rules prescribed by the commission, with which it is not impossible that his occupation may have prevented him from being acquainted. But the indirect and circumstantial evidence is very strong that he was a citizen of the United States, partly from the fact that he was a seaman on board of a United States vessel employed in a regular and legitimate pursuit—that of whaling—and partly because it was very much easier for the United States minister and consul in Mexico to ascertain whether the seamen of such a vessel were really United States citizens, than with regard to the motley crowd who called themselves the crew and passengers of the *Archibald*

Gracie. Unless, therefore, the contrary be expressly proved, the umpire considers that the claimant is entitled to be considered a citizen of the United States. He is further of the opinion, which he believes is shared by many thinking persons, that seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve."

Thornton, umpire, *Francis McCready v. Mexico*, No. 218, Am. Docket, convention of July 4, 1868.

W. M. Robinet presented a claim as a nat-
 Proof of Naturaliza-
 tion; Robinet's Case. uralized citizen of the United States before the commissioners at Macao under the convention between the United States and China of November 8, 1858. The claim was rejected for want of proof of naturalization, the commissioners, Messrs. Bradley and Roberts, delivering the following opinion:

"Mr. Robinet (the sole proprietor in the late firm of W. M. Robinet & Co.) is a native of Peru. In affidavit made on the 22d November 1858, before Mr. O. E. Roberts, vice-consul in charge at Hongkong, he swears that he went to reside in California in 1849, while that country was in military occupation of the United States, and before its adoption into the Federal Union; that by the convention there held in 1849, to demand admission into said Union, it was required that all California residents or citizens who might wish to become citizens of the United States, should take the oath of allegiance thereto; that he took said oath before Judge Leavenworth, an officer duly authorized to administer the same; that thus complying with the requirements of said primary convention, he went into the Union with the soil and became a full citizen of the United States; that record of said oath was made and deposited with the public records at the custom-house at San Francisco; that he procured an attested certificate of having, in the way and manner aforesaid, complied with the necessary conditions for citizenship, which certificate is now lost.

"Mr. Robinet further declares to the commissioners that in February 1859 he wrote to San Francisco for a duplicate copy of his said certificate, and in reply to his letter of request was informed that, owing to the frequent and extensive conflagrations which had destroyed a great part of said city, many of the earlier public records had been burned, and that others were scattered and lost, and that it would be a task of extreme difficulty to search for the entry required by him, the claimant, and which probably after all it would be impossible to find.

"No doubt is or can be entertained as to the nationality and allegiance of one who, with his own free will and by his own act, in compliance with legal provisions, was transferred with

the territory in which he resided into the family of the United States. The same rule holds in this case as in that where persons were domiciled in the Anglo-American colonies at the time of the Declaration of Independence, though born elsewhere, and deliberately yielded to it an express or implied sanction; 'they became parties to it, and are to be considered as natives—their social ties being coeval with the existence of the nation.' (Kent, II.) Such collective naturalization was provided for in Article III. of the convention of April 30, 1803, between the federal government and France, for the cession of Louisiana; and by Article VI. of the treaty of February 22, 1819, concluded with Spain for the purchase of Florida, whereby the subjects of those European powers, respectively, who were resident on the ceded territories were enabled to take upon themselves all the rights, immunities, and responsibilities of republican citizenship, without undergoing the process of ordinary naturalization, as required by the statute. In the treaty with Mexico, of February 2, 1848, whereby California was ceded to the United States, it was provided, Article VIII. that those Mexicans who remained in the territories ceded, and who did not declare their intention within one year to continue Mexican citizens, were to be deemed citizens of the United States.

"Notwithstanding all this, in settling the question of the claimant's citizenship, in which an award of indemnity is involved, the commissioners do not think themselves authorized to accept any less evidence than that which is imposed by the Department of State on consuls for the granting of passports: 'If the applicant be a naturalized citizen, a passport can only be granted upon his exhibiting a certificate of naturalization, or a certified copy thereof.' (Regulations prescribed by the President for consular officers of the United States, section 410, edition 1856.) And, however much disposed the board might be to give full faith and credit to Mr. Robinet's statement, and regret the untoward circumstances which have deprived him of this essential muniment of his claim, still the fact that it has not been produced is fatal to his petition. His oath as to acquired citizenship is of no more value as proof of the fact than that of a person who seeks to obtain such citizenship by the legal process of naturalization, when, the declaration of intention having been previously made, 'he must at the time of his admission satisfy the court by other proof than his oath * * * that he has resided five years, at least, within the United States.'

"In the absence of legal proof of the citizenship of W. M. Robinet, the commissioners hold that he has no right to an award of indemnity for losses sustained in China by reason of the late hostilities and the injuries resulting to trade therefrom."

"I can not admit as a sufficient proof [of citizenship] the incidental mention of 'citizen of the United States,' made in

the protest before the United States Consul Fitzgerald. I observe it is not the consul who certifies to the citizenship as known or proven to him; on the contrary, the consul receives the protest because the appearer makes that declaration and swears to it as a part of the protest. In the case of Curbelo, in which both the commissioners agreed to dismiss the demand, there was a protest in which mention was made that he was 'a citizen of the United States,' and that he had been 'naturalized;' both these declarations were found to be false, but the consul was not responsible for their falsity. The claimant, Curbelo, had made them under oath, and the consul received them as usual."

Bertinatti, umpire, *Thomas Gilmore v. Costa Rica*, No. 29, convention between the United States and Costa Rica or July 2, 1860.

This decision was cited and followed by the umpire in the cases of George C. Harras, Luther Bushnell, and Edward W. High. In the case of High the protest in which the allegation of United States citizenship occurred was made two years after the event which caused the damage. The umpire said: "I do not deem that document sufficient to prove either the quality of citizen of the United States or the truth of the alleged damages."

Claimant was a native of Bavaria, who had declared his intention to become a citizen of the United States. He furnished no evidence of the completion of his naturalization. He had a passport and certificate from a Mexican colonel of infantry as a citizen of the United States, but the commissioners held that these were not receivable as proof that he had been naturalized. They said that a copy of the record must be produced duly certified, or satisfactory evidence furnished that the record had been lost, destroyed, or mutilated, or could not for good and sufficient reasons be found—only then could secondary evidence be resorted to.

Juan N. Wolfe v. Mexico, No. 561, Am. Docket, convention of July 4, 1865, MS. Op. II. 181; decision, October 17, 1871.

Speyers's Case. "The umpire, in his opinion of the date of June 24th, 1871, said these words:

"My decision and award is the following: If within two months from the time when the interested parties shall be informed by the commissioners of the necessity of proving the citizenship of Moritz Speyers, it can be proved or shown in a manner perfectly satisfactory to the commissioners, or in case they disagree in their opinion, satisfactory to the umpire, that Moritz Speyers was a citizen of the United States when he

imported the merchandise into Matamoros under the Avalos tariff, then the sum to be mentioned below is due from the Republic of Mexico to the United States for and in behalf of Moritz Speyers.'

"The whole case has now been returned with a number of papers and affidavits, believed by claimant's party to prove Moritz Speyers's citizenship. They do no such thing. Only one affiant swears that he has seen Moritz Speyers's naturalization papers, and he is the claimant, Albert Speyers himself, who claims near or above \$600,000, and whose claim was cut down in the American commissioner's opinion to \$38,000. This affidavit, even did it point to defined facts, and not to undefined assertions that he had seen Moritz Speyers's naturalization papers, cannot be admitted. It is repeated in the additional papers just spoken of that the umpire has demanded additional evidence of Speyers's citizenship. The umpire has not done this. He wanted proof that Moritz Speyers was a citizen of the United States (as the above-quoted extract from his decision shows) when he (Moritz Speyers) made the original importation of goods from the United States.

"No proof or evidence has been forthcoming, despite of many attempts to present it, and the only testimony coming from a source which might have been decisive, namely, the court in New Orleans where Speyers is said to have been naturalized, states that despite of all search no record of his naturalization could be found, and that the records are not complete, owing to the occupation of New Orleans by Union troops in the time of the rebellion. I omit to discuss such evidence, and feel compelled finally to dismiss this case with its desperate claims and demands.

"I can allow no award in favor of the United States for Moritz or Albert Speyers."

Lieber, umpire, *Albert Speyers v. Mexico*, No. 23, United States and Mexican Claims Commission, convention of July 4, 1868.

Claimant alleged that he was naturalized in New Mexico. The records of the United States court prior to June 1863 had been lost or destroyed. It was prior to that time that he was naturalized. He was permitted to give secondary evidence.

Thornton, umpire, *Louis Titus Martin v. Mexico*, No. 685, Am. Docket, convention of July 4, 1868, MS. Op. III. 417, IV. 55. The umpire referred to the case of *Martin M. Steinthal v. Mexico*, No. 649, Am. Docket, as illustrating the same rule.

S., a native of Germany, claimed to have
Schaben's Case. become, as a naturalized citizen of Texas at

the time of the annexation, a citizen of the United States. No record proof was afforded of his naturalization in Texas. The constitution of the republic of Texas contained the following provision:

"All free white persons who shall emigrate to this republic, and who shall, after a residence of six months, make oath before some competent authority that he intends to reside permanently in the same, and shall swear to support this constitution, and that he will bear true allegiance to the republic of Texas, shall be entitled to all the privileges of citizenship."

Mr. Wadsworth, the American commissioner, referring to this provision, said:

"A justice of the peace was a competent authority and made no record of such an oath. And now, after the lapse of twenty years, to require a Texan to reproduce a certificate of such an oath, before recognizing him as a citizen of the United States, would disfranchise more than one-half of the people, still living, who were citizenized by the annexation."

Dr. Lieber, the umpire, on July 19, 1871, decided as follows:

"Claimant is a native of Germany and his baptismal name was doubtless Marcos. When he resided in Texas he used the English Mark for the original Marcos, for it is one of the translatable names. When Schaben resided in Spanish-speaking Mexico, he seems to have used and signed himself by the name of Marcos, and papers made out and sworn to, at a later period, in the United States, mention him as Marcos Schaben. None of these changes or translations of the name affect Schaben's identity. It is a total mistake that the baptismal name is by its very sound unchangeably infused into the essence, as it were, of the individual. An individual is incidentally named in baptism, and many nouns proper, personal, as well as geographical, are different in different languages. There is no doubt that Mark and Marcos Schaben is the same person, and it does not invalidate certain papers made out and completed in the city of New York, if Mark or Marcos Schaben is called Marcus Schaben.

"Is Mark Schaben a citizen of the United States, and was he such at the time when Mexican authorities are said to have committed those injuries to his property of which he complains? If the question were about a simple naturalization in the United States, I would not hesitate a moment to declare that Schaben's citizenship has not been proved. It is different, however, in the present case, on account of the annexation of Texas. Schaben has no proof positive, no papers of Texan naturalization, but there is nevertheless 'the highest degree of

probability' that he was and was considered a citizen of Texas. Germans are very much given to American naturalization; Schaben resided quite long enough in Texas to be naturalized, and it is asserted on oath that he voted. Voting, we are told, does not amount to much proof and evidence. Why, I have seen and heard in a court in South Carolina, a dark mulatto sworn white by several witnesses who had seen him, and because they had seen him, vote at several elections. Naturalization ought to be a solemn and no way trifling act, but it seems that Texas, in order to induce a large immigration, had made naturalization easy, and no one will deny that every free citizen of Texas, no matter how he became such, passed over into full United States citizenship when Texas became one of the States of the Union, whose Constitution says that every citizen of any State is a citizen of the United States, if it does contravene the Union's own laws, made in accordance with that very Constitution. Illinois gave the full vote to everyone, foreigner or not, who had resided half a year in the State. Suppose that Illinois had been an independent State and had then annexed herself to the United States, without a treaty designating exceptions, every foreigner, whether he knew a word of English or not, would have become a citizen of the United States, according to the law of nations and the reprehensible law of the State in particular. It is certainly of no importance whether some persons swear that 'in their opinion' Schaben is a citizen of the United States. In their opinion! But it is, on the other hand, of little importance either that Schaben's name was written in the election list of the sheriff as Schapen, with the correct house number. The clerk was doubtless a German, for a native American would have left out the 'c' and written Shaben, and if he was a German, he may have been from Saxony. A Saxon ear can rarely distinguish between 'b' and 'p.' * * * By Schapen in the election lists was unquestionably meant Schaben, if no Schapen can be found in his neighborhood. I take it that Schaben was and still is a citizen of the United States, and that he has not become denaturalized by any lengthened residence at Orizaba, or any other place."

Marcos Schaben v. Mexico, No. 100, Am. Docket, convention of July 4, 1868, MS. Op. I. 522.

"It does not appear to the umpire sufficiently proved that the claimant is a citizen of the United States. He states that he emigrated from France to the republic of Texas in 1844, and continued to reside there until the annexation of that republic to the United States and its incorporation into the Union. The claimant asserts that he became a citizen of the United States by virtue of the annexation of Texas; but to have become so

**Residence at Time of
Annexation.**

he must have first been a citizen of the republic of Texas, and it is nowhere proved that he went through the forms required to acquire that citizenship."

Thornton, umpire, August 12, 1876, *Rene Masson v. Mexico*, No. 787, Am. Docket, convention of July 4, 1868, 6 MS. Op. 449.

"It is very doubtful whether the claimant was not a citizen of the United States, for it is declared by himself and confirmed by his witnesses that he had lived the greater part of his life in Cameron County, Texas, and it is clear that he was there *animo manendi*. It is to be supposed that as he was born in 1813 he must have been residing in Texas at the declaration of the independence of the republic of Texas and again at the time of its annexation to the United States, and it is more than probable that he became a citizen first of the republic of Texas and next of the United States. It would also appear that he owned real estate in Texas, which makes it still more likely that he was a citizen of the United States."

Thornton, umpire, *Juan N. Cabazos v. United States*, No. 735, Mex. Docket, convention of July 4, 1868, MS. Op. VI. 321.

"There is direct evidence that J. de D. Pradel declared his intention to become a citizen of the United States at New York in 1829. **Official Recognitions of Citizenship; Pradel's Case.**

This alone, however, would not entitle him to be considered a citizen of that country. But circumstantial evidence is also brought to show that he took out his papers of naturalization in Columbia, South Carolina, in 1834, and that at a certain period of his residence in Mexico he was in possession of what was believed to be a certificate of naturalization. Mr. J. Forsyth, minister of the United States in Mexico, states in June 1858 to the United States consul that Mr. Pradel is entitled to his 'carta de seguridad' as a citizen of the United States, and there can be little doubt that he did so after an examination of the proofs of citizenship exhibited by the claimant. Other ministers of the United States also considered Pradel to be an American citizen, and, more particularly, Mr. Weller recognized him in that character when he urged the Mexican Government to pay to Pradel the amount which had been promised to him by that government as compensation for the losses suffered by the hacienda of 'San Borja' in consequence of the destruction of the water dam.

"It is further noteworthy that the Mexican minister for foreign affairs, Señor Zarco, requested of Mr. Weller that Pradel would give the number of the 'carta de seguridad' which he obtained at the time of the origin of his claim, the payment of which the United States minister officially urged upon the Mexican Government. In the note making this request, dated February 20, 1861, Señor Zarco never mentioned Pradel as an American citizen; indeed from the inquiry itself it would appear that he was not at that time satisfied that he was so; but in a subsequent note, dated February 24, 1861, in which Señor Zarco informed Mr. Weller that the documents relative to the claim had been sent to the Treasury Department, he speaks of the claimant as 'the American citizen, Juan de Dios Pradel.' It is impossible, therefore, to escape the conclusion that Señor Zarco had in the meantime examined the proofs exhibited by the claimant and had satisfied himself that Pradel was entitled to citizenship of the United States.

"The umpire, in his own experience, has never found that foreign ministers are prone to admit such rights unless they are fully satisfied of their validity, especially where circumstances have assimilated those who aspire to them to the citizens of the foreign country in which they reside; for in almost all such cases the admission of those rights originates irritating correspondence and discussion between the governments concerned, which it is the interest and desire of foreign ministers to avoid as far as possible.

"The umpire thinks that he would do injustice to the intelligence and honesty of the Mexican authorities and of the ministers of the United States in Mexico if he did not believe that it was only after a full examination of the proofs exhibited by Pradel that they had determined upon acknowledging his right to American citizenship.

"If it be certain that Pradel for some years claimed to be a citizen of Chile and obtained his 'cartas de seguridad' in that character, the umpire does not see that this step could have deprived him of his right to citizenship of the United States. It might have afforded a ground to the United States Government to refuse him its protection; but the Mexican Government on the contrary would have been justified in refusing to acknowledge him as a citizen of Chile and in insisting upon his assuming his real character of a citizen of that country to which he had last sworn allegiance.

"The umpire is therefore forced to the conclusion that Pradel, at the time of the origin of the claims in question, was a citizen of the United States."

Thornton, umpire, London, July 9, 1874, *J. de D. Pradel v. Mexico*, No. 145, Mex. Docket, convention of July 4, 1868, MS. Op. III. 451.

The foregoing opinion of Sir Edward Thornton was discussed by him in the case of Jabez Tipton's Case. M. Tipton, one of the persons arrested on the *Archibald Gracie*, in the so-called Zerman expedition, the particulars of which are given elsewhere. In the case of Tipton (No. 242, Am. Docket) Sir Edward Thornton said:

"There is not sufficient proof that Tipton is a citizen of the United States. The case of Pradel is very different from the one now under consideration. In that case it was necessary formally to state to the Mexican Government that an applicant for a *carta de seguridad* was a citizen of the United States, and the United States minister had a full right to insist, and no doubt did insist, that the applicant should furnish full proof of his citizenship. But with regard to the persons who came in the *Archibald Gracie*, how could he possibly expect that they should under the circumstances furnish any proof of their nationality? The umpire hardly thinks that the United States minister would, when there was at length an opportunity of their getting away from Mexico, in common humanity have refused to assist them until they could furnish proof of their citizenship.

"There were many reasons for their choosing United States citizenship, and among them the fact that they started from a United States port and in a vessel carrying the United States flag, and that probably the United States Government would take great interest in their cases. It was also the nearest government, and would, therefore, perhaps cause them to regain their freedom more speedily than any other. For these reasons the commission has certainly a right to expect more positive proof of citizenship than the memorial signed by Tipton and others, and the circumstance of the United States minister's having helped them in their difficulties."

On this ground the umpire dismissed thirty-nine other *Archibald Gracie* claims.

"In this case the umpire cannot admit that it is sufficiently proved that the claimant was a Mexican citizen; he thinks, on the contrary, that he was not so. His claim to be a Mexican citizen is founded principally upon a certificate signed by Manuel Clemente Rojo, sub-political chief of the frontier of Lower California. This certificate is not sworn to, and is signed by an

inferior authority; the umpire can not consider that the same faith is to be given to this unsupported certificate as to that of an officer of so high a rank as the governor of a State, to whose certificate accompanied by other evidence the umpire has in some cases given its due weight. The certificate in question founds the right of the claimant to be considered a Mexican citizen upon the assertion that in 1827 he served as a seaman by order of the governor, Echeardia, rendering public services (*prestando servicios publicos*); that he never had a letter of naturalization, but that from the beginning he manifested his wish to be a Mexican, and that he had always been considered as such, and that his personal services had been accepted as a soldier in defense of the frontier against the depredations of the Indians; and for these reasons he was comprised in articles 14 and 15 of the law of April 14, 1828.

"But such a certificate is no proof that the claimant actually served either in the army or navy of the Mexican republic, and even if he did it did not make him a Mexican citizen by the law of April 14, 1828; for the fifteenth article of that law imposes certain conditions upon foreigners who, being in the naval service, wish to be naturalized; there is no proof that the claimant fulfilled these conditions; indeed, there can be little doubt that if he had done so he would have received a letter of naturalization; but the certificate expressly says that he never had a letter of naturalization.

"The fourteenth article of the same law, which is also referred to in the certificate, is to the effect that colonists who come to settle on lands which may be colonized shall be held as naturalized after a year from the time of their settling. But there is no proof that the claimant was a colonist of this class, a proof which ought to have been easily furnished; for there must doubtless have been a register kept of such colonists who settled upon government lands.

"The citizenship of the claimant not being proved, it is needless to enter upon a discussion of the merits of the claim; and the umpire accordingly awards that it be dismissed."

Thornton, umpire, September 9, 1876, *Tomas Warner v. United States*, No. 890, Mex. Docket, convention of July 4, 1868, MS. Op. VI. 351.

Case of Melendez.

"The certificate of Manuel C. Rojo, sub-political chief of the frontier of Lower California, unsupported by other evidence and not sworn to, is [not] in itself sufficient proof of the citizenship of the claimant.

Besides this, it is stated in the certificate that the claimant was the son of one of the first founders who came to colonize that frontier, but it is not shown that his father was a native Mexican, or that he was comprised amongst those colonists who are referred to in the fourteenth article of the law of April 14, 1828.

"If the father was a foreigner and not naturalized, the son was bound by the same law to obtain a letter of naturalization, and even if the father was naturalized it was only the children who were under age who became naturalized by the naturalization of their father; if of age (*emancipidos*) they were foreigners, as their father had been, until they took out letters of naturalization.

"Neither in this case nor in that of Tomas Warner has the simple rule prescribed by the commission been observed, that the claimant should declare the place and date of his birth, and if naturalized, should exhibit his naturalization papers.

"If this order of the commission, which is so easy to be complied with, had been attended to, the umpire would have been obliged to admit the Mexican citizenship of the claimant. But, as it is, he is not justified in doing so, and he is therefore compelled to award that the above-mentioned claim be dismissed."

Thornton, umpire, September 11, 1876, *Guadalupe Melendez v. United States*, No. 891, Mex. Docket, convention of July 4, 1868, MS. Op. VI. 353.

The claimant was brought to the United States while a minor by his father from Germany. He claimed citizenship through the naturalization of his father, but did not prove the naturalization. He relied on his long residence in the State of Illinois of twenty years, during which time he had exercised civil and political rights. His father was dead. Mr. Wadsworth, the United States commissioner, said that the "enjoyment and possession continuously under a claim of right and title for a period of not longer than twenty years, makes title to the highest species of property in England," and he argued that the same presumption should be made in favor of the possession of political rights. The umpire, observing that there was no proof of the naturalization of the father, said: "The fact that he (the father) voted or even held office in the State of Illinois is no proof that he was a citizen of the United States. And

Performance of Political Acts.

if he was not, neither was his son, who does not pretend to have been naturalized."

Thornton, umpire, *Christian F. Gatter v. Mexico*, No. 343, Mex. Docket, convention of July 4, 1868, 7 MS. Op. 416.

Claimant, a Frenchman by birth, declared his intention to become a citizen of the United States on June 3, 1848, in the city of New York. In 1849 he went to California, where he alleged that he remained till 1855. He then went to Mexico, where he had since continued to reside. Mr. Wadsworth, delivering the opinion of the commission, said:

"His claim to citizenship in the United States is founded on the exercise, contrary to law, of the voting privilege while in California, and his recognition in Mexico as a citizen of the United States by the people and authorities of that country. These acts and facts would, uncontradicted by other facts, tend to show citizenship. But here they have no value, and can only serve to show how little regard this alien had for the laws of the United States or the privileges of a citizen."

The claim was dismissed.

Henry Pugas v. Mexico, No. 519, Am. Docket, convention between the United States and Mexico of July 4, 1868, MS. Op. II. 71, S. P.; *John Poloncy v. Mexico*, No. 40, Am. Docket, MS. Op. II. 391.

In the foregoing case the commissioners, in reply to the suggestion that the claimant became a citizen of the United States by the admission of California as a State into the Union, said: "No one can pretend that the admission of California naturalized any alien at the time residing there."

"In the case of *John W. Sharpe v. The United States*, No. 92, the claimant's proofs showed that he had exercised rights of citizenship of the United States, by voting, prior to the presentation of his memorial.

"The counsel for the United States contended, first, that such acts constituted an estoppel against the claim of the claimant to a standing as a British subject under the treaty; and, second, that if strictly and technically there was no estoppel, such acts were to be regarded as very strong evidence of the fact of naturalization, and sufficient to overcome the claimant's own denial on oath of such naturalization.

"An award was made in favor of the claimant, Mr. Commissioner Frazer dissenting; and the objection on the part of the United States was thus overruled."

Am. and Br. Claims Commission, Treaty of May 8, 1871, Art. XII., *Hale's Report*, 15.

8. DECLARATION OF INTENTION.

Orazio de Attellis, Marquis of Santangelo, a *Santangelo's Case.* native of Italy, having fallen under the displeasure of his sovereign, was compelled to leave his native land. On the 20th of May 1824 he arrived in the United States, and on the next day made a declaration of intention to become a citizen. In the following year he went to Mexico to visit a son who had obtained employment in that country. Not long after his arrival there he was invited to discuss certain questions of public interest, and his writings were received with applause by those in authority. But on the 1st of July 1826, as he alleged, suddenly and without warning he was informed that he must leave the republic within twenty-four hours; and although the execution of the order was finally delayed, he was sent a few days afterwards under escort to Vera Cruz and banished from the country. No reason for his banishment was assigned, beyond certain allegations in the nature of suspicions, and twelve days after his departure a committee of the supreme council declared his banishment to be illegal. The allowance of damages for this ill-treatment finally turned on the question of his right to prefer a claim as a citizen of the United States in respect of the injury which he had received.

He was admitted to citizenship of the United States in 1829; and the American commissioners contended that he was entitled to an award as "an inchoate citizen of the United States in the year 1826," as well as by virtue of his full citizenship subsequently acquired, which, as they argued, conferred upon him a right to the support of the United States in obtaining redress from Mexico for an injury done him prior to his naturalization.

On these questions the American commissioners maintained that the object of Santangelo's going to Mexico in 1825 was altogether temporary, and that his eleven months' residence in Mexico in no way interrupted his intention to return to the United States; that it was needless to inquire what were his relations to the United States at the time of his expulsion from Mexico in 1826; that having established the injury done him in 1826 merely as a man not then possessing the citizenship of any country and, *argumenti gratia*, destitute of any legal, moral, or physical ability to enforce his claim, he became

perfected in all these things in 1829, when he became a full citizen, and as such possessed, in 1835, a perfect right to sue, as an American citizen, for the damages done him as a man in 1826; that it was a mistake to suppose that an American citizen *initiate*, "that is, a foreigner who has renounced all allegiance to his own government and made his sworn declaration of intention to become a citizen of the United States," was wholly without protection of his *civil rights* during his prescribed novitiate of five years; that it was likewise a mistake to suppose that such an initiate act conferred no right of protection of his civil rights should such person happen temporarily to absent himself from the United States during some portion of the five years; that even conceding that the American law had no respect either for the civil or the political rights of such an initiate citizen, that he actually forfeited by his absence what protection he might otherwise have had, and that by the decisions of the highest American tribunals he remained a mere foreigner or alien until actually naturalized, yet such a person, when naturalized, acquired the character or quality of citizenship in respect of all rights which may have been acquired during the intermediate period, unless for good reason it should have been lost. "His moral and natural law claims," said the American commissioners, "ripened into a full and perfect civil claim in 1829."

The Mexican commissioners holding a contrary view, the case was referred to the umpire, Baron Roenne, who decided that the claim was not within the competence of the commission, thus rejecting the theory propounded by the American commissioners.¹

Commission under the convention between the United States and Mexico of April 11, 1839.

¹ Part of the argument of the American commissioners proceeded on the erroneous assumption that the declaration of intention involves the actual renunciation of original allegiance. In fact, the declarant merely expresses his intention to renounce it.

The case of Santangelo was like that of Koszta in the circumstances that in each case the individual had been banished from his native country, that he had made a declaration of intention to become a citizen of the United States, and that before becoming a citizen he suffered injury in a third country. In the case of Koszta, however, the injury was committed by the authorities of his original country in violation of the sovereignty of the third country, while, in the case of Santangelo, the acts complained of were committed by the authorities of the third country within whose jurisdiction he was at the time.

Mary Santangelo, sole legatee of the claimant in the foregoing case, presented a memorial to the commissioners under the act of 1849, setting forth a claim the principal item in which was for indemnity on account of the expulsion of Santangelo from Mexico in 1826. The commissioners said:

"Santangelo was a native of Europe. Some time previous to 1826 he came to the United States and declared his intention in due form of law to become a citizen. Without remaining, however, a sufficient length of time to perfect his naturalization and acquire the rights of a citizen, he went to Mexico, from which country he was banished by the government in 1826. He then returned to the United States and became a naturalized citizen thereof. The treaty of 11 April 1839 stipulated that the decision of the umpire should be final and conclusive on all the matters referred to him. The decision made by him that the claimant was not a citizen of the United States at the time the alleged wrong occurred, and that therefore he was not embraced in the terms of the treaty, must be regarded as conclusive. This board has already decided (see opinion in case of May, administrator of Slocum) that the claim must have been in its origin in favor of a citizen of the United States to bring it within the provisions of the treaty of 2 February 1848. Under this decision the present claim would be inadmissible, and therefore, whether the claim be regarded as within the competence of the board to decide, or as *res adjudicata*, it must be disallowed.

"Another item of claim is for a loss sustained by a sale of the certificates which were issued to him as evidences of the amount due from the Government of Mexico on account of the award of the mixed commission. This sale was voluntary, and no responsibility can be charged to the Mexican Government in consequence of it. The board decides that the claim is not valid, and it is accordingly disallowed."¹

John Ehlers presented to the commissioners, under the act of 1849, a claim against Mexico in the character of a naturalized citizen of the United States. It appeared that he went to Mexico about 1825, and that in 1829, while he was engaged in business in the city of Zacatecas, a forced loan was collected by order of the government from the firm of which he was a member. In 1832 the partnership was dissolved, and the claimant by the

¹ In 1841 Santangelo published a pamphlet of 163 pages, entitled: Statement of Facts relating to the claim of Orazio de Attellis Santangelo, a citizen of the United States, on the Government of the Republic of Mexico preceded by some explanatory remarks, and followed by a specified list of the accompanying documents. Washington: printed by Peter Force. | 1841. |

terms of the dissolution became the sole owner of the claims on that account. The commissioners said:

"The claimant filed his declaration of intention to become a citizen of the United States in 1818, but was not in fact admitted as a citizen according to the act of Congress until the year of 1846. A mere declaration of intention to become a citizen of the United States does not vest in the party any political rights. The responsibility of a government to protect a citizen is founded on the right which a government has to his services; and until a party has gone through the forms of law required to establish his character as a citizen the latter can not be said to owe allegiance to the government he has signified his intention to obey, nor can such government claim his services. The Congress of the United States has pointed out the only mode by which an alien can become a citizen, and until he has complied with the law he is not entitled to its benefits. The claimant was not a citizen of the United States when the claim he now presents had its origin, and the board has decided in several cases that a claimant must have been a citizen at the origin of the claim to entitle him to the benefits of the treaty of the 2nd February 1848."

In the case of *George Adlam v. The United States*, No. 40, before the claims commission under the treaty of Washington of May 8, 1871, it appeared that the claimant, who was born in London in 1827, emigrated to the United States in 1850, that he had since continuously resided in the latter country, and that in 1859 he declared his intention to become a citizen of the United States. The United States demurred to the memorial on the ground, among others, that the claimant was not a British subject within the meaning of the treaty; that the declaration of intention was "of itself," "a complete renunciation of all claim upon the intervention or protection of the sovereign" whose allegiance he had announced his intention to abjure; that this declaration, by the laws of many, if not all of the United States, gave him, of itself, many of the rights of a citizen; that it certainly put him, so long as he remained in the United States, under the protection of that government for international purposes; that in the case of *Koszta* it was asserted by the United States as a sufficient ground for protection even while abroad; and that it subjected the claimant, by the laws and usages of the United States, to conscription and enrollment for military service.¹

¹ 12 Stats. at L. 731, sec. 1.

Counsel for Great Britain replied that the claimant's declaration of intention worked "no change in his status under the law of nations;" that the intention so declared might be abandoned at pleasure; that while it "might furnish to his sovereign a sufficient reason to decline interference in his behalf," it "did not purport to bring him under any new obligation to the country which he then intended to adopt;" that the British Government had not declined to protect him, but on the contrary presented his claim for indemnity; that the declaration gave him no rights "as a citizen of the United States;" that the rights which might result under State laws did not affect his condition as an alien; that he could not so much as claim from the United States a passport for his protection abroad; that the case of Koszta was without precedent, and had been repudiated by the United States itself, so far as it had been appealed to as recognizing the right of persons by virtue of a declaration of intention to be considered as citizens of the United States; that the statute of the United States authorizing the conscription of such persons did not pretend to change their allegiance, and gave them no rights or privileges in consequence of the conscription.

Similar facts and arguments were presented in other cases. The commissioners unanimously rendered the following opinion:

"The question is raised as to whether in consequence of the claimants having declared their intention to become citizens of the United States and to renounce their allegiance to Her Britannic Majesty they have ceased to be British subjects within the meaning of the treaty. We are of opinion that notwithstanding the claimants having expressed this intention, they still remain British subjects until, the necessary formalities having been completed, they acted upon the intention so expressed."

See Hale's Report, 14, Am. and British Claims Commission, treaty of May 8, 1871.

Wilson's Case. "The memorialist represents that he was born in Stockholm, Sweden, on the 7th day of February 1834, and emigrated to the United States, and resided in Brooklyn, N. Y., during the years 1869, 1870, and 1871, and resided later on at several places in the western part of the United States; that while residing in Brooklyn, New York, on the 23d day of July 1869, he renounced his allegiance to the

Government of Sweden and declared under oath his intention to become a citizen of the United States of America, and having complied with the law, applied for citizenship, and on the 11th day of October 1893, said application for citizenship was perfected by the superior court of the city of New York, in the State of New York; that he is advised that his protection as a citizen of the United States relates back to and began on the day of his declaration to become a citizen of the United States, to wit, the 23d day of July 1869; that his present residence is Iquique, Chile, and at the time when the acts complained of herein occurred he resided at that place. He further represents that on the 20th of January 1891 he was engaged in business at Iquique, Chile, and was the owner of valuable buildings at that place; that in the conflict of arms which took place between the troops of Balmaceda, in command of Colonel José Maria Soto, and the Congressional troops and war vessels, in command of Merino Jarpa and Jorge Montt, on the 19th day of February 1891, all of said buildings, with the furniture, merchandise, account books, and other property contained therein, amounting to the sum of \$124,498, were totally destroyed.

“The republic of Chile, through its agent, has filed a general demurrer to the memorial. We are of opinion that according to the showing made by the memorialist himself this commission can not take jurisdiction of his claim. By the express terms of the convention under which this commission has been created its jurisdiction is confined to claims on the part of citizens of the two governments respectively. The wrongs and injuries complained of were committed on the 19th of February 1891. At that time the claimant was not a citizen of the United States, and did not become such until the 11th day of October 1893. It is true that on the 23d of July 1869, he declared his intention to become a citizen of the United States, but that declaration did not make him a citizen. It was only an incipient step in that direction. Among other attributes of sovereignty exercised by governments is the right to determine the conditions and qualifications of citizenship, and to decide who shall be deemed citizens. In a case decided under the treaty between the United States and Mexico of July 4, 1868, very similar in its provisions to the treaty under which this commission has been organized, Dr. Francis Lieber, the eminent publicist, who was acting as umpire at that time, coincided

in the following views expressed by the counsel of the United States:

"1st. That every state exercises the power of determining who shall enjoy the right of membership of the political society or body politic of which it consists.

"2d. That those who are invested by the municipal constitution and laws of a country with this quality or character, and *none others*, are citizens of the state.

"3d. That nations proceed in their municipal legislation upon the idea that the citizens of other countries have the right to change their nationality and incorporate themselves with new political societies.

"4th. That all nations provide by their laws the terms and conditions upon and in pursuance of which this change of nationality may be and is effected.

"5th. That except in pursuance of those laws, and upon the terms and conditions so provided, no member of any political society can incorporate himself with a new state and become a citizen or subject of such state.

"6th. That until a change of nationality is thus effected the old relation subsists, unless the individual has done some act which under the laws of the state of his origin has the effect of denationalizing him.'

"If these views be accepted as correct, it only remains to inquire: What are the terms and conditions prescribed by the Government of the United States under which a citizen or subject of another country can become a citizen of this country? The first section of the fourteenth amendment of the Constitution of the United States declares: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' How can a person become naturalized? This is a matter of national and not of international arrangement, except in cases where it is regulated by treaty. Accordingly we find that the laws of the United States prescribe the method of naturalization in this country. Section 2165 of the Revised Statutes of the United States provides:

" 'An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:

"*First.* He shall declare on oath before a circuit or district court of the United States, or a district or supreme court of the Territories, or a court of record of any of the States having common-law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince,

potentate, state, or sovereignty of which the alien may be at the time a citizen or subject.

“*Second.* He shall, at the time of his application to be admitted, declare, on oath before some one of the courts above specified, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty; and, particularly, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

“*Third.* It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the State or Territory where such court is at the time held one year at least; and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence.’

“It thus appears that according to the plain and explicit provisions of law, both constitutional and statutory, the claimant was not a citizen of the United States at the time he sustained the damages and losses complained of. Nor could the United States recognize him as such without violating a solemn treaty stipulation made with the Government of Sweden. Article I. of the convention, relative to naturalization, between the President of the United States of America and His Majesty the King of Sweden and Norway, proclaimed January 12, 1872, reads as follows:

“‘Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are legally recognized as citizens of Sweden and Norway, shall be held by the Government of the United States to be Swedish or Norwegian citizens, and shall be treated as such. Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the Government of Sweden and Norway to be American citizens, and shall be treated as such. *The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of citizenship legally acquired.*’

“We are sustained in our views on this subject by the decisions of similar commissions that have existed under treaties between the United States and other countries. (See the lead-

ing case of *Joseph Napoleon Perche v. The United States*, decided by the French and American Claims Commission.)

"It also appears from the diplomatic correspondence of the State Department that the Government of the United States has uniformly held that a mere declaration of intention to become a citizen is not sufficient to clothe a person with the rights of citizenship in the United States. In a letter from Mr. Marcy, Secretary of State, to Mr. Buchanan, April 13, 1854, he says:

"If a person has been here and declared his intention to become a citizen and afterwards leaves this country, goes to another and there takes up his permanent abode, his connection with the United States is dissolved, and consequently his intention to become a citizen thereof must be adjudged to have been abandoned. By such a course of conduct his previous declaration ceases to be available for any purpose whatever, and our ministers and functionaries abroad would not be warranted in such case to do any act to give it effect."

"See to the same effect the letter of Mr. Marcy, Secretary of State, to Mr. Siebels, May 27, 1854; also a letter of Mr. Bayard, Secretary of State, to Mr. Mackey, August 5, 1885; and of Mr. Bayard, Secretary of State, to Mr. Williams, October 29, 1885.

"Inasmuch as the memorial does not show that the claimant was a citizen of the United States on the 19th day of February 1891, when the alleged losses occurred, we decide that the demurrer should be sustained and the claim disallowed for want of jurisdiction."

Charles G. Wilson v. Chile, No. 11, United States and Chilean Claims Commission, convention of August 7, 1892.

The case of *Frederick Selway v. Chile*, No. 17, was dismissed, it not appearing that the claimant was a citizen of the United States at the time of his alleged wrongs.

In the case of *Patrick Shields v. Chile*, No. 23, a claim was made for successive assaults on the claimant by the Chilean police, continuing through some days, while he was held in custody, and ending in his permanent physical disablement. In his memorial he stated that he was a native of Ireland, and had never been naturalized in the United States, but that he had resided in the United States for the last eighteen years, during which time he had served for many years in the merchant marine of the United States, in which he was, as fireman of the steamer *Keeweenaw*, employed at the time of his ill-treatment.

The agent of Chile demurred to the memorial on the ground that the claimant was not a citizen of the United States.

Mr. Shields, the agent of the United States, summarizes (Report, 114) the reply of his government as follows:

"In reply to the demurrer, the agent for the United States stated that it was distinctly shown that the claimant was an American seaman, on a regularly documented and registered American vessel, sailing under the American flag at the time the injuries complained of occurred. He referred also to the message of President Harrison to Congress, dated January 25th, in which he says:

"On information that Patrick Shields, an Irishman and probably a British subject at the time, a fireman of the American steamer *Kecweenaw*, in the harbor of Valparaiso for repairs, had been subjected to personal injuries in that city, largely by the police, I directed the Attorney-General to cause the evidence of the officers and crew of that vessel to be taken upon its arrival in San Francisco, and that testimony is also herewith transmitted. The brutality and even savagery of the treatment of this poor man by the Chilean police would be incredible if the evidence of Shields was not supported by other direct testimony and by the distressing condition of the man himself when he was finally able to reach his vessel. The captain of the vessel says: 'He came back a wreck, black from his neck to his hips from bleeding, weak and stupid, and is still in a kind of paralyzed condition, and has never been able to do duty since.' Claim for reparation has been made in behalf of this man. While he was not a citizen of the United States, the doctrine long held by us, as expressed in the consular regulations, is:

"The principles which are maintained by this government in regard to the protection as distinguished from the relief of seamen are well-settled. It is held that the circumstance that the vessel is American is evidence that the seamen on board are such, and in every regularly documented merchant vessel the crew will find their protection in the flag that covers them."

"The agent for the United States also cited Consular Regulations, 1888, section 172, page 56, which provided:

"The shipment of the seaman in a port of the United States as an American citizen is to be held *prima facie* evidence that the seaman is by birth or naturalization a citizen, and when the nationality does not appear from the crew list it will be presumed that they are citizens of the United States."

"Also section 202, page 66, which provides:

"A foreign seaman, having shipped on an American vessel at a port of the United States, is entitled to extra wages on his discharge at a foreign port in all cases where a seaman who is a citizen should be so entitled, and on such discharge he may be relieved and returned to the United States. And the quality of the American seaman is retained by him on his shipment at such port of discharge on an American vessel, and he may continue to retain that quality by successive reshipment on American vessels abroad,' etc.

"That the ill-treatment of claimant was reported by Mr. Egan to Mr. Blaine (see page 128 of the pub. Doc. 'Message of the President of the United States of America respecting the relations with Chile'); that on the 13th of August 1892 Mr. Egan reported to Secretary of State Foster that the treaty under which the commission now sits had been negotiated and approved, and made special reference in such letter to the case of Patrick Shields, stating that he had called the attention of the minister

of foreign affairs of Chile to that case, and to the provisions of the United States Consular Regulations, and asked if it would be necessary to insert a special clause in the convention to include this case; that the minister and also the sub-secretary of the ministry of foreign relations assured him that it was not necessary to do so; that no question would be raised on this point, and that the rights of Shields as a citizen of the United States would be admitted by Chile before the arbitration tribunal (Foreign Relations, United States, 1892, page 66). An affidavit by Mr. Egan that the facts stated in that letter were true was also filed in the case. In view of these facts the agent of the United States expressed the hope that the agent of Chile would withdraw his demurrer. If not, he submitted that the Shields case came within the treaty inasmuch that he was, when injured, invested with all the rights of American seamen to the full extent that an American citizen seaman could have enjoyed them."

The demurrer not having been withdrawn, the commission rendered the following decision:

"The commission, considering that it appears both by the facts related in the memorial and by the message of the President of the United States of the 25th day of January 1892, that the claimant was a British subject at the time he was subjected to personal injuries in the city of Valparaiso; that he was therefore not a citizen of the United States;

"Considering, on the other hand, that the provisions of article 172 of the United States Consular Regulations, 1888, referred to by the memorialist, are not applicable to this case;

"Considering, finally, that the convention of Santiago, of August 7, 1892, has been established only in behalf of citizens of the contracting nations,

"Declares, that the demurrer is sustained, under the ruling of this commission in the case of *Charles G. Wilson*, No. 11; and that the memorial must be dismissed upon the ground that the said Shields is not a citizen of the United States, and does not come within the terms of the treaty nor within the jurisdiction of this commission."

In the case of *Andrew McKinstrey*, No. 24, a similar claim against Chile was made, "except," says Mr. Shield, "that his treatment was not so brutal, nor was his case mentioned by President Harrison in his message, nor by Mr. Egan in his letter relating his understanding with the minister of foreign relations of Chile." (Report, 115.) The claim was dismissed by the commission on the same grounds as the claim of Shields.

May 24, 1897, Mr. Sherman, Secretary of State, and Mr. Gana, Chilean minister, signed at Washington the following agreement:

"The Government of Chile, by equitable considerations, will allow to the heirs of Patrick Shields a compensation of three thousand five hundred dollars, and this amount shall be delivered for that purpose to the honorable Secretary of State of the United States within a period of four months from this date.

"This agreement is subject to the acceptance of the congress of Chile, from which the necessary amount is to be requested.

"The allowance of the said amount of three thousand five hundred dollars in the manner before mentioned, will imply the final and complete settlement of the claim of Patrick Shields, and the said claim may not be presented at any other time, or in any other form."

9. ABANDONMENT OR FORFEITURE OF CITIZENSHIP.

Fretz' Case. "By the convention executed between the United States of America and the republic of Granada, the government of the latter republic acknowledges their liability for damages caused by the riot at Panama.

"It defines, moreover, clearly the persons entitled to claim, and the subject-matter for which claims can be made.

"Corporations, companies, or individual citizens of the United States are to be indemnified and due regard is to be had, in considering claims which have grown out of the riot at Panama of April 15, 1856, to damages suffered through death, wounds, robberies, or destruction of property.

"The only question which in my opinion is presented by this case under the terms of the convention is this, 'Was A. Fretz an American citizen or not?' For if he did not forfeit his American citizenship he is by the terms of the convention entitled to compensation for the destruction of his property of whatever description, the more so, as that property was intimately connected with and supplementary to the necessities created by the transit route, the preservation of good order and peace along which route the republic of Granada declares to be the foundation of its liability in this class of cases. To a share of that protection, and to compensation for damages resulting from the want of it, this hotel property is equitably entitled.

"The evidence in this case satisfactorily establishes that up to the day of his death Fretz remained a *bona fide* American citizen and had not naturalized himself in Colombia. There was neither actual residence in Panama, nor is there evidence of intention to reside there, nor do any of the circumstances exist which are required to prove the abandonment by a person of his native domicile. He remained to the last an American citizen, entitled to the full protection of his government. The admitted principles of international law recognize the right of a government to insist upon reparation of injuries that may be done to its citizens or subjects in foreign lands; and where, as in the Panama riot, the circumstances attending the disturbances are of such a character as to take it out of the category of acts, redress for which is to be sought by application to the ordinary tribunals of law, and to induce the government of the country where it happened to grant compensation directly, the practice of nations requires that the

compensation allowed should be a full satisfaction for the losses suffered. On such occasions it frequently happens that houses are the subject of attack and damage, and in the case of Pacifico, which is referred to, though the representatives of foreign governments used their utmost endeavors to find out grounds for invalidating that gentleman's claim on the government of Greece, no objection was taken to the claim on the ground that it included damage done to the house which he inhabited. It was not pretended that the ownership of the house, even coupled with long residence, rendered him constructively a subject of Greece, as to matters affecting that property, or deprived him of the right to protection and full compensation which he claimed as a British subject. The same views were acted upon in the case of Mr. Finlay.

"As therefore Mr. Fretz's American citizenship is established and the terms of the convention include in general terms compensation for the destruction of property, I consider his representatives entitled to the amount of three thousand eight hundred dollars in American gold, with interest at the rate of six per cent from the 15th day of April 1856 to the day on which the certificates bear date.

"I have read with attention the very able argument of the Colombian commissioner, but the grounds on which I arrive at my decision render it unnecessary to discuss the propositions therein advanced."

Sir Frederick Bruce, umpire, March 8, 1886, *Augustus E. Fretz v. Colombia*, No. 12, United States and Colombian Claims Commission, convention of February 10, 1864.

Case of Lacoste. "It appears that the claimant was naturalized as a citizen of the United States in Texas, but that during his residence in Mexico he represented himself, or at least allowed himself to be supposed, to be a French subject, and that during the French intervention in Mexico he actually presented to the Franco-Mexican Commission, as a French subject, the same claim which is now before the United States and Mexican Commission. He must therefore have intended either to abandon his adopted country, or, for reasons which can easily be imagined, to let it be supposed that he was a subject of France. By such conduct the umpire thinks that he forfeited his right to consideration by this commission."

Thornton, umpire, September 4, 1875, *J. B. Lacoste v. Mexico*, Nos. 222 and 717, Am. Docket, convention of July 4, 1868, 7 MS. Op. 402.

Cases under the
Spanish Commission.

The agreement between the United States and Spain of February 12, 1871, for the settlement of the claims of citizens of the United States, or of their heirs, against the Government of Spain, growing out of the insurrection that broke out in Cuba in 1868, contained the following provisions:

"No judgment of a Spanish tribunal, disallowing the affirmation of a party that he is a citizen of the United States, shall prevent the arbitrators from hearing a reclamation presented in behalf of said party by the United States Government. Nevertheless, in any case heard by the arbitrators, the Spanish Government may traverse the allegation of American citizenship and thereupon competent and sufficient proof thereof will be required. The commission having recognized the quality of American citizens in the claimants, they will acquire the rights accorded to them by the present stipulations as such citizens. And it is further agreed that the arbitrators shall not have jurisdiction of any reclamation made in behalf of a native-born Spanish subject naturalized in the United States if it shall appear that the same subject-matter having been adjudicated by a competent tribunal in Cuba and the claimant, having appeared therein, either in person or by his duly appointed attorney, and being required by the laws of Spain to make a declaration of his nationality, failed to declare that he was a citizen of the United States; in such case and for the purposes of this arbitration, it shall be deemed and taken that the claimant, by his own default, had renounced his allegiance to the United States."

In the correspondence that led up to the adoption of these provisions touching the citizenship of claimants, the subject of the jurisdiction of the commission as to the question of the abandonment, forfeiture, or renunciation of the rights of citizenship was pointedly discussed.

In his note to General Sickles of September 12, 1870, Mr. Sagasta, Spanish minister of state, referring to the claims presented by the United States, declared that "the good faith of the United States Government" had been imposed upon by worthless men whose only object was "to create international complications and conflicts;" that "the greater portion of the natives of Cuba" who had given their allegiance to the United States had done so "with the studied intention of making use of it at some future day as a shield for their criminal designs;" that many such persons had "lived in the Island of Cuba as Spanish citizens, and did not remember their American citizenship until affairs went against them," and that some of them had accepted employments and offices which Spanish subjects alone were permitted to hold. In view of these circumstances,

Mr. Sagasta took the ground that it was "indispensable," in order that the Spanish Government might "do justice to the reclamations of American subjects," that they should "prove their citizenship before the Spanish authorities."¹

Mr. Fish, who was then Secretary of State, was unwilling to accept this condition, by which it was proposed to place the determination of the claim of American citizenship within the exclusive jurisdiction of the Spanish authorities; but in an instruction to General Sickles of November 18, 1870, he said:

"There may be a misapprehension in Mr. Sagasta's mind as to one point in our offer, which you may correct in conversation. The President contemplates that every claimant will be required to make good before the commission his injury and his right to indemnity. Naturalized citizens of the United States will, if insisted on by Spain, be required to show when and where they were naturalized, and it will be open to Spain to traverse this fact, or to show that from any of the causes named in my circular of October 14, 1869, the applicant has forfeited his acquired rights; and it will be for the commission to decide whether each applicant has established his claim."²

The circular referred to was a "circular of instructions to diplomatic agents and consuls," and it opened with the statement that "recent troubles in Cuba and elsewhere" had "made it necessary to revise and consolidate the existing regulations for the granting of passports." It then proceeded to substitute, for the regulations previously existing, other regulations, among which was the following:

"The official action of the representatives of the United States may also be asked in foreign lands in favor of natives thereof who have been naturalized in the United States. Should passports or other protection be asked for by such persons, it will be the duty of the officer to satisfy himself that they have done nothing to forfeit their acquired rights; for a naturalized citizen may, by returning to his native country and residing there with an evident intent to remain, or by accepting offices there inconsistent with his adopted citizenship, or by concealing for a length of time the fact of his naturalization and passing himself as a citizen or subject of his native country, until occasion may make it his interest to ask the intervention of the country of his adoption, or in other ways which may show an intent to abandon his acquired rights, so far resume his original allegiance as to absolve the

¹ For. Rel. 1871, pp. 710-711, 713.

² For. Rel. 1871, p. 730.

government of his adopted country from the obligation to protect him as a citizen while he remains in his native land.

"Cautious scrutiny is enjoined in such cases, because evidence has been accumulating in this department for some years that many aliens seek naturalization in the United States without any design of subjecting themselves by permanent residence to the duties and burdens of citizenship, and solely for the purpose of returning to their native country and fixing their domicile and pursuing business therein, relying on such naturalization to evade the obligations of citizenship to the country of their native allegiance and actual habitation. To allow such pretensions would be to tolerate a fraud upon both governments, enabling a man to enjoy the advantages of two nationalities and escape the duties and burdens of each."

In a formal note to Mr. Martos, Mr. Sagasta's successor as minister of state, of January 8, 1871, General Sickles, in the very language of Mr. Fish's instructions of the 18th of the preceding November, said:

"The President contemplates that every claimant will be required to make good before the commission his injury and his right to indemnity. * * * Naturalized citizens of the United States will, if insisted upon by Spain, be required to show when and where they were naturalized; and it will be open to Spain to traverse this fact, or to show that from any of the causes named in the circular of the Department of State of the United States of October 14, 1869, the applicant has forfeited his acquired rights."¹

These terms are so clear and precise that they leave no room to doubt that it was intended to invest the commission with jurisdiction to determine whether the naturalized citizen had, by any of the acts specified, forfeited his claim to the protection of the United States. They merely express the rule which Mr. Fish sedulously wrought into the public law of the United States, that an alien who obtains admission to the citizenship of the United States, not with a view to perform the duties of such citizenship, but with a view to escape the obligations of citizenship in the land of his nativity, in which he then resumes his residence, is guilty of a double fraud which the government of his adoption should not, by giving him its protection, aid him to consummate.²

¹ For. Rel. 1871, p. 757.

² Memorial address of the Hon. George F. Edmunds on Mr. Fish, Albany, 1894, p. 58; "Hamilton Fish," by J. C. Bancroft Davis, *Atlantic Monthly*, February 1894, p. 220.

Leaving Country with no Intent to Return. 'It appears from the papers on record in this case that the claimant, immediately after having been naturalized a citizen of the United States, left the United States for the Island of Cuba; that he settled in the said Island of Cuba; that he did not even come back to the United States during the rebellion. Therefore it is my opinion that the claimant must be considered as having, after he had become an American citizen, left the United States without the intent to return, and that he has no right to appear before the commission.'

M. Bartholdi, umpire, case of *Leopold A. Price*, No. 5, Span. Com. (1871), July 2, 1876.

Abandonment of Citizenship by Permanent Residence Abroad. A citizen of the United States who, being of lawful age, leaves the United States and establishes himself in a foreign country, without any definite intention to return to the United States, is to be considered as having expatriated himself.

Decision of the arbitrators, cases of *Lucien Larigne*, No. 11, and *Thomas Bister*, No. 21, Span. Com. (1871), April 27, 1878.

The claimants in these cases were persons who, soon after Cuba was thrown open to immigration by the royal order of 1817, emigrated from Louisiana to that island, purchased land, and settled there for life. They abandoned their plantations in consequence of the disturbances that followed the Cuban insurrection of October 1868, and came to the United States. Substantially the same facts were presented in the case of *Galatea Marrot*, No. 114, which was dismissed by Baron Blanc, umpire, February 18, 1880. In all these cases there was some question as to who committed the damages complained of.

Portuondo's Case. Juan F. Portuondo, a native of Cuba, was naturalized in the United States in 1847. In 1870 he was seized by Spanish troops near Santiago de Cuba, and was shot without trial, on suspicion of being implicated in the prevailing insurrection. A claim for damages for his execution was preferred by his son against Spain before the commission under the agreement between the United States and Spain of February 12, 1871. It was contended by Spain before the commission that Portuondo was not at the time of his death entitled to the protection of the United States, since he had abandoned his American citizenship.

It appeared that after his naturalization he went back to Cuba, and that in 1855 he was expelled from the island by

General Concha, the captain-general, on suspicion of being implicated in a political plot. After his expulsion, his wife, who was a Spanish woman and a resident of Havana, asked that he be permitted to return to Cuba on condition of renouncing his American citizenship. It was not proved that Portuondo was a party to this application. General Concha refused to grant it, on the ground that Portuondo "having been naturalized in the United States," it was "not in the faculty of the 'Spanish' Government to admit the renunciation proposed by him through his wife to return to the enjoyment of the rights of a Spaniard." About six months later Portuondo returned to Havana without permission. Subsequently, on March 18, 1856, the political secretary of the eastern department of Cuba wrote to the political governor of the jurisdiction that the captain-general, "taking into consideration the repeated solicitations" of Portuondo to be permitted to return, and the fact that he was then "in Havana" awaiting "orders," had "resolved to concede his return and residence" in that city, in which he should make a declaration "in such terms as should, at the proper time, be ordered, renouncing his rights as an American citizen." No such renunciation appeared ever to have been made, but Portuondo continued to reside in Cuba.

In behalf of Portuondo it was urged that he had not only not renounced his American citizenship, but that he had always claimed and asserted it; that it had always been recognized by the Spanish authorities, and that at the time of his arrest and execution he had sold a large part of his property in Cuba, and was on the point of finally returning to the United States.

The arbitrators differing in opinion as to the rights of citizenship of the deceased, the umpire, Baron Blanc, on May 31, 1879, rendered the following decision:

* * * * *

"4th. That as to the traversed allegation of American citizenship of the deceased, competent and sufficient proof thereof, as required by the agreement of February 12, 1871, is given by his certificate of naturalization, such certificate not being proved or charged to have been procured by fraud or issued in violation of public law, treaties, or natural justice. Such grounds of impeachment, upon which any certificate of naturalization may be declared altogether void, not being found in this case, the umpire called upon to resolve such conflict about the allegiance of the deceased must, following previous adju-

dications by umpires of this commission, and in the absence of any treaty between Spain and the United States restricting the power of the United States to grant naturalization in accordance with the municipal law as interpreted by the municipal courts, give full force to the naturalization of the deceased, even against Spain.

"5th. That the allegation that the deceased had lost or forfeited his right of American citizenship by abandonment or renunciation of such citizenship is not sustained by the evidence. No positive proof has been offered to exclude the intention of the deceased to return to the United States, whose nationality he openly and continually claimed, where he had sent his son, and to which country he had manifestly made preparations to go himself for definitive settlement when he was arrested and shot. No positive proof has been offered of any individual act of the deceased implying the renunciation of his American citizenship acknowledged by the Spanish authorities, which renunciation the said authorities declared should, at some proper time, be ordered as a condition of his free sojourn in Cuba, and no evidence that his continued sojourn there is not to be accounted for by the simple omission of the authorities to enforce such contingent condition." * * *

Case of *José N. Portuondo*, No. 65, Span. Com. (1871).

It was admitted that the claimant was a
Effect of Carta de duly naturalized citizen of the United States.
Domicilio.

Since 1861 he had been in the habit of taking goods to Havana for sale, selling them in the name of a friend there in order to avoid the payment of a tax; but he spent at least his summers in New York, where his family lived. In the latter part of 1866, he took out a *carta de domicilio* in Cuba, under the royal order of October 21, 1817, which was intended to invite immigration to Cuba, hired rooms, procured a license, and imported a considerable stock of goods, which he sought to sell to retailers. One of the conditions of the *carta de domicilio* was that the "settler" should take an oath of loyalty and allegiance, and engage to obey all the laws and general orders of the Indies to which Spaniards were subject, and the royal order under which it was issued prescribed a residence of five years and the profession of the Catholic religion as the conditions of naturalization. The advantages accruing from the *carta de domicilio* were exemption from general and ordinary taxes and from export duty on produce, freedom from military service, a right to acquire and dispose of real estate, to own ships, and to enjoy various other privileges.

It was conceded on the part of Spain that a mere intention to change one's allegiance does not deprive an alien of the protection of his native sovereign; but it was contended that to accept the benefits offered by law only to those who presumptively entered the country with the intention of becoming citizens and to take an oath of allegiance and loyalty and engage to be bound by the laws to which natives were subject, was in terms a renunciation, while that engagement continued, of the protection of one's native government.

The umpire decided that the claimant had a right to appear before the commission as an American citizen.

Count Lewenhaupt, umpire, *Case of John A. Machado*, No. 84, Span. Com. (1871), December 22, 1880.

Views of Count Lew- A native of Cuba was duly naturalized in
enhaupt on Aban- the United States July 15, 1872. In the fol-
donment by Per- lowing September he returned to Cuba, and
manent Foreign established himself in business and purchased
Residence. real estate at Colon. On July 16, 1875, he was
arrested on a charge of being implicated in the insurrection
then prevailing in that quarter. As to the foundation for this
charge there was no evidence. It appeared, however, that on
July 27, after an imprisonment of eleven days, he was released
and ordered to quit the island within twenty days. This order
was subsequently revoked on the claimant's application.

By the advocate for Spain it was contended that the fact that the claimant, within two months after his naturalization, returned to Cuba, established himself in business, purchased real estate, and remained in the island till the occurrence of the events that formed the ground of his claim, showed "that he never intended to return to the United States." He had never owned any property in the United States other than the stock and fixtures of a store which he kept while he lived in New York. On these facts the advocate for Spain maintained that the claimant, when he took the final step in his naturalization in July 1872 intended to return to Cuba, and did not intend to remain in the United States and perform the duties of citizenship therein, and that he must, as to the United States, be considered as having expatriated himself. In this relation the advocate for Spain quoted from the circular of Mr. Fish, Secretary of State, of October 1869, issued in view of

"the recent troubles in Cuba and elsewhere," the following passage:

"Evidence has been accumulating in this department for some years that many aliens seek naturalization in the United States without any design of subjecting themselves by permanent residence to the duties and burdens of citizenship, and solely for the purpose of returning to their native country and fixing their domicile and pursuing business therein, relying on such naturalization to evade the obligations of citizenship to the country of their native allegiance and habitation. To allow such pretensions would be to tolerate a fraud upon both governments, enabling a man to enjoy the advantages of two nationalities and escape the duties and burdens of each."

Count Lewenhaupt, umpire, in deciding the case, said that "in the absence of consent or treaty" naturalization abroad had "within the limits of the country of origin no other effect than the government of said country chooses voluntarily to concede." Where there was a treaty it was "usual for the country of origin to require actual residence abroad during five years," and some treaties stipulated that the original nationality should revert if the emigrant returned to the country of his origin with intent to remain there, but the conditions depended in each case on the stipulations of the treaty. In the present case there was, he said, no stipulation applicable to the facts before the commission; and as it was not contended that the claimant's nationality "would have been lost if he had been a native-born citizen of the United States," it followed that he "must be considered [as] authorized to appear before the commission as an American citizen." But, he then proceeded to declare: "The umpire is further of opinion that the Spanish authorities knew before the arrest that the claimant was an American citizen, enjoying the privileges granted by the treaty [between the United States and Spain] of 1795; * * * and that in consequence he is entitled to some indemnity for illegal arrest and imprisonment." On this ground he allowed the claimant \$1,100, without interest.

Case of *Juan San Pedro*, No. 117, Span. Com. (1871), April 18, 1881. The same view as to the abandonment of citizenship was taken by Count Lewenhaupt, though without any statement of reasons, in the case of *Jose M. Macias*, No. 52, May 20, 1881.

"The claimant was born in the United States in the year 1802, went to Cuba in 1822, and resided there continuously

until 1870, when he says he was forced to leave the island. Spain contends that the length of residence, nature of business, acquisition of real estate, and marriage in Cuba, had made him a Spanish subject according to the Spanish constitution and laws; and further, that having expatriated himself without intent to return he had ceased to be an American by American law.

"In the opinion of the umpire it is a generally adopted principle that a settlement abroad with intent to remain may be considered sufficient reason to declare a person divested of the rights of protection abroad inherent to his citizenship; but this principle implies only that the government of the country of origin may in certain cases make such declaration. As regards the country of residence the rights of foreigners are usually, as in the present case, regulated by treaty. Spain has by the treaty of 1795 conceded that American citizens are entitled to certain privileges in Spain, and as no limitation of the time of residence is stipulated, it must be held, in the opinion of the umpire, that American citizens who do not happen to be at the same time subjects of Spain on account of the locality of birth have a right to reside in Spain and enjoy these privileges so long as the treaty remains in force, except if they renounce themselves, by express declaration, their American nationality, or if the Government of the United States declare them to have forfeited their right to protection, and as it is not contended that the present case falls within any of these exceptions the claimant must be considered entitled to appear as an American citizen before this commission."

Count Lewenhaupt, umpire, case of *William S. Lynn*, No. 104, Span. Com. (1871), April 18, 1881.

Juan C. Zenea, a native of Cuba, who was admitted to citizenship of the United States at New Orleans in 1852, went to Cuba in the latter part of 1870 under a safe conduct of the Spanish minister in Washington. About the 1st of January 1871 he was arrested by the military authorities near Havana and charged with violating his safe conduct, and on August 25, after conviction by a court-martial of treason, he was shot. His widow, who was also his administratrix, claimed damages from Spain for his execution in derogation, it was alleged, of Article VII of the treaty of 1795, and for money taken from him

Decisions of Messrs.
de Potestad and
Lowndes.

at the time of his arrest. The arbitrators rendered the following decision:

"There is no evidence whatever that Zenea gave notice or that notice was given on his behalf to Spain of his being a citizen of the United States. A passport from the so-called Cuban Republic was found on his person in which he was spoken of as a citizen of the United States, but in our opinion that fact, coupled with his own silence during his long imprisonment, does not constitute notice. That notice of citizenship is necessary in order to maintain a claim for violation of rights attaching to such citizenship has been expressly held by the umpire in the cases of J. O. Wilson, No. 121, and Delgado, No. 31. In the case of Portuondo, No. 64, which was similar to the present one, ample notice of citizenship was given.

"We are of the opinion that the claimant can not recover in respect of the killing of her husband.

"The sum of \$1,700 was found on Zenea's person and went into the possession of the Spanish authorities. The want of notice does not affect the right of recovery as regards this sum.

"We are of the opinion that judgment should be rendered in favor of the claimant, as administratrix, for this sum, with interest from January 1, 1871, at the rate of six per centum per annum."

Opinion of Marquis de Potestad-Fornari, arbitrator for Spain, concurred in by Mr. Lowndes, arbitrator for the United States, case of *Louisa M de Zenea v. Spain*, No. 136, Span. Com. (1871), December 26, 1882.

"This is a claim for damages on account of the imprisonment in Havana of the claimant by the Spanish authorities from February 5, 1869, to May 2, 1869.

"The claimant was born in Cuba of Spanish parents in 1849. In the view I take of the case it is not necessary for me to decide whether, by the naturalization of his parents, the claimant became a citizen of the United States. It is to be observed that on his cross-examination he refused to answer questions bearing upon that issue. For three years before his arrest, the claimant had been studying law at the University of Havana, with the intention of studying there three years longer, and of practicing law in Cuba. He was a member of a firm doing business in Cuba. His name and language were Spanish. At the time of his arrest, he was editor of a newspaper at Havana, published in Spanish. The name of the newspaper was *La Chamaretta*, that word signifying the blouse worn by the insurrectionist. On the 20th January 1869 he published in his newspaper an article, the writer of which spoke in the

character of a Spanish subject, and a song, the language of which could not be made more seditious. Early in February 1869 the father of the claimant said to the captain-general that 'his sons,' five in number, creoles by birth, and educated in the modern idea of untrammelled self-government, were heart and souls for the liberty of their own country, but that they would not be conspirators against the established government of the island, unless all justice and freedom should be denied them.

"I think that the duty of a foreigner when arrested, if he desires to protect himself by his citizenship, is to give notice of it and to claim the rights he may possess by virtue of his nationality.

"The Spanish authorities had every reason to believe that the claimant was a Spaniard. It is not proved that on his arrest, or during his detention, he claimed immunity as a citizen of the United States, or that such a claim was made on his behalf.

"The naturalization of the claimant's father was known to the Spanish authorities, but he may have been naturalized in the United States and his son still have been a citizen of Spain.

"The claimant's father testifies that the claimant 'was held over three months, and until he, being under age, was claimed as an American citizen, on account of his father's nationality, and restored to liberty.'

"His release seems to have promptly followed the notice.

"On the ground that the claimant did not give notice of his being a citizen of the United States on his arrest or during the period of his detention, I think that he is not entitled to damages, and that his memorial should be dismissed."

Mr. Lowndes, arbitrator for the United States, case of *Rafael C. Casanova v. Spain*, No. 124, U. S. and Span. Com., May 12, 1882.

The arbitrator for Spain, the Marquis de Potestad-Farnari, delivered the following concurrent opinion:

"I agree with my colleague in dismissing this claim, and in addition to the reasons stated by him, I am of opinion that there were sufficient grounds for the arrest, detention, and trial of the claimant, and that the proceedings took place before a competent tribunal."

A claimant, a native of France, said in his testimony: "When I came to this country [the United States] I came with the intention of remaining permanently." Counsel for the United States there-

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Commission.

upon maintained that the claimant had lost his French citizenship, citing article 17 of the French code, which enumerates the acts by which a Frenchman may lose his citizenship, as follows: "3°. Enfin par tout établissement fait en pays étranger, sans esprit de retour." Counsel for the United States admitted that there was no evidence tending to show that any tribunal of France had passed upon the question of the claimant's citizenship in that country, but contended that it belonged to the commission to decide it.

Special counsel for the claimant argued that as his client, a native-born French citizen, had not been naturalized in or made a citizen of any other country, it followed as a legal conclusion that he remained a citizen of France. In support of this position he asserted it as a "fact universally declared and admitted in the writings of publicists that every human being must have a nationality, a society, or state, or government to which he belongs." "All authorities," he contended, "on public law declare that every person must have a country—a nationality; and further, that the country or government of origin remains to each person and stamps him with its character and citizenship, until by some well-defined public act he renounces that nationality and takes upon himself a new citizenship." In support of this position the authority of Mr. Webster was cited; also of Attorneys-General Cushing, Black, and Williams. The opinion of the Supreme Court in the case of *The Charming Betsey* (2 Cranch, pp. 64–119), and in the case *Hauenstein v. Lynham* (U. S. Rep. vol. 100, p. 484), were referred to. Decisions of courts of France were also cited to the effect that it is to be presumed that all Frenchmen absent from the country intend to return to France, and consequently that nothing but the most direct and undoubted evidence would do away with such presumption.

The commission unanimously decided to allow the sum of \$300 to the claimant. The commissioner for the United States, however, placed his name to a note, in which he said:

"In signing this decision I waive the question whether the claimant had established himself in the United States without intent to return to France, so that if in any case hereafter that question should arise I must reserve my freedom of action upon the question."

In the case of *Elise Lebreton v. United States*, No. 173, the commissioner for France, Mr. De Geofroy, in assenting to the

position of the majority of the commission that she was not a citizen of France, did so upon the express ground that her long residence in the United States justified the conclusion that she was absent from France without an intention to return.

Francois E. Parrenin v. United States, No. 62, Boutwell's Report, 103; commission under the convention between the United States and France of January 15, 1880.

Bleze Motte, in the character of a citizen of France, presented to the commission under the convention between the United States and France of January 15, 1880, a claim for the value of a horse and other personal property seized by the military authorities of the United States during the civil war. In his testimony he stated that he "was a slave owner before and during the late war." Counsel for the United States then demurred to the jurisdiction of the commission, on the ground that Motte had by holding slaves lost his French citizenship. In support of the demurrer counsel cited (1) a decree of April 27, 1848, by which Frenchmen were forbidden in future, even in a foreign country, to hold, buy, or sell slaves, or to be concerned in such transactions, and by which every infraction of its provisions was to involve "the loss of the quality of a French citizen" (*la perte de la qualité de citoyen français*); (2) an act of the National Assembly of February 11, 1851, by which a period of ten years was allowed for the freeing or sale of slaves by Frenchmen living abroad; and (3) an executive decree of May 7, 1858, by which it was declared that the decree of 1848 was not applicable to the owners of slaves the possession of which began before that time, or resulted from succession, gift, or marriage contracts.¹

¹ The provisions referred to were as follows:

The decree of the French Government, No. 296, of April 27, 1848, entitled "Décret relatif à l'abolition de l'esclavage dans les Colonies et Possessions françaises," provided, article 8, as follows: "A l'avenir, même en pays étranger, il est interdit à tout Français de posséder, d'acheter ou de vendre des esclaves, et de participer, soit directement, soit indirectement, à tout trafic ou exploitation de ce genre. Toute infraction à ces dispositions entraînera la perte de la qualité de citoyen français." (Bulletin des lois de la République Française, No. 32.)

The act of the National Assembly of France of February 11, 1851, provided: "Article unique. Le délai que l'article 8 du décret du 27 Avril 1848, accorde aux Français établis à l'étranger, pour affranchir ou aliéner

Counsel for France moved to set aside the demurrer on the ground (1) that the provision of Article II. of the convention, that "no claim or item of damage or injury based upon the emancipation of slaves shall be entertained by the commission," implied that Frenchmen who held slaves might make claims before the commission for other kinds of damage or injury; (2) that whatever might be the effect of the ownership of slaves upon French citizenship, the execution of the French legislation on the subject belonged exclusively to the French courts, and not to the commission, which possessed no power to denationalize Frenchmen; (3) that the convention, being itself the last expression of the will of the contracting parties and a part of their law, in effect annulled every act of municipal legislation inconsistent with it; (4) that the commission had no power to inquire into the question raised by counsel for the United States, and that, if it entertained any doubt on the subject, it should at once refer the matter to the two governments.

Counsel for the United States replied (1) that the act of the claimant in holding slaves after the expiration of the ten years prescribed by the act of the National Assembly of February 11, 1851, in itself, and without any proceeding on the part of the French Government or its tribunals, deprived him of French citizenship as effectually as if he had been naturalized in the United States; (2) that as, in such a case, the commission would look only at the evidence of naturalization, so, in the case of slave-holding, it would look only at the proof that the decrees were violated; (3) that the loss of citizenship in such a case was the act of the claimant, and not of the commission; (4) that the French Code, as well as the decrees in question, assumed that a person born in France might lose his French nationality without acquiring a new one; (5) that the laws of the United States (Rev. Stat. sec. 1999) recognized the

les esclaves dont ils sont possesseurs, est fixé à dix ans. (Bulletin des lois 1851, 10 série, lois et décrets 7—404 à 409, page 220.)

By the executive decree of May 7, 1858, the eighth article of the decree of 1848 was construed as follows: "Article unique. Le paragraphe 2 de l'article 8 du décret du 27 Avril 1848 est modifié ainsi qu'il suit:

"Le présent article n'est pas applicable aux propriétaires d'esclaves dont la possession est antérieure au décret du 27 Avril 1848, ou résulterait, soit de succession, soit de donation entre vifs ou testamentaire, soit de conventions matrimoniales." (Bulletin des lois, No. 607, XI series. B.)

See, in the same sense, law of May 25, 1858. (Daloz, 1858, 4 partie, lois, décrets et actes législatifs, 62.)

same principle; (6) that while French tribunals doubtless were competent to determine the citizenship of a person born in France who had held slaves in violation of the decrees, the commission, which was "at the same time a tribunal of France and a tribunal of the United States," was "clothed with all the authority that could be conferred by either government upon any tribunal within its territorial jurisdiction in all questions arising under the treaty and pending before the commission;" (7) that the question of citizenship was "one of those questions, and a primary one in its nature," in respect of which the commission would "examine and apply the laws and decrees of France and the laws of the United States precisely as those laws and decrees would be applied by the French tribunals on the one hand and by the courts of the United States on the other in cases within their jurisdiction respectively;" (8) that, in deciding whether the claimant had lost his French citizenship as the result of slave-holding, it was the duty of the commission "to consider the matter, not in the light of an infringement of the law and the infliction of a penalty, but in the light of a duty imposed upon it to ascertain whether the claimant is a French citizen;" (9) that the provision of Article II. of the convention, excluding claims for the loss of slaves, did not in any manner affect the question at issue, since it might "well be assumed that a country which had denationalized its citizens on account of slave-holding would be unwilling either to make compensation for slaves emancipated or to claim compensation for its own citizens for such emancipated slaves at the hands of another government;" (10) that the powers and duties of the commission in the case under consideration were precisely the same in their legal character as if the claimant had left France without the intention to return, or had held office in a foreign country, or had been naturalized abroad, since the commission could have "no jurisdiction of the claimant if by any act, or by any process, or by the operation of any law, or any decree, his citizenship in France has been either transferred to another country or been lost by him in the country of his birth."

In answer to counsel for the United States, special counsel for the claimant maintained (1) that the objection to the claim was founded upon a mere play on the double meaning of the word "citizen," the phrase *"perte de la qualité de citoyen français"* signifying, as used in the decree of 1848, merely the loss of the right to vote and to hold office; (2) that the forfeiture of

citizenship denounced by this decree could be enforced only by direct judicial proceedings against the offender, and not collaterally; (3) that advantage of the forfeiture could be taken only by the French Government; and (4) that the intent of the contracting parties, as manifested by circumstances, was to include such claimants as Motte. In support of these positions special counsel contended that the term "*citoyen français*," as used in the French law, was not analogous to the term "*American citizen*," as used in the American law; that "*citoyen français*" meant only a French voter, the term denoting a "*citizen*," in the broad sense of one under the allegiance and protection of France, whether man, woman, or child, being simply "*Français*;" that consequently the equivalent of "*American citizen*" was "*Français*," while "*citoyen français*" was merely the equivalent of "*American voter, capable of holding office.*"¹

It was also argued in behalf of the claimant that the commission could not receive parol testimony, even his own admissions under oath, to show that he was not a citizen of France, after his birth in France had been established; that nothing but the record evidence of naturalization was competent to establish the change of citizenship and that mere admissions or statements under oath were incompetent to confer or to "*confiscate*" citizenship in any case; that as the decree of 1848 was in the nature of a penal enactment, and as the French Government had not established any mode for its enforcement, the commission, which could find the loss of citizenship only after the proper French authorities had in a direct proceeding declared it, could

¹Special counsel cited Rivière's "*Codes Français et Lois usuelles*," as follows:

"§ 7. L'exercice des droits civils est indépendant de la qualité de *citoyen*, laquelle ne s'acquiert et ne se conserve que conformément à la loi constitutionnelle.

"§ 8. Tout Français jouira des droits civils." (Code Civil, liv. 1, tit. 1, ch. 1.)

"Art. VIII. Constitution de la République française (22 frimaire, an VIII). Titre 1^{er}—De l'exercice des droits de cité. Art. 1^{er}.

"2. Tout homme né et résidant en France, qui, âgé de 21 ans accomplis, s'est fait inscrire sur le registre civique de son arrondissement communal, et qui a demeuré depuis, pendant 1 an, sur le territoire de la République, est *citoyen français*." (Rivière, Codes Français &c., vol. 2, p. 73.)

Also from the Dictionary of the Academy, s. v. *citoyen*:

"*Citoyen français*, se dit de Quiconque jouit en France des droits politiques, tels que le droit de concourir à l'élection des députés, celui de siéger aux assises en qualité de juré, etc."

Special counsel also cited Lawrence's Wheaton, ed. 1863, 893, 912, 913.

not go further than the French Government had gone, and undertake to enforce its criminal law.

Counsel for the United States, in conclusion, renewed his previous arguments, and contended that as the decree of 1848 had been for more than thirty years in operation, first under the republic, then under the empire, and again under the republic, French-born subjects who held slaves in violation of it were by operation of law, when the convention of 1880 was ratified, excluded from citizenship in France as much as if a formal decree had been made by a competent tribunal denationalizing them, and that it was to be assumed that the French Government ratified the convention with this fact in view.

The question argued in the case of *Motte* was also involved in the cases of *Pierre Nougé*, No. 323; *David de Laureat*, No. 97, and *Ladmirault*, No. 475.

In all these cases the commission, by the judgment of a majority of its members, Baron de Arinos and M. De Geoffroy, asserted jurisdiction and made awards.¹

Bleze Motte v. United States, No. 282, Bontwell's Report, 92; Commission under the convention between the United States and France of January 15, 1880.

¹ In the case of *Pierre Nougé*, United States Commissioner Aldis filed, April 28, 1883, an opinion in which he stated the reasons for his dissent on the slave question. (Bontwell's Report, 125.) Nougé bought a slave in Louisiana in May 1859, and it was admitted that he did not come within any of the exceptions of the French law on the subject. Commissioner Aldis contended that the words "perte de la qualité de citoyen français" meant "loss of nationality." He referred to the report of the committee of the Corps Législatif on the decree of 1848, in which report it was declared that "la qualité de maître devient incompatible avec le titre de citoyen français." He also recited a report of a committee of the Corps Législatif of 1858, referring to the decree of 1848, and declaring, although more than 20,000 Frenchmen in North America, Cuba, and Brazil would be "sans peine d'être dénationalisés," yet: "Il n'est cependant pas indifférent, au point de vue de la dignité nationale, de consacrer de nouveau, après dix ans d'expérience, le principe que nul Français ne peut, en quelque pays qu'il habite, être un marchand, ou même un simple acheteur d'esclaves." Commissioner Aldis argued that the prohibition to vote and hold office in France would involve no penalty at all in the case of a slaveowner residing abroad. Women in France could not vote and hold office. Did the law intend to leave them free to remain French and still buy and sell slaves? As to the two contentions that the loss of French citizenship under the decree in question must be proved by a judicial record, but that France had "not yet established any method of ascertaining what portion of its citizens resident in the United States have fallen under the decree," he declared that together they involved the *reductio ad absurdum* of requiring proof which could not exist. He maintained, however, that the decree

Jean Petit, in the character of a citizen of France, presented a claim against the United States growing out of acts of military authorities in 1863. On the part of the claimant, it was alleged "that he was born in Bordeaux, France, in 1818; that he remained a citizen of France until October 1868, when he was naturalized as a citizen of the United States; that in

was to be enforced in France by the ordinary tribunaux, and "out of France by any tribunal established by the authority or with the consent of France." The objection of French counsel would be valid only in case the law, in declaring what would constitute loss of citizenship, had also provided a special tribunal for ascertaining the fact. But the commission, being a court established by the two governments, had, as the law stood, full jurisdiction of the matter (see Article V. of the convention), and could act upon parol evidence. Record evidence as to the act of slaveholding would rarely if ever exist in France, nor was there any reason why such an act, performed in a foreign country and in conformity with its laws, should be proved by the record of a French court. The French law declared that *the act itself* entailed loss of citizenship, but required no specific form of proof of such loss. By the omission of such a requirement it "was left to any tribunal having jurisdiction of the question to find the fact and the loss of citizenship according to the general rules of evidence." By the law of Prussia, said Commissioner Aldis, the quality of a Prussian subject was lost (1) by discharge upon the subject's request, (2) by the sentence of competent authority, (3) by living ten years in a foreign country, (4) by the marriage of a female subject with a foreigner, and (5) by the declaration of the Prussian police authority of the failure of a subject to obey, within the prescribed time, an express summons to return. (For. Rel. 1873, part 2, p. 1434.) The first, second, and fifth modes were specially regulated by Prussian laws, and the proof must therefore conform to them; but how could the third mode be shown by the record of a Prussian court? Nor could the fourth be so established. In France, citizenship was lost (For. Rel. 1873, part 2, p. 1277) (1) by naturalization abroad, (2) by accepting public office abroad without consent of the King, (3) by settling in a foreign country without intent to return, (4) by the marriage of a French woman with a foreigner, (5) by entering foreign military service or affiliating with a foreign military corporation without consent of the King, and (6) by buying or holding slaves, with certain exceptions. In respect of these modes, Commissioner Aldis observed that naturalization was proved according to the laws of the country where it was effected, usually by record, but not always, since a French woman might by marrying an American become an American citizen without applying for letters of naturalization; that accepting public office under a foreign government could not be proved by the record of any court; and that the fact of settling in foreign country "*sans esprit de retour*" must be proved by witnesses. Such was the law not only of the United States, but of France. (*Les Codes Annotés de Sirey*, p. 68, liv. 1, tit. 1; Delaporte, *Pond Fr.*, p. 81; Duranton, tom. 1, No. 185; Guichard, No. 512; Coin-Delisle, p. 63, No. 17.)

1870 he returned to France with his family and all his means," and "resumed his native nationality by his declarations and acts;" that he and his family had since resided in France continuously, and that he had exercised all the rights of a citizen of France, and had been recognized as such by the French authorities; that in September 1881, five months after his memorial was filed with the commission, he received from the French authorities a certificate of reintegration as a citizen of France, but that the object of this certificate was merely the completion of the evidence of his French citizenship in order to meet any technical question which might be raised.

On the part of the United States, it was argued that the mere fact of Petit's return to France in 1870, though it was followed by acts of citizenship and by a recognition of his citizenship by the French authorities, did not constitute him a citizen of France. In support of this position the eighteenth article of the Civil Code of France was quoted, in these words: "A native of France who shall have lost his citizenship may always recover it on reentering France with the authorization of the King, and on declaring that he wishes to remain there, and that he renounces all distinction contrary to French law." Article 17 of the French Code was also cited, in which it is declared that French citizenship is lost by naturalization acquired in a foreign country. Resting upon the fact of the naturalization of Petit in the United States and upon the seventeenth and eighteenth articles of the Code of France, counsel for the United States claimed that Petit did not become a citizen of France until the 12th day of September 1881, when he was duly reinstated. As the date of his reinstatement was not only subsequent to the date of the treaty, but subsequent also to the presentation of his claim, counsel for the United States contended that the commission had no jurisdiction of his case.

Special counsel for the claimant on the other hand contended that he had resumed his native citizenship long prior to 1881; and in this relation counsel cited an opinion of Attorney-General Black (9 Op. 63), and the case of a Prussian, naturalized in the United States, who had returned to Prussia, and to whom Mr. Wheaton, then United States minister at Berlin, wrote (Dana's Wheaton, 144): "Having returned to the country of your birth, your native domicil and national character revert, so long as you remain in the Prussian dominions,"

The commission awarded Petit the sum of \$2,865. Touching this award, counsel for the United States in his final report said :

"As the commission entertained jurisdiction, notwithstanding the naturalization of Petit in the United States in the year 1868, it is to be assumed that the views of the special counsel were accepted. It is not to be inferred, however, that the commission reached the conclusion that the reinstatement of Petit as a French citizen in the year 1881 was accepted as justifying jurisdiction, but that the jurisdiction was found in the fact that he returned to France in 1870, and had acted as a French citizen and had been accepted as a French citizen for the period of ten years and more previous to his formal reinstatement in citizenship by the duly constituted authorities."

Jean Petit v. United States, No. 255, Bontwell's Report, 84; commission under the convention between the United States and France of January 15, 1880.

May 23, 1881, N. presented a memorial in which he declared that he was then a citizen of France. It appeared that he was born in Corsica in 1837, but came to the United States in 1855, and was naturalized in 1870. In 1871 he returned to France, and immediately afterward addressed a communication to the mayor of Rogliano, stating his wish to exercise the rights of a French citizen. He subsequently enjoyed the privileges of a citizen of the French Republic, and performed a certain kind of military service, and from 1875 to 1881 his name appeared on the electoral lists of the commune of Rogliano. It appeared, however, that he returned to the United States in 1875, and from that time to 1878 voted, held office, and carried on business in the State of Alabama. At the date of his memorial he was living at Rogliano, but was engaged in business at Montgomery, Alabama.

On this state of facts counsel for the United States contended that N. had never been restored to citizenship in France by the act of the authorities duly constituted to reinstate him; and that his return to the United States, and the exercise of the rights and privileges of a citizen of that country, were sufficient to justify the conclusion that he intended to continue a citizen of the United States.

Counsel for the French Republic contended that his declaration of intention to exercise the rights of a citizen of the French Republic reinstated him in citizenship, especially in

view of the fact that his name appeared upon the electoral lists of the commune of Rogliano for the years 1875 to 1881, inclusive.

The claim was unanimously dismissed for want of jurisdiction, the commissioners saying:

"This claimant was naturalized in the United States. He went back to France, but did not comply with the provisions of the Civil Code to become again a citizen of France. He came back to the United States, and there claimed the rights of an American citizen."

Peter M. Nicrosi v. United States, No. 415, Boutwell's Report, 87; commission under the convention between the United States and France of January 15, 1880.

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Odon Deucatte preferred a claim against the United States for the seizure of cotton by military authorities. The facts in regard to his nationality appear to have been as follows:

"Deucatte came to the United States from France in the year 1831, and at the close of the proceedings [of the mixed commission under the claims convention between the United States and France of January 15, 1880] he had been a resident of this country for about fifty-two years. In all that period he had not returned to France, and upon the divorce of his wife, who was a French woman, he was married a second time to an inhabitant of Louisiana. In the year 1848 the claimant made oath before the district court of Avoyelles, by which he renounced his allegiance to France, and declared his intention to become an American citizen. There was no evidence, however, that that intention had ever been effected by a decree of naturalization. It was shown in proof that in the year 1867, in a proceeding before a United States district court in the State of Illinois, Deucatte had declared that he was a French citizen, and in the judgment given by the court he was so described. It did not appear, however, that the court had knowledge of the declaration made by Deucatte in 1848 of his intention to become a citizen of the United States, nor did it appear that the attention of the court was called to the Code of France, by which it is declared that the nationality of a French citizen is lost by residence abroad, '*sans esprit de retour*.'"

The majority of the commission, Baron de Arinos and Commissioner Aldis, gave an opinion, in which they said:

"Under the third provision of the Civil Code—that French citizenship shall be lost by an establishment in a foreign country without an intent to return (*sans esprit de retour*)—we have frequently decided that the declaration of an intention to become an American citizen, accompanied by such facts as

are proven in this case, are full and satisfactory proof of the loss of French citizenship. In consistency with these decisions, we find that the claimant is not a French citizen, and are therefore obliged to disallow the claim."

The French commissioner, M. Lefavre, dissented from the conclusions of the majority, saying:

"In my opinion, the declaration of the claimant of his intention to become an American citizen, made in 1848, was only the first step in the process of naturalization, and this intention was never carried out. First, we find the claimant in 1867, in a proceeding before the United States district court in Illinois, declaring himself to be a French citizen, and the judgment of that court so characterizing him. It was not necessary, in order to give jurisdiction to the court, that the claimant should declare himself a French citizen. Therefore, there is no reason to doubt the truth of the declaration and the correctness of the finding of the court."

"Moreover, there is no proof that the claimant ever voted or held office in this country, and numerous witnesses testify to his French citizenship and his expressed intention to return to France. He must, therefore, be considered as having retained his French citizenship."

10. IMPEACHMENT OF NATURALIZATION.

Case of Medina. The firm of Crisanto Medina & Sons, composed of "Crisanto Medina, Perfecto Medina, and Crisanto Medina, jr.," presented, as naturalized citizens of the United States, a claim against Costa Rica to the commission under the convention between the two countries of July 2, 1860. Perfecto Medina, son of Crisanto, sr., was the first of the three that was naturalized, but he had no interest in the firm when the claim arose. Crisanto Medina, sr., was naturalized by the court of common pleas of the city of New York, December 31, 1859. He made his declaration of intention in 1856, and immediately afterward went to Costa Rica, where he remained till the end of 1859 as a sort of financial agent of that government and as consul of Ecuador. His naturalization was attacked before the commission on the ground that it was not granted in accordance with law. His counsel, Messrs. Caleb Cushing and Ch. Eames, contended that the decree of naturalization was final and conclusive. They argued that such decrees in the United States were judicial, not "ministerial" acts; and that, as judicial acts, involving a construction of the laws of the United States, they were to be received

as containing a sound construction of the law, as well in Costa Rica as in the United States. They said:

"But it is unnecessary to discuss here that general subject. For, if this commission could be induced to regard the present as a question of the effect, so far as regards Costa Rica, of a foreign judgment, it will suffice to say that the present is a particular question free from the embarrassments of the general one, since, in according credit to foreign judicial proceedings which determine the *status* of persons (of which class of adjudication is the present matter), the jurists of Latin Europe go further than those of Great Britain and the United States. (See Boullenois, *Traité de la Personnalité*, tom. 1, p. 602.) And even such continental authors as deny all international force to judgments in general, yet accord it to judgments fixing the status of persons. (Ibid., p. 603.)

"Regarding the question as a domestic one of purely judicial character, in which light we have thus far considered it, we might concede, for the argument's sake, that in some possible form, by some possible party, a certificate of naturalization imprudently granted by the court, as, for instance, without the previous declaration of intention having been made, might be vacated in and by the same court. The government of Costa Rica might have the same right as a private person, perhaps, to appear in the courts of the United States, and might, perhaps, if so disposed, attack the naturalization of Crisanto Medina in the court of common pleas of the city of New York, or that of Perfecto and of Crisanto, jr., in the district court of Massachusetts. (See *Richards v. McDaniel*, Nott & McCord's Rep., vol. 2, p. 351.)

"But the Government of Costa Rica can not do that collaterally, and before this commission. Here, the Medinas are citizens of the United States by decrees of competent courts, the records of which in due form are before the commission. Those decrees, thus evidenced in due form, are final and conclusive here, both in pursuance of general principles of jurisprudence and of the particular principles established in this class of cases.

"We suggest a further consideration, of a larger and higher nature, appertaining to the public law and to the political relations of the two governments.

"Without discussing the international question of the general effect of a foreign judgment, and passing by now all judicial questions, we suggest that a political question is involved, which overrides the judicial questions, and absolutely precludes all controversy here as to the political status of the Medinas.

"We affirm that every government has the sovereign right to determine in what way persons may become naturalized citizens, and its determination of the matter of form is conclusive, and the application of those forms to a given person or persons is unassailable, except, perhaps, by the government to which such person or persons owed previous allegiance. And if one government wrongfully naturalizes the subject of another, that is a public wrong, to be dealt with diplomatically by the government wronged; it can not be attacked collaterally in the country of the alleged wrongful naturalization, even by the wronged government.

"But Costa Rica has no such right of reclamation against the United States' naturalization of Crisanto Medina, previously the subject of the Argentine Republic, or of Perfecto and Crisanto, jr., previously the subjects of Nicaragua. As to Costa Rica, at any rate, if not as to the Argentine Republic and that of Nicaragua, the Medinas are to be deemed to have been naturalized here in the forms required by the sovereign law; that naturalization is the act of national sovereignty; as such it is valid, final, and incontrovertible here as against Costa Rica. If Costa Rica be aggrieved by this, her only remedy is by diplomatic complaint to the Government of the United States."

On the part of Costa Rica, Mr. James Mandeville Carlisle, as counsel for that government, replied. That judgments of naturalization were final and conclusive, as the acts of courts of competent jurisdiction, Mr. Carlisle said that he did not, "as a general proposition of the municipal law of the United States," deny. But was the act of naturalization "conclusive on all the world in all cases?" The authorities produced by counsel for claimants to prove this proposition were, said Mr. Carlisle, either cases of "unmixed municipal judgment," or cases "where nothing appeared in the record, or by the act of the party, to show either want of jurisdiction or fraud." In the case at bar two elements existed, either of which deprived those cases of all applicability. First, the commission was "a tribunal deriving its jurisdiction not alone from the United States, but in equal degree from another sovereign power—the Republic of Costa Rica." "The convention," continued Mr. Carlisle, "which is its charter, obliges it to inquire into and determine, amongst other things, the citizenship of the claimants. And although the proceedings of a court of the United States, or of either of the States, are undoubtedly evidence here, and very weighty evidence, upon this question—not to be lightly overruled—it does not follow that they constitute full proof. They are evidence, not proof. The courts of the United States, and of the several States, proceeding upon the applications of aliens to be naturalized, are not international courts. They act in a purely municipal character, and for merely municipal ends. It can not be said that they adjudicate *in rem*, at least for any other than municipal purposes, if indeed it be adjudication at all."

Mr. Carlisle then referred to the *ex parte* character of the proceeding and argued that it was "repugnant to common reason that the success of a party in procuring a judicial order concerning only his own condition and interests, and where,

neither in form nor substance, could there be any *litis contestatio*, should absolutely foreclose all the world." The most, said Mr. Carlisle, that could be claimed for decrees of naturalization, admitting them to be judgments, was that, as to Costa Rica, they stood on the footing of foreign judgments. But foreign judgments were conclusive only in certain cases. "Judgments *in rem*," continued Mr. Carlisle, "without doubt have a more extended influence in jurisprudence than other judgments; and a judgment upon the status of a person is, in certain cases, regarded as a judgment *in rem*. But it is submitted that no case can be found of such a judgment admitted to any quality of the *res judicata*, where there was not a *contestatio*, either in form or substance."

But, in the second place, Mr. Carlisle argued that it was always competent to impeach a judgment, whether foreign or domestic, for fraud. The naturalization of Crisanto Medina was, he contended, an imposition and a fraud. If the facts in regard to him had been placed before the court, his application would undoubtedly have been rejected. Upon such a state of facts the court had no jurisdiction to grant him naturalization. "The suppression of these facts," said Mr. Carlisle, "amounts to fraud, invalidating the act of naturalization if wilfully done, and if ignorantly done he has now himself, in this cause here pending, furnished the evidence that the court had no jurisdiction to make him a citizen. Upon either ground the act of naturalization is void."

Mr. Carlisle then referred to the statutes requiring continuous residence within the United States during the five years preceding naturalization, which was intended to be a period of probation, "to familiarize the candidate with the constitution of the country, and to acquaint him with the duties of a citizen on the one hand, and on the other to subject him to a sort of test of fitness for the new condition." Under the circumstances Mr. Carlisle contended that a fraud must have been practiced, either intentionally or ignorantly, upon the court which granted the certificate of naturalization.

The umpire, the Commander Bertinatti, rendered, December 31, 1862, the following decision:

"This claim comes before me first on the preliminary objection by which the claimants are denied the quality of citizens of the United States. They admit that they are not native-born citizens, but allege to have been naturalized, and present the naturalization papers as evidence which can not be controverted.

"The circumstance that naturalization in the United States is granted by a general law of Congress to all who prove before certain courts that they have complied with the conditions of the same law, has led the claimants to regard the record of the declaration of naturalization as a real sentence, namely, the act of a court endowed with power to judge between contending parties—*contentiosa jurisdictio*—judging in the last resort, and having special jurisdiction to decide a question of *status* when it is raised, to which sentence, thus considered as definitive, may properly be applied the well-known principle, *res judicata pro veritate habetur*, in regard to those who were parties to the judgment.

"If this principle should be applied to the present case, it would lead to erroneous consequences. The judgments given in the United States are not binding in Costa Rica, without being declared executable there according to a treaty, in the manner prescribed by the same. A declaration of naturalization, even if it were a definitive sentence, could not claim a particular privilege of being admitted there as an absolute truth, though its intrinsic falsity might be evident.

"An act of naturalization be it made by a judge *ex parte* in the exercise of his *voluntario jurisdictio*, or be it the result of a decree of a king bearing an administrative character; in either case its value, on the point of evidence, before an international commission, can only be that of an element of proof, subject to be examined according to the principle—*locus regit actum*, both intrinsically and extrinsically, in order to be admitted or rejected according to the general principles in such a matter.

"To attack such an act because obtained by *obseptio* as it has been alleged by Costa Rica, showing that truth was concealed and falsity alleged, in order to evade the law of the United States, far from being an offense against their territorial sovereignty, denying it the power of giving naturalization to foreigners, is on the contrary an homage to the same sovereignty; because it could never be the intention of the legislator, either in a kingdom or in a republic, that his laws may be violated or evaded with impunity.

"Moreover, the question in this case is not as to the right of the United States to naturalize a foreigner, though he may not have complied with the conditions prescribed by their law. The claimants have alleged to have been naturalized by complying with said law; and they must prove their allegation to the commission which is to judge, first of their quality of citizens of the United States, and afterward of their claim.

"The certificates exhibited by them being made in due form, have for themselves the presumption of truth; but when it becomes evident that the statements therein contained are incorrect, the presumption of truth must yield to truth itself.

"It has been alleged in behalf of the claimants that even admitting that their acts of naturalization are intrinsically void, it is not in the power of this commission to reject them as proof,

if they are not first set aside as fraudulent by the same tribunal from which they were obtained.

"To admit this would give those certificates in a foreign land or before an international tribunal an absolute value which they have not in the United States, where they may eventually be set aside, while Costa Rica, not recognizing the jurisdiction of any tribunal in the United States, would be left with no remedy. Moreover, this commission would be placed in an inferior position, and denied a faculty which is said to belong to a tribunal in the United States.

"If we examine this question with a view to the law of the United States, and if in the matter under consideration we establish a contrast between the powers of a tribunal of one of the States and the powers of the federal constitution, of treaties and of other acts which the executive can make in virtue of his faculty of treating with foreign nations, and so also with the powers of this joint commission, which precisely is the result of the exercise of that faculty, there can be no doubt as to which of the two shall be the supreme law of the land.

"Consequently this commission judges according to truth and justice, and can not be prevented from examining the intrinsic value of an act exhibited as evidence by any limitation or extrinsic objection arising from a matter of form established by the municipal law of the United States. The claimants having chosen to place themselves under the jurisdiction of this commission, must bring before it proofs which are really true and not merely considered so by a fiction introduced by the municipal law of the United States.

"Now, the proofs offered by Costa Rica and the admission made by the claimants themselves have established that the two sons were *minors* and could have been naturalized only by the naturalization of their father, Crisanto Medina; but when he received his certificate of naturalization from the court of common pleas of New York in 1859, he had not been a resident of the United States for the term of five years, which the law requires as a period of probation and a proof of a determined and constant intention to become a bona fide citizen of the United States.

"The residence of a man," says Hon. Judge Daly, "is the place where he abides with his family, or abides himself, making it the chief seat of his affairs and interests." Now, the residence of Crisanto Medina for many years previous to 1856 had been, no doubt, at Costa Rica, where he abode with his family and made it the seat of his business. During that year he visited New York, declared there his intention to become a citizen of the United States, and immediately went back to Costa Rica, where he continued to abide and to have the seat of his business. Moreover, he engaged there in business requiring his presence for many years to come, and accepted the office of consul resident for Ecuador.

"Three years after that declaration the said claimant made

another visit to New York, took out his naturalization papers and went back to reside in Costa Rica. That he left or did not leave his family in New York or in any other part of the United States during those three years between 1856 and 1859 is immaterial. In fact, he did not reside in the United States either five years or three years; nor even one year in the State of New York. Had this been represented to Hon. Judge Daly, he could not have granted the certificate of naturalization; and should the case be legally brought now before that learned judge he could not hesitate a moment to set aside that certificate. * * *

"In conclusion, my opinion is that the claimants have no standing before this commission, and therefore, without prejudice to their rights and actions against the Government of Costa Rica, to be asserted before the ordinary tribunals, I hereby dismiss their demand."

"In the case of *M. J. de Lizardi v. Mexico*,
Case of Lizardi. No. 146, it is claimed that Mr. Lizardi was a naturalized citizen of the United States, and a certificate is produced showing that he was admitted as a citizen on the 25th of March 1833.

"But it appears that Lizardi arrived in the United States for the first time on the 13th of August 1829. The certificate states that he arrived on that day in Louisiana, but the court was not bound to know that it was the first time he had set foot in the United States.

"It must be concluded that, as Lizardi clearly could not have resided in the United States for five years, which is the term required by the act of Congress of April 14, 1802 (vide United States Revised Statutes, section 2165), when he was admitted as a citizen on March 25, 1833, the court must have been deceived by the witnesses Antonio Maria Pintado and Edmund J. Fortsall, who are said to have proved the intention to become a citizen and the residence to the satisfaction of the court.

"They could only have done so by false swearing, and the umpire is of the opinion that Mr. Lizardi cannot take advantage of such false swearing nor be considered a citizen of the United States. The court believed that he had resided in the United States for five years and admitted him as a citizen; but the court was deceived by a false oath, and the umpire must consider the certificate as null and void."

Thornton, umpire; convention between the United States and Mexico of July 4, 1868, MS. Op. VII. 380.

The property of the claimant in Cuba was **Case of Delgado.** embargoed in 1869. He was a native of that island, but on November 5, 1866, he was naturalized as a citizen of the United States. The Marquis de Potestad, arbitrator for Spain, maintained that he was not entitled to assert a claim as a citizen of the United States, for the following reasons:

"Delgado was naturalized on the 5th of November 1866; the five years, therefore, begin at the same date and month of the year 1861.

"The evidence shows that from September 1861 until the end of July 1863—that is to say, consecutively, *for one year and ten months out of the five years*—Delgado resided at Havana, and that during every subsequent year of the five he appears at all times and seasons either at Havana or some other point of the Island of Cuba.

"It is said that Delgado owned a house and other property in the city of New York, thereby seeking to establish the fact of residence—continued residence. But he owned various houses in Havana, and far the greater portion of his property. Besides, if the law could be satisfied with the mere possession of property, accompanied perhaps with occasional personal residence therein, a man having the means and the inclination might acquire citizenship in various countries at the same time, which is absurd. * * *

"A man can not reside in two different places at the same time. To say nothing of his various residences at *every season of every one of the five years next preceding* his admission, *which is a matter of fact*, it is also a *matter of fact* that Delgado resided *uninterruptedly* for the *almost entire first two years* out of the five in the city of Havana; that he had his family there; several houses besides the one he occupied himself; his pictures, his books, his plate, his carriages, and his horses.

"Under such circumstances, and unless the law is to be estimated in the light of a vain and empty formula, I do not think it can be successfully maintained that this claimant has acquired his naturalization as an American citizen in fair and honest compliance with any one of the laws of the United States since 1795 to the present date.

"The possession of a certificate of citizenship is not in itself conclusive evidence of its having been obtained in due compliance with the exigencies of the law.

"In December 1865 Mr. Riotte, then minister from the United States to Costa Rica, reported to Mr. Seward that 'Young men from this republic go to the United States, remain there for a short time, obtain, by means of hard swearing and an *inexcusable laxity on the part of the court*, letters of naturalization, upon which they return for good to their native country, or leave the United States for other parts; and all this for the *sole purpose of making this citizenship a bar against the enforce-*

ment of whatever obligation by their native or any other government.'

"Mr. Riotte shaped his action, in a definite case, in accordance with these views, and his course was approved by Mr. Seward. (Dip. Cor. 1866, vol. 2, p. 430.) * * *

"The true character and operation of these fraudulent naturalizations is thus forcibly described by a prominent statesman of South America:

"Foreign nationality is, in the republics of the South, a *sort of oriental exterritoriality*; all the rights, no duties, sacred inviolability of person, *immunity for property*, and the right to claim heavy indemnities under the slightest pretense. For the subject are all the charges, and for the foreigner, or, more properly, the native born subject naturalized abroad, are all the advantages and all the privileges.'

"Abuses of this sort are, in an international point of view, among the most odious that can possibly arise, and liable to produce the most serious complications.

"So frequent have they been, as reported from almost every country with which the United States have relations, that the attention of Congress has been repeatedly directed by the President toward the necessity of adopting measures for their repression.

"One of the most efficacious methods by which that object could be accomplished would be to search scrupulously the manner in which the process of naturalization has been carried out, and, when ascertained not to have honestly conformed to law, repudiate the pseudo citizen."

Judge Otto, the arbitrator for the United States, expressed the following views:

"The certificate of naturalization was, in due form and by the proper authority, granted to the claimant on said date. If obtained in good faith, it undoubtedly severed the ties which bound him to the land of his birth, and conferred upon him the rights and privileges of a citizen. It therefore entitles him to the protection of the United States as fully as if he had been within their jurisdiction. By the laws of both countries it operated upon his international status, and divested him of the nationality of his origin. The Spanish constitution of May 23, 1845, expressly declares that the quality of a Spaniard is lost by naturalization in a foreign country. The convention of February 12, 1871, under which this commission was organized, denies jurisdiction over a claim of this description only under certain circumstances which do not exist in the present case. The diplomatic correspondence which resulted in the convention, as well as the text of that instrument, renders it clear that the claim of an American citizen of Spanish origin, which does not fall within the excepted class, may be adjudicated and allowed to the same extent and with like effect as if he were a natural-born citizen.

"The learned counsel of Spain, while insisting that the claimant 'has never released himself from his allegiance to Spain,' and 'that it does not rest with individuals to renounce at their pleasure their natural allegiance,' makes no question that naturalization in good faith and not afterward lost or waived entitles a claimant to the jurisdiction of the commission. I have carefully examined all the proofs, and they fail to satisfy me that the claimant acted in bad faith in obtaining his naturalization, or that he subsequently waived or lost it. He is therefore a citizen of the United States within the meaning of the convention."

The arbitrators thus differing in opinion, the umpire rendered the following decision :

"1. That the claimant has been naturalized an American citizen, according to the laws of the United States; that the judge who ordered him to be admitted a citizen of the United States was, as it has been decided in many cases by the Supreme Court of the United States, the competent authority to decide if the claimant had sufficiently complied with the law which prescribes a continued residence of five years in the United States before having a right to obtain the naturalization; that there is no evidence nor charge of the naturalization having been obtained by fraud; that the claimant has not lost the American citizenship which he has obtained by naturalization; that, therefore, he has a right to be heard by the commission.

"2. That the property of the claimant, in the Island of Cuba, having been seized by the Spanish authorities in violation of the treaty stipulations, he has a right to recover damages to the amount of \$113,360; and, as it appears from the papers laid before the commission, that it is not before the 5th of May 1869 that the Spanish authorities were informed that the claimant had become an American citizen, it is my opinion that the claimant has a right to interest at the rate of 8 per cent upon the sum of \$113,360 only from the 5th of May 1869 to date."

M. Bartholdi, umpire; case of *Joaquin M. Delgado*, No. 31, Span. Com. (1871), February 24, 1875.

The claimant was naturalized at New Orleans on October 28, 1852, on the strength of evidence produced to the court that he arrived in the United States in 1838, when he was a minor under the age of 18 years, and that he had resided in the United States during the term of five years immediately preceding his admission to citizenship. By the act of Congress of April 14, 1802 (2 Stats. at L. 153), it was provided that an alien, in order that he might be admitted to citizenship, must have "declared on oath * * * three years at least before his

admission, that it was *bona fide* his intention to become a citizen of the United States," etc. By the act of May 26, 1824 (4 Stats. at L. 69), such a prior declaration of intention was dispensed with in the case of an alien, being a minor under the age of 21 years, who should have resided in the United States *three years next preceding his arrival at the age of 21 years*, and who should have continued to reside therein up to the time of his naturalization, provided that he should, at the time of his admission to citizenship, have arrived at the age of 21 years and have resided five years in the United States. The claimant was naturalized under this statute, without having made a prior declaration of intention. It appeared, however, by the evidence before the commission, including the admissions of the claimant himself, who was a native of Cuba, that he did not arrive in the United States till 1845 or 1846, when he was about twenty years of age, so that he did not reside in the United States "three years next preceding his arrival at the age of 21 years."

The arbitrators differing in opinion as to the question of citizenship, M. Bartholdi, the umpire, held that, as the declarations of the claimant clearly showed "that he was not naturalized according to the laws of the United States," the claim must be dismissed.

Case of José Maria Ortega, No. 91, Span. Com. (1871), October 30, 1875.

In respect to the two preceding cases, the following observations may be made: In the *Case of Dominguez*, following observations may be made: In the case of Delgado, No. 31, M. Bartholdi declined to inquire into the validity of the claimant's naturalization, it appearing that he came to the United States five years or more before his admission to citizenship, though it was denied that he resided there for five years uninterruptedly. In the case of Ortega, No. 91, however, it appearing by the claimant's own statements that he came to the United States at about the age of 20 years, and consequently that he could not have resided there for the three years preceding his majority, as required by the law under which he was admitted to citizenship, M. Bartholdi held that his naturalization was invalid, since it was not in accordance with the laws of the United States. This decision involved a denial of the position of the advocate for the United States, that the judgment of naturalization must be accepted by the commission as final; and it may be distinguished from the decision in the case of Delgado

by the fact that in the latter case the claimant came to the United States five years before his naturalization. Under the circumstances, compliance with the laws was not necessarily an impossibility, and, in the absence of any charge that fraud was practiced on the court, M. Bartholdi held that the judge who admitted the claimant to citizenship was the "competent authority" to determine whether he had "sufficiently complied" with the requirement of "a continued residence of five years in the United States."

On the 7th of March 1879 Mr. Durant, the advocate for the United States, addressed a letter to the Secretary of State in relation to the claim advanced by the advocate for Spain "to go behind the judgment of naturalization * * * to show that the courts mistook the facts and misjudged the law." This letter had reference to the case of Fernando Dominguez, No. 32, which was then pending before the umpire, and Mr. Durant inquired whether there was anything in the diplomatic records that "could properly be brought to the attention of the umpire to aid him in forming a correct judgment." The umpire at this time was Baron Blanc, M. Bartholdi having resigned the position on the termination of his functions as French minister at Washington.

On the 7th of March 1879 the Department of State replied that, so far as the intent of the two governments was of record as defining the powers of the commission on the point at issue, it was found in the note addressed by General Sickles to Mr. Martos, Spanish minister of state, on January 8, 1871, in which the former said:

"Naturalized citizens of the United States will, if insisted upon by Spain, be required to show when and where they were naturalized; and it will be open to Spain to traverse this fact or to show that, from any causes named in the circular of the Department of State of the United States of October 14, 1869, the applicant has forfeited his acquired rights."

The letter of the Secretary of State then proceeds:

"This declaration of General Sickles follows the language used in the instructions sent him by Mr. Fish on the 18th of November 1870; and, being acceptable to Mr. Martos, the Spanish minister of state, became the basis of the corresponding clause of Article V. of the memorandum of February 12, 1871, from which the commission draws its powers.¹ * * * I may

¹ See *supra* 2562, where the negotiations preceding as well as following General Sickles's note to Mr. Martos of January 8, 1871, are reviewed.

properly add that this department is of opinion that the powers of the commission for the determination of the disputed cases of citizenship, which may arise before it, is not in any manner judicial. The advocate for Spain may traverse the fact of naturalization, when it is incumbent upon the claimant to show when and where he was naturalized. Those facts being shown by judicial proof, and it being established that the party has done nothing since to forfeit his acquired right, the limit of the discretionary power would seem to be reached. The commission does not appear to have other powers than those derived from the respective departments of state of the two countries, of whose functions it is the joint delegate; and it is certainly not competent for the Department of State, either by itself or through its delegated authority in the commission, to go behind the judicial decision of a court of law, such as is a certificate of naturalization.

"These conclusions are borne out by the decision of the late M. Bartholdi."

Whether this letter was brought to the notice of Baron Blanc does not appear. Probably it was not, as it was not filed with the commission. But on the 16th of April 1879 Baron Blanc rendered in the case of Dominguez, No. 32, the following decision:

"In the case of *Fernando Dominguez v. Spain*, referred by the arbitrators to the umpire of the American and Spanish commission for decision on the subject of the naturalization of the claimant, I adopt the following views:

"The claimant was, on the 17th day of March 1869, naturalized a citizen of the United States by judgment of a competent court.

"In order to traverse, in behalf of Spain, such evidence of naturalization as is furnished by the record of the court, the charge of fraud is set up, based principally on the admitted fact that the claimant had actually spent in the Island of Cuba the greater part of the five years immediately preceding his admission to citizenship.

"It is the duty of the umpire to determine, under the circumstances evidenced by the papers submitted to him by the commission, whether the certificate of naturalization was procured by fraud or was granted in violation of treaty stipulations or of the rules of international law.

"There is no proof or charge that the court was imposed upon by false testimony as to the claimant's absence from the territory of the United States.

"Except in the respect above alluded to, namely, material absence from the country, I fail to find in the case any sufficient evidence against the claimant of such facts as have given to the umpires of this commission a ground to impeach other naturalizations, and going to show a state of things inconsistent with the *bona fide* intention to comply with the laws of the

United States prescribing the manner in which citizenship may be acquired, there being especially no adequate proof that the offices which the claimant held in Cuba were not open to foreigners, nor that he escaped the duties and burdens of two nationalities for the purpose of plotting against one of them.

"On the other hand, in aid of the presumption in his favor, stand the concomitant circumstances that he actually arrived in the United States at the time of his declaration of intention to become an American citizen, which declaration was made on the 16th of October 1851; that he then established a domicile in New York, which domicile, considered in relation with that declaration, constitutes a legal residence; that he went into business in the same city and continued there for nearly four years; that after a successive absence, which, however protracted, may be considered insufficient of itself to work a change of legal residence, so long as the intention of returning was not excluded by positive evidence, he again settled with his family in New York, where he was present in court when the judgment of naturalization was rendered. It is attested by the papers of the case that he is still now residing in that city.

"There is no evidence to sustain the vague suspicion intimated of fraudulent acts with reference to the proceedings of this particular case, although Presidential messages have been quoted by the representatives of Spain in this commission, in which such occurrences appear to have been denounced to Congress with a view to contemplated legislative reform. Nor is there any evidence in this particular case of such 'loose and corrupt practices' as are acknowledged by the arbitrator for the United States to have vitiated other records of naturalization. Thus, no such circumstances have been proved in reference to the record in question as might eventually, in the light of international law or jurisprudence, furnish grounds for a charge of collusion or of neglect of those precautions which the universal principles of justice render necessary.

"Finally, neither the authorities on public law nor the agreements between Spain and the United States afford any unquestioned and controlling definition of what constitutes in fact the lawful residence with presumable *animo manendi*, and, when absence intervenes, with presumable *animo revertendi*, such as would justify or empower the umpire to overrule, by force of treaties or of the laws of nations, the construction placed by a court of competent jurisdiction upon the municipal law as to the required residence in the United States for the next continued term of five years preceding the admission to American citizenship.

"Therefore the construction thus given, however broad it may be deemed, must be followed so long as it is unimpeached and unreversed by an American tribunal of superior jurisdiction. The tribunals of the United States are the sole interpreters of the laws of the country, and it is not the privilege

of the umpire to review their adjudications as to the requirements of these laws.

"It does not appear essential to consider the subsidiary question as to what force is to be given to the formal recognition of the American citizenship of the claimant by the decree of the ultramarine department at Madrid of November 23, 1873, and by the accompanying directions of the proper authorities in Cuba. The umpire cannot, in my opinion, entertain the claim that a certificate of naturalization may be sufficient to invest the individual with rights of citizenship as regards the country of adoption, and yet not be effectual as to the country of origin. In the absence of any restrictive treaty enforcing resolution of such undesirable conflicts about private international law, the full effect intended by the government granting a certificate of naturalization must be given to it by the umpire, inasmuch as such naturalization is not impeached for fraud or for violation of public international law.

"My conclusion is that the claimant has a standing before the American and Spanish Commission as a naturalized American citizen."¹

On June 7, 1879, the arbitrators, in accordance with this decision, awarded the claimant the sum of \$604.48 in gold coin of the United States, which they increased on the 4th of October to the sum of \$1,500.

On the 3d of May 1879 the Marquis de Potestad entered the following protest:

"At the meeting of the commission, held on the 19th ultimo, the decision of the umpire was announced in the case of Fernando Dominguez, whose claim against Spain is inscribed under No. 32.

"Whilst not intending to criticise that decision, in so far as it rests on the merits of the case, there are, nevertheless, two propositions laid down in said decision, which, if they were to be established as precedents, would, in the opinion of the undersigned, deprive Spain of one of the principal reservations made in her behalf by the convention of February 1871.

"The propositions alluded to are:

"Therefore, the construction thus given, however broad it may be deemed, must be followed so long as it is unimpeached and unreversed by an *American tribunal of superior jurisdiction*. The tribunals of the United States are the *sole interpreters of the laws of the country*, and it is not the privilege of the umpire to review their adjudications as to the requirements of these laws. * * *

"The umpire can not, in my opinion, entertain the claim that a certificate of naturalization may be sufficient to invest

¹Case of Fernando Dominguez, No. 32, Span. Com. (1871), April 16, 1879, 5627—Vol. 3—30

the individual with rights of citizenship as regards the country of adoption, and yet not be effectual as to the country of origin. In the absence of any restrictive treaty enforcing resolutions of such undesirable conflict about private international law, *the full effect intended by the government granting the certificate of naturalization must be given to it by the umpire, inasmuch as such naturalization is not impeachable for fraud or for violation of public international law.*¹

"It would be a breach of the proprieties that govern the relations between the arbitrators in a commission like this one and the umpire for the undersigned to attempt an argument on any one point that may be embraced or conveyed in a judgment of the latter; he will therefore confine himself to making the following statements:

"It is the belief of the undersigned that the convention in virtue whereof this tribunal deliberates grants to Spain, with all its logical and necessary consequences, the right to review the adjudications of the courts of the United States in the matter of granting certificates of naturalization, and that such certificates, whilst they may be held as valid for every purpose in the United States, are not, from the mere fact of their existence, conclusive upon Spain.

"It is the belief of the undersigned that the above-mentioned right and privilege constitutes *one of the bases* of the convention of February 1871, *in accordance with which* all claims are to be considered.

"Every judgment given within the bases established by the convention must be beyond question or criticism.

"But none of the bases themselves can be set aside by the members of this commission.

"Now, therefore, inasmuch as it is the firm conviction of the undersigned that in the following out practically of either of the two propositions that have been recited serious damage would be done to Spain by setting aside one of the most important safeguards established in her behalf by the convention of February 1871, the undersigned deems it his duty to declare that he can not agree to have any case referred to the umpire wherein a question of citizenship may be involved, until he shall have referred the matter to the Government of Spain, who shall determine, together with the other high contracting party—the Government of the United States—the exact reach and scope of the right conceded to Spain to *traverse* an allegation of American citizenship."¹

Views of Mr. Evarts. As the result of the course taken by the arbitrator for Spain, the reference to the umpire of the following cases, in which the question of naturalization was involved, was suspended: Felix Govin y Pinto, No. 9; José García Angarica, No. 17; Pedro David Buzzi, No. 22;

¹ S. Ex. Doc. 86, 46 Cong. 2 sess.

Antonio Maximo Mora, No. 48; Magdalena Farres de Mora, No. 49; Fausto Mora, No. 50; José M. Macias, No. 52.

On the 9th of February 1880 the Spanish minister at Washington brought the protest of the Marquis de Potestad to the attention of the Secretary of State, Mr. Evarts, who replied on the 4th of March.

In this reply Mr. Evarts said that he saw no reason to "seek, by any new definition of its powers, either to restrict the functions or diminish the authority of the commission of arbitration." The Government of the United States had, said Mr. Evarts, from the first considered, as it still maintained, that the commission established under the convention of 1871 was "an independent judicial tribunal possessed of all the powers and endowed with all the properties which should distinguish a court of high international jurisdiction, alike competent, in the jurisdiction conferred upon it, to bring under judgment the decisions of the local courts of both nations, and beyond the competence of either government to interfere with, direct, or obstruct its deliberations." In this view, the United States had, said Mr. Evarts, felt bound, in accordance with the stipulations of the seventh article of the agreement, to "accept the awards made in the several cases submitted to the said arbitration as final and conclusive." In no case had the right been denied to Spain to traverse the allegation of American citizenship, and to "support such denial on the part of Spain by admissible evidence going to show that the proofs adduced in maintenance of the claimant's demand to be considered citizens of the United States were on their face inadmissible, or that they were unworthy of credit because of a taint of fraud in the proceedings of naturalization from which the documents emanated, or that, taken together, such proofs were insufficient to establish the demand of American citizenship put forth by this government on behalf of the claimant." Mr. Evarts continued:

"If, therefore, the decision of the umpire on the question of Dominguez' acquired American citizenship had been otherwise than it was; had it, in other words, been declared by the umpire that Mr. Dominguez had never in fact acquired American citizenship, or having acquired such citizenship had subsequently renounced it, the United States would have felt equally bound to accept such decision of the umpire as the final and conclusive determination of the question by the commission. * * * It becomes in this view of the authority of

the tribunal to fix, not only the general scope of evidence and argument it will entertain in the discussion both of the merits of each claim and of the claimant's American citizenship, but to pass upon every offer of evidence bearing upon either issue that may be made before it, entirely unnecessary, and therefore entirely unsuitable, for me to enter upon any discussion of either the jurisprudence that should govern the decisions of the tribunal, or of the reach of the jurisdiction accorded by the convention of 1871. All these topics are to be judicially treated and judicially decided by the tribunal, and the two governments are to accept the 'awards made in the several cases submitted to the said arbitration as final and conclusive, and will give full effect to the same,' as expressed in the seventh article of the convention. * * * I sincerely hope that the views I have had the honor to submit to you may satisfy you that the contention on the citizenship of the claimants, dependent upon naturalization, is as fully a question of judicial determination for the tribunal in respect to the admissibility of evidence, its relevancy and its weight, and in respect to the rules of jurisprudence by which it is to be determined, as any other question in controversy in the cases. * * * The conclusions which I have formed upon this subject result in the expectation that the rights secured by the convention to claimants whose cases have been laid before the tribunal by this government will no longer be delayed or interrupted in their presentation by the obstruction interposed by the Spanish arbitrator to their due course of consideration and determination as prescribed by the convention."

On the 17th of March the Spanish minister
Resignation of Baron addressed another note to Mr. Evarts, in which
Blanc.

he said that, as the two governments were in agreement on essential points, he hoped they would come to an understanding as to the "means of a better and more complete observance of the terms and of the spirit" of the convention of 1871, as soon as he had received the instructions of the Spanish Government. While the matter was thus pending, Baron Blanc, on the 27th of April 1880, being on the point of leaving the United States for an indefinite absence, resigned.

On the 4th day of May the Spanish minister addressed a note to Mr. Evarts, in which he said that, as he was about to make a further reply to the latter's note of the 4th of March, in pursuance of instructions received from his government, he was informed of the resignation of Baron Blanc. The minister then said:

"The undersigned being always desirous of avoiding all unnecessary discussion, considers that, as that which was begun by his note of the 9th of February last had for its principal

object the combatting of the mistaken view of Baron Blanc, who believed himself incompetent to decide in regard to the decrees of the local tribunals of both countries, with the resignation of his charge by that gentleman, disappears the necessity of continuing this correspondence, since indeed there is demonstrated by the contents of the note already referred to and that of the Hon. Secretary of State of the 4th of March, the perfect conformity which exists between the views of the Government of the United States and that of His Majesty the King, in regard to the special character of the commission of arbitration, and in regard to the attributes which were conceded to it by the convention of 1871, placing it in a certain manner above and beyond the reach of the tribunals of either country. As this conformity is a sufficient guaranty that all the rights which both governments propose to protect by that convention will remain intact, the commission of arbitration may continue its labors without any interruption so soon as the Hon. Secretary of State shall have the goodness to name a successor to the respectable and illustrious Mr. Segar,¹ in order that both arbitrators being agreed, they can designate the person who shall succeed Baron Blanc."

Count Lewenhaupt
as Umpire. On May 27, 1880, Count Carl Lewenhaupt succeeded Baron Blanc as umpire. In due time the contested cases involving the question of naturalization were certified to the new umpire, and an elaborate discussion of the principles of citizenship ensued.

Mr. McPherson's
Argument. On September 5, 1880, Mr. McPherson, the advocate for Spain, submitted to the umpire a printed brief, entitled "In the Matter of the Claims of the Naturalized Cubans," in which he fully set forth his views as to citizenship within the meaning of the agreement of February 12, 1871. In opposition to the doctrine maintained by the advocate for the United States in the case of Dominguez, that a person could have but a single nationality, Mr. McPherson took the ground that there might be a double citizenship, or national character. In support of this view he cited the opinion of Attorney-General Bates (10 Op. 328); Alexander's case (British and Am. Com., 1871); Drummond's case (2 Knapp's P. C. 295); despatch of Mr. Cramp-ton (Report of Royal Commission on Naturalization and Allegiance, 1869, p. 74); opinion of the Attorney-General (13 Op. 90); 2 Kent's Comm. 43; *Inglis v. The Trustees of the Sailors' Snug Harbor* (3 Peter's U. S. 99; *Shanks v. Dupont* (Id. 242); Lawrence's Wheaton (2d Ed. 919); opinion of Attorney-General

¹ Mr. Segar, arbitrator for the United States, died on April 30, 1880.

Cushing (8 Op. 139); For. Rel. 1873, p. 1294; case of Llaño (S. Ex. Doc. 38, 36 Cong. 1 sess. pp. 224, 230); case of Larmarsino (For. Rel. 1878, pp. 458, 462, 474); Steinkauler's case, opinion of Attorney-General Pierrepont (15 Op. 15); circular of the Secretary of State, May 2, 1871 (For. Rel. 1871, p. 24).

On the strength of these authorities Mr. McPherson expressed a confident belief that he had disposed of "the arrogant doctrine that naturalization in the United States puts an end to the rightful jurisdiction of the native sovereign over his subject, when that subject returns to his native land," as well as of the "still more objectionable" doctrine, enunciated by the advocate for the United States in the case of Dominguez, that the judgment of the country of adoption, speaking through its appropriate department, whether executive, legislative, or judicial, as to whether an alien has been admitted to citizenship, was conclusive upon the country of origin as well as upon all other countries.

By the constitution of Spain of 1845, said Mr. McPherson, it was provided that "the quality of Spaniard is lost by acquiring naturalization in a foreign country, and accepting employment from another government without permission of the King." It was contended, on the part of the claimants, that under this provision the naturalization of a Spaniard *ipso facto* terminated his allegiance to his native country. To this contention, Mr. McPherson replied:

"We have seen that naturalization, to discharge a man from his allegiance, must have the consent of the sovereign; and the provision in the constitution of 1845 does not purport to give that consent, but punishes the act done without the King's consent; thus the provision of the constitution of 1845 is penal, and only deprives the man of his civil rights. On this subject, Mr. Abbott, in his observations on expatriation, prepared for the British Government, and laid before Parliament, cited at page 1248 of Foreign Relations of 1873, says: 'There are two conflicting principles of expatriation, the *continental*' (of course, says Mr. McPherson, including Spain) 'which punishes emigration by loss of civil rights, but does not necessarily admit that such emigration can free the emigrant from the obligations of his native nationality; and the *American* doctrine which claims for the subjects of other countries (but does not grant by law to Americans) the right to free expatriation.'

"But this question is set at rest by the royal decree of November, 17, 1852. Article 45 declares:

"The alien who may obtain naturalization in Spain, as well as the Spaniard who may obtain it in the territory of another

power, without the knowledge and authorization of his (respective) government, will not free himself from the obligations which were incident to his primitive nationality, although the subject of Spain loses, in other respects, the quality of Spaniard in accordance with the provision in paragraph 5, Article I. of the Constitution of the Monarchy.

“In consequence of this declaration, when an alien has naturalized himself in Spain, without the authorization of his government, and claims by this means to exempt himself from the obligation of military service, or others which may belong to the country of origin (*patria primitiva*), the Spanish Government will not sustain the exemption; as, in like manner, it will not recognize it in a Spaniard who may allege a change of nationality without having obtained the authorization aforesaid.’ (Coleccion Legislativa de España, 1852, vol. 3, p. 489.)

“It has been objected that this declaration does not apply to Cuba because, by article 41 of the decree of 1852, Cuba is excluded from the operation of that decree.

“The decree of 1852 purports to classify and settle the condition, obligations and rights of aliens; and this being done in forty articles, a new chapter (V), entitled ‘disposiciones generales,’ begins with article 41, which declares ‘that all the dispositions of the present decree are applicable only to the peninsula and the adjacent islands, the dispositions which govern foreigners in the provinces beyond seas remaining in full force and vigor;’ and thereafter follow four other general provisions, the last of which (art. 45) I have quoted.

“The naturalization, which this decree refuses to recognize, is that obtained by a Spaniard ‘in the territory of another power’ and could not be obtained in Spain or Cuba; and it can not be contended that a man born in Cuba is not a Spaniard; hence, whatever may be said as to the application of this decree to Cuba, it can not be contended that the declaration in the 45th article does not apply to Spaniards born in Cuba and naturalized in the United States.

“The objection that this decree does not apply to Cuba proceeds on the *theory* that the naturalization of a Spanish subject, which could not be recognized in Spain, would be recognized in Cuba. A *practical* answer to this *theory* is found in the case of Liano already cited, and in the case of Govin before this commission (No. 9), where the consul-general of the United States at Havana forwards a report upon Govin in which it is distinctly stated that ‘though he may by some means have acquired a nationality in the United States, still, examined from a Spanish point of view, which is the only one which can be admitted here, *his case is comprehended in the royal decree of November 17, 1852, Art. 45.*’

“In Lawrence’s Wheaton (second annotated edition), p. 928, the communication of the captain-general of Cuba, in the case of Liano, setting up the 45th article of the decree of 1852, as in force in Cuba, is cited as illustrating the application of the Spanish law.

"Thus, besides the reason of the thing, we have the authority of the captain-general of Cuba, the consul-general of the United States at Havana, and an eminent American publicist for the application of the 45th article of the decree of 1852, to Cuba and Cubans, while, so far as I know, it has never been decided by any Spanish or other authority that article 45 does not extend to all naturalization obtained abroad and attempted to be made effective in Cuba."

As to the effect of double allegiance on claims, Mr. McPherson referred to Alexander's case (British Com. 1871); Drummond's case (2 Knapp's P. C. 295); case of the *Ann* (For. Rel. 1873, p. 1365); Steinkauler's case (15 Op. 15).

Having thus, as he contended, shown that, independently of any agreement, a native-born subject of Spain could not maintain a claim against the Spanish Government for acts done in the Spanish dominions, notwithstanding that he had been naturalized in the United States, Mr. McPherson proceeded to consider the effect of the agreement of February 12, 1871. This agreement, said Mr. McPherson, was peculiar in specially providing for an examination of the right of claimants to appear before the commission, and in empowering the arbitrators to refuse that right. The history of the insertion of this provision would be found in the volume of Foreign Relations, 1871, pp. 697-774. From the correspondence there published, Mr. McPherson argued that it was the intention of the parties to the agreement of February 12, 1871, while recognizing naturalization in the United States, to exclude from the benefits of the convention all persons "who had been naturalized in the United States without having fulfilled the conditions prescribed by law, or who, having been duly naturalized, voluntarily or involuntarily lost their citizenship."

Mr. McPherson maintained that this understanding was in conformity with the principles of justice and equity as well as with the laws of the United States, and that even if such an understanding had not been expressed, yet the convention ought to be construed in that sense. It was the purpose of the parties to protect *emigrants*, who were described by Vattel as persons "who quit the country from a lawful reason, with the design to settle elsewhere, and take their families and their fortunes with them."¹ It was notorious that the process of naturalization had been abused in the United States, and that many persons not entitled to be naturalized had been admitted

¹ Vattel, B. 1, ch. 19, secs. 220-224.

to citizenship. An investigation lately made by a committee of Congress in New York City had, said Mr. McPherson, shown that a judge had in a single day admitted to citizenship 2,543 persons, which was at the rate of 250 persons an hour, or 1 person in every 15 seconds. Another judge had on the same day naturalized 2,077 persons. It was obvious that a judge could not, under such circumstances, make any inquiry into the cases before him, or hear any evidence as to the qualifications of the applicants for citizenship. In this relation, Mr. McPherson also cited *Foreign Relations*, 1877, p. 246; 1878, p. 233.

Mr. McPherson contended that, in view of such facts as these, as well as of the principle that the effect to be given to foreign judgments was a matter of comity in cases where it was not regulated by treaty, the judgment of naturalization could not be considered as conclusive on the whole world, even if it could be considered as a judicial proceeding.¹

The advocate for the United States, said Mr. McPherson, contended that the rules of evidence which governed tribunals in the United States must govern the commission. The advocate for Spain might argue with equal force that Spanish laws and rules should govern. But, in reality, the commission was an extritorial court, governed by the statutes of neither party. In contemplation of law it sat in Washington no more than in Madrid. To admit the rules of evidence of both countries would only lead to irreconcilable conflicts. The arbitrators could be safe only in acknowledging the guides given by the convention itself, the "public law, the treaties between the two countries, and these present stipulations."²

As to the forfeiture or relinquishment of citizenship, Mr. McPherson referred to a circular of the Secretary of State, of October 14, 1869, which was referred to in a note of Mr. Sickles to Mr. Martos, of January 8, 1871. In this circular, the Secretary of State said:

"Should passports or other protection be asked for such persons (naturalized citizens), it will be the duty of the officer

¹ Kent's Comm. vol. 2, p. 120; Phillimore, *Private Int. Law*, vol. 1, p. 182; Supreme Court of the United States, 6 Cranch, 182; Phillimore's *Int. Law*, vol. 4, pp. 654, 662, 668; Smith's *Leading Cases*, vol. 2, p. 448; *Gaston de Brimont v. Penniman*, 10 Blatchf. C. C. R. 436.

² Wharton's *Conflict of Laws*, secs. 207-208; Circular of the Department of State, May 2, 1871; For. Rel. 1871, p. 24; Annual Message of the President, December 1874; Id. 1875; Id. 1876.

to satisfy himself that they have done nothing to forfeit their acquired rights, for a naturalized citizen may, by returning to his native country and residing there with an evident intent to remain, or by accepting offices there inconsistent with his adopted citizenship, or by concealing for a length of time the fact of his naturalization, and passing himself as a citizen or subject of his native country until occasion may make it his interest to ask the intervention of the country of his adoption, or in other ways which may show an intent to abandon his acquired rights, so far resume his original allegiance as to absolve the government of his adopted country from the obligation to protect him as a citizen while he remains in his native land."

As to the evidence that would establish an intent to remain in Cuba, Mr. McPherson quoted from a letter of Mr. Fish, Secretary of State, in the case of John E. Houard,¹ the following passage:

"A formal act or declaration is not essential to effect the renunciation of the nationality of birth. If Dr. Houard had desired to renounce his nationality of birth, it was not necessary for him to do more than he actually did in quitting the United States, establishing himself permanently in Cuba, and making that island his residence without any declared or fixed intention to return to the United States, and without discharging, during his long residence there, any duty of a citizen of the United States, and appearing ostensibly as a Spanish subject."

Also, from the report of Mr. Webster, Secretary of State, to the President, December 23, 1851, in the case of John S. Thrasher,² a native citizen residing in Cuba, the following passages:

"The general rule of public law is that every person of full age has a right to change his domicile, and it follows that if he removes to another place with the intention of making that his permanent residence or his residence for an indefinite period, it instantly becomes his place of domicile; and this is so notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period. * * * And a person found residing in a foreign country is presumed to be there *animo manendi*, or with the purpose of remaining; and to relieve himself of the character which this presumption fixes upon him, he must show that his residence was only temporary, and accompanied all the while with a fixed and definite intention of returning."

¹ H. Ex. Doc. No. 223, 42 Cong. 2 sess. p. 29.

² 6 Webster's Works, 522-523.

In conclusion, Mr. McPherson said:

"Believing the true construction of the convention to be that which I have here contended for; whenever a claimant born in the Spanish dominions shall offer in proof of his American citizenship a regular and properly attested record of his naturalization in the United States, I shall present to your excellency such evidence as I may be able to obtain, to prove that the claimant did not reside within the United States during the five years preceding the ceremony of his naturalization, but that, on the contrary, he resided during some portion of the time in Cuba. The proof of his residence there will be his personal presence there, his having a home there, his carrying on business there, and generally, if not always, such business as in Spanish law is considered to distinguish a permanent resident; and that he had no such residence or occupation in the United States. If your excellency shall find this evidence sufficient to prove what it is intended to prove, I shall confidently expect an award in favor of Spain rejecting the claim.

"So, too, in every case I shall present to your excellency such evidence as I may be able to obtain to prove that the claimant, after being naturalized in the United States, returned to Cuba and took up his residence there without any declared intention to return, and if I shall show that the residence had the usual indications of permanency, and if the claimant shall not prove his intent to return, I shall confidently expect an award in favor of Spain rejecting the claim.

"So, too, in every case I shall present to your excellency such evidence as I may be able to obtain to prove that the claimant, after being naturalized in the United States, returned to Cuba and resided there, concealing his naturalization and passing himself for a Spanish subject; and if it shall appear that said claimant was guilty of such concealment, I shall confidently expect an award in favor of Spain rejecting the claim.

"The claims of the naturalized Cubans before this commission constitute more than four-fifths of the whole, and are the only claims on account of the embargo of estates. The claims of naturalized citizens of other nativities constitute another and much smaller class, and the claims of native Americans are the least of all. As I have already remarked, no embargo was ever issued against a native American."

The views of Mr. McPherson were answered
 Argument of Mr. Durant. in a printed brief by Mr. Durant, advocate for the United States. Mr. Durant contended that the commission was invested "with no appellate jurisdiction whatever" over judgments of American courts naturalizing aliens. The agreement of February 12, 1871, in

declaring that "the Spanish Government may traverse the allegation of American citizenship, and therefore competent and sufficient proof will be required," meant nothing more than "the right to call for a copy of the judicial act of naturalization." The agreement itself was made exclusively by the executive departments of the two governments, neither of which was authorized to exercise the power of reviewing the decisions of their courts.¹ Moreover, the conclusive character of decrees of American courts admitting aliens to citizenship had been settled by the umpires, M. Bartholdi and Baron Blanc, and their decision was to be considered as definitive.

The naturalization of aliens, said Mr. Durant, was a practice adopted by all civilized nations in modern times. The act by which an alien was made to become a citizen was one of a purely domestic character. No two nations exactly agreed in the manner in which aliens might be naturalized. Each nation in its sovereign capacity determined that question for itself. The mode of naturalizing aliens in Cuba itself was duly prescribed.² The naturalization, therefore, accorded to an inhabitant by one nation must be respected by every other nation.³

The statutes of the United States, said Mr. Durant, prescribed certain conditions of admission to citizenship, and the compliance with those conditions was to be shown "to the satisfaction of the court" by which the alien was admitted to citizenship. What would satisfy the mind of the judge was a question for him, exclusively, to answer. If the claimant should assert a title to land, an international tribunal would have to determine the question of title according to the law of the country where the land was situated. By the law of the United States, anyone who purchased land of the government received as evidence of his ownership an instrument in writing called a patent. This patent was conclusive evidence against the government and all others. Would it not be deemed con-

¹ For. Rel. 1875, vol. 1, pp. 577-579; Williams, Attorney-General, 14 Op. 509; Letter of Mr. Calderon y Collantes, minister of state, to Mr. Cushing, February 9, 1876, saying: "His Majesty, * * * seeing that the Spanish laws do not concede to the executive power the right of annulling sentences made executory," etc.

² Zamora, Biblioteca de legislación ultramarina, artículo "colonización," vol. 2, p. 247.

³ L'Affaire Bauffremont, Journal du Palais, 1876, pp. 981, 986, 988, 989; Journal du Droit Int. Privé, 1876; Calvo, Le Droit Int. (1870), vol. 1, p. 90.

clusive before an international tribunal? In the same way the courts of the United States held that a certificate of naturalization was conclusive, and this view must necessarily be taken by other authorities called to pass upon the question of American citizenship. The decree which changed the status of an individual and converted him from the citizenship of one country to that of another was a judgment *in rem*, and such a judgment was by public law of universal obligation.¹

Mr. Durant argued that under the agreement of 1871 Spain might deny that there existed such a court as that by which a certificate of naturalization purported to have been issued, or might allege that the signature of the clerk or attesting officer or the seal of the court was forged, as occurred in the Mexican commission in the cases of *Naphegyi v. Mexico*, Nos. 399 to 407, inclusive. Such, Mr. Durant contended, was the whole extent of the signification of the words "traverse the allegation of American citizenship," found in the agreement.

Turning to the requirements of the laws of the United States on the subject of naturalization, Mr. Durant discussed the question of residence. The act of Congress of March 3, 1813 (2 Stats. at L. 811), required the applicant for citizenship to have resided continuously in the United States for a term of five years next preceding his naturalization, "without being at any time during the said five years out of the territory of the United States." By the act of June 26, 1848 (9 Stats. at L. 240), this last clause was repealed, and the applicant was permitted to leave the territory without forfeiting his residence. This permission to be absent, said Mr. Durant, was "unrestricted as to cause or duration." "Whether," said Mr. Durant, "the alien be absent for business, or pleasure, or for a longer or shorter time, if the court is satisfied that he went away with the intention of returning, and consequently did not abandon his residence, he may be lawfully naturalized."²

Mr. Durant further contended that the concession to Spain, by the agreement of February 12, 1871, of the right to traverse the allegation of American citizenship did not invest the commission with power to reopen the question of citizenship, where the claimant's quality as an American citizen had been recognized by the Spanish Government.

¹ Story, *Conflict of Laws*, §§ 593, 594.

² In support of this proposition Mr. Durant cited *Mitchell v. United States*, 21 Wallace, 253, which relates to the subject of domicile.

As to the question of the right of a Spanish subject to expatriate himself without the consent of his sovereign, Mr. Durant maintained that the views of the advocate for Spain were untenable, because the royal decree of 1852 was not applicable to the transmarine provinces. But, assuming that the transmarine provinces were not excepted, and that the royal decree of 1852 did forbid a native of Cuba to be naturalized in a foreign country without the consent of his sovereign, it could not affect the present commission, since the agreement of 1871 expressly recognized the naturalization of Spanish subjects in the United States. More than this, the consent of the Spanish sovereign was not required by the laws of the United States, nor could it be deemed a condition of naturalization in any country. As to the position of the United States on the subject of expatriation, Mr. Durant cited the act of Congress of July 27, 1868 (15 Stats. at L. p. 223); Mr. Marcy, Secretary of State (S. Ex. Doc. No. 38, 36 Cong. 1 sess. p. 198); Mr. Cass, Secretary of State (Id. p. 133); Mr. Bancroft, minister to England (Id. p. 159); *Murray v. The Charming Betsey* (2 Cranch, 64, 119); Cicero, Pro Balbo, XI. CXXIII.

With his argument Mr. Durant submitted a memorandum by Mr. J. I. Rodriguez on the naturalization of aliens in Spain, the denaturalization of Spaniards, and the regaining of the Spanish character once lost. In this memorandum it was maintained that Spain had never entertained the doctrine of perpetual allegiance, and that she allowed her subjects to give up at their own pleasure their Spanish nationality and character. The decree of November 17, 1852, requiring the permission of the government for the naturalization of Spanish subjects in foreign countries, was not, it was argued, extended to Cuba. On the various propositions made by him, Mr. Rodriguez cited Eseriche, *Diccionario razonado de Legislacion*, Madrid, 1876, article, "Naturalizacion;" *Boletin de la Revista General de la legislacion y jurisprudencia*, vol. 29, p. 6; *Códigos ó estudios fundamentales sobre el derecho civil Español*, por el Dr. D. Benito Gutierrez Fernandez, Madrid, 1875, vol. 1, p. 210; Zamora, *Biblioteca de Legislacion Ultramarina*, art. "Colonizacion;" Pantoja, *Repertorio de la Jurisprudencia Civil Española*, Apéndice Primero, *Éxtrangero*, and Apéndice Quinto, *Español*.

Argument of Mr.
Morse.

Mr. Durant also submitted with his argument a brief by Mr. Alex. Porter Morse, as special counsel. Mr. Morse maintained that it was the right of every country, under international law, to naturalize aliens in whatever manner it pleased.¹ The doctrine of inalienable allegiance found no support or countenance in the writings of authoritative Spanish publicists.²

The doctrine of double allegiance, noticed by all publicists, was, said Mr. Morse, altogether a different thing from what the advocate for Spain, and writers who fell into a similar error, meant when they used it as synonymous with double citizenship. There was a distinction between local allegiance and natural (permanent) allegiance or political status.³ Allegiance, as defined by Coke, was a "true and faithful obedience of the subject due his sovereign."⁴ The customary law of England anciently distinguished between natural and local allegiance. Under this law the rule as to natural allegiance was expressed by the maxim, *Nemo patriam in qua natus est exuere nec legeantio debitum ejurare possit*. This maxim, which was of feudal origin, never was countenanced by civilians or publicists. England, however, had abandoned the doctrine of perpetual allegiance, and had recognized the right of expatriation.⁵ The true distinction lay between *permanent* allegiance, which signified the character of the obligation of the citizen to the state, and *temporary* allegiance, which signified the obedience due by an alien to the laws in force in the place where he happened to be.⁶

The whole extent, said Mr. Morse, to which the doctrine of double allegiance might be carried was expressed by Bluntschli (*Droit Int. Codifié*, § 394) in which it was said:

"Certain persons may, in rare instances, be under the jurisdiction of two different states, or even of a greater number of

¹"Naturalization and Allegiance," Washington, D. C., political pamphlets, Congressional Library, p. 27 (1816), citing Grotius and Vattel.

²Calvo, *Derecho Internacional*, I. 288; Pando, *Elementos del Derecho Internacional*, 153.

³Lord Westbury, *Udny v. Udny*, L. R. 1Sc.; *Moorhouse v. Lord*, 10 H. L. Cas. 272; *Shaw v. Gould*, L. R. 3 H. L. 55, App. 457.

⁴Calvin's case, 7 Rep. 5; Mr. Justice Story, 3 Peters, 155.

⁵33 Vict. ch. XIV.; Treaty between the United States and Great Britain, May 13, 1870.

⁶Kent's Comm. Lect. IV.

states. In case of conflict, the preference will be given to the state in which the individual or family in question have their domicile; their rights in the states where they do not reside will be considered as suspended."

The method of determining a conflict growing out of naturalization had, said Mr. Morse, been pointed out in the case of *John J. Martin v. Mexico* before the Mexican commission (1868), in which it was held that when the laws of naturalization of two states in controversy are different, and each insists that its own law shall decide the case, there will arise a serious conflict, inasmuch as one state does not recognize as valid the naturalization of its subjects in another country with the effect of extinguishing the anterior nationality. In these cases the conflict should be decided by principles of international law; but if the two states admit that naturalization extinguishes the anterior nationality, then the difficulty is removed. Both Spain and the United States, continued Mr. Morse, admitted that the nationality of origin was lost by naturalization in a foreign country. The agreement of February 12, 1871, under which the commission sat, was proof that Spain did not hold to the doctrine of inalienable allegiance. It was true that in the United States the inclination of the judiciary had been to follow the rule of the English common law.¹ But the legislative and executive departments had adopted the principle of expatriation.² A certificate of naturalization constituted an unimpeachable patent of citizenship, the validity of which could be questioned only for fraud or for want of power in the tribunal issuing it. Its validity was not impaired by an inaccurate statement in its recitals.³

While admitting that Heffter (*Droit Int.* § 59) maintained the doctrine of a double nationality, Mr. Morse cited, as opposed to it, Cicero, pro Balbo; Zouch, *De Jure Feciali*, 2, s. II., XIII; Bluntschli, *Droit Int. Cod.* § 394; Foelix, *Droit Int. Privé*, 4th ed., par Demangeat (Paris, 1866), 56, 57, 60, 62, 81; Twiss, *Law of Nations (Peace)*, 231, 232; *For. Rel.* 1873, part 2, pp. 1280, 1282; Calvo, *Derecho Internacional*, vol. 1, p. 288; Pando, *Elementos del Derecho Internacional*, p. 153; Westlake, *Private Int. Law*, p. 20; Cockburn on *Nationality*, pp. 214, 215.

¹ Kent's *Comm.* 49; Story on the Constitution, III. 3, n. 1; Wharton's *State Trials*, 654; *Opinions of the Attorney General*, VIII. 157.

² Daly on *Naturalization*, 26; Dana's *Wheaton*, 143, note.

³ Field, J. *In re Frank McCoppin*, 5 Sawyer's C. C. 630.

Mr. Morse dissented from the opinion of Attorney-General Pierrepont in Steinkauler's case (15 Op. 15), so far as it asserts the doctrine of double allegiance. While Steinkauler continued to be a minor, he followed the nationality of his father.¹ In modern times the nationality of origin was determined by parentage or the place of birth.² Though a person may apparently have a double citizenship or nationality, yet whenever circumstances arise that make the two citizenships inconsistent he must elect one or the other.³

The requirements, said Mr. Morse, of the laws of the United States touching residence for the purposes of naturalization were easily satisfied.⁴ The question whether those requirements had been satisfied was to be determined by the naturalizing authority.⁵

On April 18, 1881, Count Lewenhaupt, as
 Decision in Case of umpire, rendered in the case of *Pedro D. Buzzi*
Buzzi. v. *Spain*, No. 22, the following decision:

"The arbitrators, having been unable to agree upon the question whether they should recognize the quality of American citizen in the claimant, said question has been referred to the umpire.

"The claimant, who was born in Trinidad de Cuba about 1833, states that he is an American citizen by descent, but he supports this allegation only by a copy of a declaration of intention made by his father in 1824, and by a statement that he has always understood from older members of his family that his father had completed his naturalization. He claims further that, not knowing this alleged fact at the time otherwise than as mere impression or belief, he procured in 1869 a certificate of naturalization, issued by the judge of Baltimore city court July 28, 1869. He produces also a declaration of intention made by himself in 1850, at the age of sixteen or seventeen, before the superior court of New York. He came from Cuba to New York at six years of age, but according to his own statement he returned to Cuba some time before he became twenty-one, or about 1854, and thereafter he did not come back to the United States before 1869. Between 1864 and 1869 he was United States consular agent at Zuza, Cuba.

¹ Phillimore, Int. Law, vol. I. p. 38.

² Stoicesco, Etude sur la Naturalisation, p. 286.

³ Westlake's Private Int. Law, p. 21; 1 Boileux, pp. 52, 62; Zouch, *supra*; Field's Int. Code, 2d ed. pp. 129, 130.

⁴ Trimble's case, 33 Md. 468; Naar on Suffrage and Elections, 87.

⁵ *Campbell v. Gordon*, 6 Cranch, 182; *Spratt v. Spratt*, 4 Peters, 407; *U. S. v. The Acorn*, 2 Abbott U. S. 443; *People v. McGowan*, 77 Illinois, 644.

"The father of the claimant was born in Milan, Italy, in the year 1799. It is contended that he was a native-born Austrian, but that he had become by naturalization an American citizen, but the only documents furnished in this connection are the following certificates:

EXHIBIT P. D. B. NO. 1.

(Duplicate.)

CITY OF NEW YORK.

Report of Pietro Buzzi, an alien, of himself, made to the clerk of the marine court of the city of New York, on the 26th day of October, in the year 1824.

Name, Pietro Buzzi; sex, male; place of birth, Milan in Italy; age, twenty-five years; nation and allegiance, German. Gulian, the Emperor of Germany; places whence emigrated, London; conditions or occupations, physician; places of actual or intended residence, city of New York.

PIETRO BUZZI.

JOHN G. LARDY, *Clerk*.

(Duplicate.)

TUESDAY, October 26, 1824

The marine court of the city of New York.

Present, Justice Hegeman.

I, Pietro Buzzi, at present of the city of New York, physician, do declare on oath, before the marine court of the city of New York, that it is *bona fide* my intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly to the Emperor of Germany, of whom I am a subject.

PIETRO BUZZI.

"The umpire is of opinion that there is no proof to which nationality the claimant's father belonged at the time of his death; that there is no proof that the claimant had a nationality by descent; that according to Spanish law existing at the time he would not have become a Spaniard only in consequence of the locality of birth, if he had had a nationality by descent, but that inasmuch as no person can be without nationality, he must, according to international law, be considered and held a Spanish subject by birth, as, besides, stated by himself in 1850, before the superior court of New York, and in 1869, before the city court of Baltimore, and that therefore the remaining question to be considered in this case is, whether, being a native-born Spanish subject, the claimant has a right to appear before this commission as a naturalized citizen of the United States.

"According to the agreement between the United States and Spain of February 11, 1871, it is the duty of the umpire to impartially determine this question to the best of his judgment and according to public law and the treaties in force between the two countries and the stipulations of said agreement.

"The umpire is of opinion that according to international law every country has a right to confer, by general or special legislation, the privilege of nationality upon a person born out of its own territory; but in the absence of special consent or treaty such naturalization has, within the limits of the country of origin, no other effect than the government of said country chooses voluntarily to concede. If the emigrant's wife and children remain in the old country it depends upon the law of the land whether their condition be affected by the foreign naturalization of the emigrant. The same principle applies to property of any kind which the emigrant leaves behind him, and if the emigrant returns himself he may become as amenable as any other subject to any laws which may be in force.

"As the laws concerning nationality and naturalization differ in almost every country, it follows that very frequently persons may have more than one nationality; for instance, one by locality of birth, one by descent, and one by naturalization. Such cases can not be avoided, except by special treaty stipulations.

"It is not contended that the various treaties between the United States and Spain concluded prior to the agreement of 1871 throw any light upon the present question.

"Article 5 in the agreement of 1871 contains the following stipulation:

"No judgment of a Spanish tribunal disallowing the affirmation of a party that he is a citizen of the United States shall prevent the arbitrators from hearing a reclamation presented in behalf of said party by the United States Government; nevertheless, in any case heard by the arbitrators the Spanish Government may traverse the allegation of American citizenship, and thereupon competent and sufficient proof thereof will be required. The commission having recognized the quality of American citizens in the claimants, they will acquire the rights accorded to them by the present stipulations as such citizens.'

"There is a great difference between the parties concerning the true interpretation of this stipulation.

"The advocate for the United States says:

"It will be remarked as perfectly clear that without the existence of this clause in the treaty Spain could not be heard to deny the quality of citizenship in anyone whom the Government of the United States recognized and presented before the commission as invested with that character. But under the agreement Spain may deny the fact of citizenship.' (Brief, October, 1878, p. 2.)

“The decree which changes the status of an individual and converts him from the citizenship of one country to that of another is known as a judgment *in rem*, and such judgment by public law is of universal obligation. * * *

“The right which the agreement of 1871 extends to Spain to traverse the allegation of citizenship is a substantial privilege by the exercise of which Spain can deny the authenticity of any certificate of naturalization offered by the United States; for example, Spain may deny that there existed such a court as the certificate declares admitted the alien to citizenship, or may allege that the signature of the clerk or attesting officer, or the seal of the court is forged, as it occurred in the United States and Mexican Commission. * * * Such is the whole extent of the signification of the terms “traverse the allegation of American citizenship,” found in the agreement.’ (Appendix, p. 13.)

“The advocate for Spain says:

“It is denied at the outset that this is an extraordinary privilege, only to be claimed under the special sanction of the express terms of the convention.’ (Reply of Spain, December, 1878, p. 2.)

“I have already indicated the nature of the evidence that Spain offers to meet the claims of the naturalized Cubans. It is that they obtained naturalization without that residence in the United States which the laws of that country required.’ (Views, p. 59.)

“The question in the case is not whether the United States can confer American nationality, but whether the United States can destroy Spanish nationality.’ (Brief for Spain, February, 1881.)

“The advocate for the United States contends that a Spaniard lawfully naturalized in the United States has thereby lost his prior nationality. The advocate for Spain contends that a Spaniard naturalized in the United States, without the consent of Spain, has a double nationality.

“In order to decide between these conflicting interpretations, it is necessary to examine what persons both the United States and Spain, according to the correspondence preceding the agreement, intended should be regarded as citizens of the United States within the meaning of the agreement.

“This act grew out of remonstrances and complaints urged by the Government of the United States upon that of Spain in relation to wrongs and injuries said to have been committed in Cuba in violation of certain privileges conferred upon American citizens in Spain by the treaty between the two nations of October 27, 1795.

“On the 24th of June 1870 Mr. Fish instructed Mr. Sickles, the minister of the United States in Madrid, to bring the whole subject to the notice of the Spanish Government.

“On the 26th of July Mr. Sickles executed this order and transmitted a list of cases, giving names of parties and grounds of complaint.

"On the 12th of September Mr. Sagasta, minister of foreign affairs in Madrid, replied to Mr. Sickles that the good faith of the United States Government had been imposed upon by worthless men; that the greater portion of the natives of Cuba who had given allegiance to the American flag had done so with the studied intention of making use of it at some future day as a shield for their criminal designs. To this Mr. Sickles answered, on the 14th of October, by a note containing the following assurance:

"* * * The Government of the United States will not be found disposed to extend its protection to persons who have not the right to invoke it. It is to be presumed, unless the presumption is overcome by proof, that aliens who have deliberately renounced, after an uninterrupted residence of five or more years within the territory of the Union, all allegiance to any other government, and have thereupon become citizens of the United States, are sincere in their solemnly avowed purpose. If it shall be made to appear that any one of the claimants in whose behalf the Government of the United States intervenes is not a citizen thereof, or, having been naturalized in conformity with its laws, has by any act of his own forfeited his acquired nationality, or that he has voluntarily relinquished it, your excellency may rest assured that the case of such claimant will be dismissed from the further consideration of the American Government."

"In the opinion of the umpire, this correspondence shows that by neither party was the convention intended for the benefit of other in the United States naturalized Spaniards than those who had been naturalized in good faith; and conformably to the proposal of Mr. Sickles it was agreed that naturalization after an uninterrupted residence of five or more years should be considered as a conclusive test. The umpire is of opinion that Article V. of the agreement, interpreted in the light of the correspondence, and only with reference to the present case, stipulates that the Spanish Government may traverse the allegation that the claimant has acquired American citizenship in good faith, and thereupon proof satisfactory to the commission will be required of an uninterrupted residence in the United States during the five years immediately preceding the naturalization.

"The umpire has been unable to find any indication in either the agreement or in the correspondence that, as contended by Spain, the commission ought to examine whether the requirements of the American law of naturalization have been fulfilled. In such case the umpire would have to examine, in the present case, not only the question of five years' residence, but also whether the declaration of intention made in 1850 was legal or not; whether it could be replaced by the declaration of intention made by the claimant's father in 1824; whether the claimant resided one year in Maryland, where he was naturalized; whether he conducted himself as a man of

good moral character; whether he was attached to the principles of the Constitution, etc. It is not probable that when the question was to determine naturalization in good faith as against Spain, either party intended an examination of these questions, because it seems entirely indifferent to Spain whether the claimant abjured his allegiance only once at the end of five years, or whether he made also a similar oath two years previously; whether in case of five years' residence he resided one year in Maryland or the whole time in other parts of the United States.

"The umpire is further of opinion that the claimant in this case during the five years immediately preceding his naturalization resided about four years and a half in Cuba; and the umpire hereby decides that the claimant has no right to appear as an American citizen before this commission."

Case of *Pedro D. Buzzi*, No. 22, Span. Com. (1871), April 18, 1881.

On the 19th of April, the day after the foregoing decision of Count Lewenhaupt was rendered, Mr. Durant brought it to the notice of the Department of State, of which Mr. Blaine had then succeeded Mr. Evarts as the head. On the 22d of April, Mr. Blaine wrote to Mr. Durant, and, referring to the decision of the Supreme Court of the United States in the case of *Spratt v. Spratt* (4 Peters, 393), took the ground that a judgment of naturalization might, as the judgment of a competent court, be impeached "only for fraud in its procurement," and that even in this case it could not "be impeached collaterally, but only by direct proceedings for that purpose." He therefore concurred in the suggestion of Mr. Durant that a motion be made before the umpire for a rehearing.

On the 30th of November, however, Mr. Blaine withdrew this instruction, and directed Mr. Durant to inform the commission that the United States could not accept the judgment in the case of *Buzzi* "as within the competence of the umpire to render," or submit the cases remaining unsettled on the docket "to the application of principles distinctly repudiated by the agreement (of 1871) itself." The commission was not, declared Mr. Blaine, a proper tribunal to which to submit the question at issue, which was one to be discussed and decided by the two governments themselves. "For the present," continued Mr. Blaine, "it is sufficient that I refuse to recognize the power of the commission to denationalize an American citizen. When a court of competent jurisdiction, administering the law of the land, issued its regular certificate of naturalization to *Pedro Buzzi*, he was made a citizen of the United States, and

no power resides in the Executive Department of this government to reverse or review that judgment. And what the power of the Executive can not do in itself it can not delegate to a commission, which is the mere creation of an executive agreement. * * * You are instructed not to have any case referred to the umpire wherein the question may be involved of the effect due to a certificate of naturalization issued by a competent court, and in which it is not denied that the claimant presenting it is the person to whom it was originally issued."

**Course of Mr. Fre-
linghuysen.**

Under this instruction Mr. Durant suspended action in some fifteen cases before the arbitrators, in which the question of citizenship was involved. On the 17th of February 1882, Mr. Frelinghuysen, who had succeeded Mr. Blaine as Secretary of State, informed Mr. Suydam, who had succeeded Mr. Durant as advocate for the United States, that this suspension of action, while it might appear to have received the tacit consent of the Department, was not warranted by its instructions, which only inhibited the reference of cases to the umpire. It could not, said Mr. Frelinghuysen, be assumed that the principles enunciated by the umpire in the case of Buzzi would, in so far as they conflicted with the rulings of previous umpires, which should, as Mr. Blaine had contended, apply to the settlement of future cases, receive the sanction of the arbitrators; but if the commissioner on the part of Spain should be found maintaining a construction of the convention adverse to the rulings of Mr. Bartholdi or Baron Blanc, the American commissioner had it in his power to refuse to refer the case to the umpire until the two governments could agree upon instructions. Mr. Suydam was therefore instructed to press the business before the arbitrators, and whenever he found them disagreeing, and in his judgment the disagreement opened a controverted question of citizenship to the decision of the umpire, to report at once to the Department. He was also directed to take no step in any case pending before the umpire which involved that question until further instructed.

**Mr. Frelinghuysen's
Instructions.**

On the 25th of September 1882, when the commission, after a recess, was about to reconvene, Mr. Frelinghuysen addressed a further instruction to Mr. Suydam, in which he said:

"This Department must insist—

"1. That there is no power in this Department, and none has been conferred on the commission, to examine into the

good faith, which term in these cases is understood to signify the motive, the purpose, and object of the applicant in seeking naturalization. The only question, in each case, is whether the person claiming to be a naturalized citizen has been naturalized. There is no law of the United States requiring the applicant to disclose the motive which induces him to change his nationality.

"2. That there is no power in this Department, nor any power conferred upon the commission, to make it requisite and essential that the applicant for naturalization should have been actually present in the United States for five years immediately preceding naturalization. A residence may exist without an uninterrupted actual presence during the whole probationary period.

"3. That it is not the law of the United States that 'naturalization has, within the limits of the country of origin, no other effect than the government of said country chooses voluntarily to concede.' On the contrary, this Department is expressly directed by the laws of the United States to recognize and maintain the reverse of this proposition. Section 1999 of the Revised Statutes of the United States on this subject, passed prior to the agreement of 1871, so provides.

* * * The Department of State has no power, and has conferred on the commission no power, to question the proceedings antecedent to the judgment of naturalization. The judgment of the court granting to an individual the rights of citizenship is entitled to receive the respect given to all other judgments rendered by courts of competent jurisdiction, and, if not impeachable for fraud, is conclusive as to all the facts necessarily passed upon. The decisions of the umpires, Mr. Bartholdi and Baron Blanc, given in numerous cases presented to the commission, seem to have fixed the law in relation to naturalized citizens in harmony with the views herein expressed, and to have given an interpretation to the agreement of February 1871, which should not now be departed from.

* * * This government, while holding, as before stated, that the judgment of naturalization, unimpeached by fraud, is complete evidence of its own validity, can not deny that, under the terms of the agreement, the certificate of naturalization may be proven to have been obtained fraudulently. * * * The true rule to govern the commission is, that when an allegation of naturalization is traversed and the allegation is established *prima facie* by the production of a certificate of naturalization, or by other competent and sufficient proof, it can only be impeached by showing that the court which granted it was without jurisdiction, or by showing, in conformity with the adjudications of the courts of the United States on that topic, that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment, was practiced upon it, or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law."

These views Mr. Suydam was instructed to present to the commission in such manner as he might deem advisable, accompanying them with an intimation that the Department of State would be glad to receive an assurance that the principles stated by it would be concurred in, so that the suspended cases might be proceeded with and all matters before the commission speedily determined.

On the 14th of December 1882 Mr. Lowndes, Agreement of the Arbitrators. now the arbitrator for the United States, and the Marquis de Potestad, arbitrator for Spain, made the following announcement:

"That the principles mentioned in the instruction of the Secretary of State to the advocate for the United States, dated the 25th September 1882, are concurred in, and the following rules have been adopted by them [the arbitrators], viz: When an allegation of naturalization is traversed and the allegation is established *prima facie* by the production of a certificate of naturalization, or by other competent and sufficient proof, the allegation can only be impeached by showing that the court which granted the judgment of naturalization was without jurisdiction, or by showing, in conformity with the adjudications of the courts of the United States on similar matters, that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment, was practiced upon it, or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law; and that naturalization invests the individual with the rights of a citizen of his adopted country in the country of origin or elsewhere not less than in the country of adoption."

The arbitrators added that they would transmit these rules in due form to the umpire that he might be guided by them in the cases not yet decided by him.

After the promulgation of this agreement the business of the commission was rapidly proceeded with, and the arbitrators and umpire rendered various decisions involving the question of naturalization, which are given below:

Case of Angarica. "It is alleged in the petition that the claimant's intestate, José Garcia Angarica, was a citizen of the United States by naturalization. This allegation is traversed by Spain, and evidence is adduced tending to show that the naturalization of José Garcia Angarica was obtained by fraud.

"It has been agreed by the arbitrators in this commission, in accordance with the decisions of former umpires, and the

views expressed by two Secretaries of State of the United States, that fraud practiced in obtaining naturalization, on the court which granted it, renders such naturalization invalid so far as this commission is concerned. I am therefore called upon to decide whether José García Angarica obtained his naturalization by fraud.

"The fraud which renders naturalization invalid must consist in intentional and dishonest misrepresentation as to a material fact or in the wilful suppression of material facts.

"By the act of March 3, 1813, as amended by the act of June 26, 1848 (9 Stats. at L. 240), it is provided 'that no person who shall arrive in the United States from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission as aforesaid have resided within the United States.'

"By the act of April 14, 1802 (2 Stats. at L. 153), it is enacted that the court admitting an alien shall be satisfied that he has resided within the State where such court is at the time held, one year at least.

"It appears from the statutes that the material facts in the proceedings of naturalization are:

"1st. Residence by the applicant within the United States for a continued term of five years next preceding his admission.

"2nd. A residence by him for one year in the State in which he is naturalized.

"Did José García Angarica make any intentional and dishonest misrepresentations to the court which naturalized him, in regard to these facts or either of them?

"It is said by a late writer: 'The nature of residence considered as a part of domicil and thus looked at as a physical fact, and independent of the "animus amendi," has been little discussed. It may be defined as habitual physical presence in a place or country. The word "habitual," however, must not mislead. What is meant is not presence in a place or country for a length of time, but presence there for a greater part of the time, be it long or short, which the person using the term residence contemplates.' (Dicey on the Law of Domicil, p. 76.)

"Another writer has thus defined residence: '*La résidence est un fait matériel qui se rattache à la présence physique*

dans un lieu.' (2 Calvo, Droit International, p. 131.) 'La résidence s'acquiert par l'habitation * * * et se perd avec elle.' (Ibid.)

"A definition of residence more favorable to the claimants is that of Judge Daly, quoted by Commander Bertinatti in the case of Crisanto Medina in the Costa Rican Commission: 'The residence of a man is the place where he abides with his family, or abides himself, making it the chief seat of his affairs and interests.'

"The testimony of José Garcia Angarica as to his residence in the United States is as follows: He was born in Cuba on the 19th of March 1833, and first came in 1850 to the United States. After attending schools in this country he went into business in New York. On the 19th December 1854 he formally declared his intention of becoming a citizen of the United States. About the end of 1854, on the advice of a physician, he went to Cuba, and was all the winters there until 1869. On the 30th March 1858 he was married in Cuba. During the five years preceding the 16th January 1869 he spent the winter months—that is, the period from the beginning of November to the beginning of May—in Cuba. In the summers or falls of 1864, 1866, 1867 he was in New York. He does not recollect where he was in the summer or fall of 1865. In the summer of 1868 he thinks he was in Cuba. When in New York, in the summer, he lived in his father's house. His wife accompanied him in only one trip to the United States. He was engaged in the sugar business in Cuba. He owned no land in the United States, and paid no taxes there. From the time of his marriage to that of his leaving Cuba he was a householder in Cuba, living in a hired house. He left Cuba in 1869, on account of the revolution, under a Spanish passport. In deeds and other formal instruments he had been described as a resident of Cuba.

"It further appears from the evidence that the claimant owned a large amount of real and personal property in Cuba. It does not appear that he had any property in the United States. He was engaged in a very large business as factor or commission merchant in Cuba. He was naturalized in New York on the 16th February 1869.

"The testimony of José Garcia Angarica seems to me to prove that in no sense of the word 'reside' did he reside five years before the 16th February 1869 in the United States, and that, on the contrary, during that period he resided in Cuba.

"In this state of facts, Mr. Angarica, on the 16th February 1869 applied for naturalization to the superior court of New York, and produced as a witness to prove his residence in the United States, one Palomino.

"The statements of this witness to the court are in law, as regards the proceedings of naturalization, to be treated as the statement of Mr. Angarica. They were, moreover, made in his presence.

"Palomino swore that Mr. Angarica had resided in the United States for the continuous term of five years next preceding his application.

"In my opinion it is proved that Mr. Angarica practiced a fraud on the court by intentional and dishonest misrepresentation of a material fact in the proceedings of naturalization.

"It is not necessary to decide whether Mr. Angarica had resided in New York one year when he was naturalized, but a fact disclosed by the record should be mentioned as showing the recklessness of statement which characterized the proceedings before the court.

"Palomino swore that Mr. Angarica resided within the State of New York one year, at least, immediately preceding his naturalization. Mr. Angarica says: 'I don't recollect where I was in the summer and fall of 1868. I think I was between Cardenas and Havana; I was very busy in that time.'

"I am of the opinion that the case should be dismissed for want of jurisdiction."

Opinion of Mr. Lowndes, arbitrator for the United States, concurred in by the Marquis de Potestad, arbitrator for Spain; case of *Josep M. Mestre*, executor of *José Garcia de Angarica*, No. 17, Span. Com. (1871), December 26, 1882.

"It is alleged in the petition that the claimants' intestate, Ramon Fernandez Criado y Gomez, was a citizen of the United States by naturalization. This allegation is traversed by Spain, and evidence is adduced tending to show that the naturalization of Ramon Fernandez Criado y Gomez was obtained by fraud.

"It has been agreed by the arbitrators in this commission, in accordance with the decisions of former umpires and the views expressed by two Secretaries of State of the United States, that fraud practiced on the court in obtaining naturalization renders such naturalization invalid, so far as the commission is concerned. I am therefore called upon to decide

whether Ramon Fernandez Criado y Gomez obtained his naturalization by fraud.

"The fraud which renders naturalization invalid must consist in intentional and dishonest misrepresentation as to a material fact or in the suppression of material facts.

"In my opinion, in the case of José Garcia Angarca, I have endeavored to show that the material facts in the proceedings of naturalization are: 1st. The applicant's residence in the United States for the continuous term of five years next preceding his naturalization. 2nd. His residence for one year in the State in which he is naturalized. I have also endeavored to show in that case that residence in a place means bodily presence there for the greater part of one's time.

"Did the intestate make any intentional and dishonest misrepresentations to the court which naturalized him as to the facts of his residence during the five years preceding his naturalization?

"His own statement is as follows: He was born in the Island of Cuba, a Spanish subject; he was educated in the United States, where he resided while a minor; he declared on the 25th of October 1865 his intention of becoming a citizen of the United States; after attaining his majority he resided a portion of his time in the United States for many years; he was naturalized on the 15th of April 1869; he came to the United States from Cuba in February 1869; for the period beginning November 20, 1867, to February 1869 he was not in the United States; on the former date he went to Cuba; between 1864 and 1869 he had no dwelling house in the United States and paid no taxes there; during his absences in Cuba he kept a room at the St. Julien Hotel, in New York; from 1863 to 1869, while in Cuba, he lived at his mother's house; he was unmarried; he owned a great deal of property, both real and personal, in Cuba; Cuba was the field of his labors and enterprises, and in taking refuge in the United States he abandoned property, friends, and business.

"On cross-examination, he could not remember how many weeks he spent in the United States in 1864, 1865, 1867; when he came there he spent most of the time every year—'months.'

"Mr. Criado testified that during the year 1868 he kept a room at the St. Julien Hotel, in New York. On this point he is completely contradicted.

"The minutes of the Cardenas and Jucaro Railroad Company,

of which the claimants' intestate was a director, show that in the 57½ months which elapsed between the 15th April 1864, at which date the claimant's alleged residence began, and February 1869, when he came to the United States, he attended meetings of the board of directors in 44 months. In two other of three months he is shown to have been in the United States. In two months there were no meetings of the board.

"The Spanish passport books show passports issued to him only on July 18, 1865, and August 2, 1867. The records show that he returned to Cuba under the former on October 25, 1865, and under the latter on November 26, 1867. In July 1868 he applied for, but did not use, a passport.

"There is other evidence tending to show that between the 15th April 1864 and the 15th April 1869 Mr. Criado was for much the greater part of that period not only bodily in Cuba, but that his home, affairs, and interests were all there.

"I think it proved that in the five years immediately preceding his naturalization Mr. Criado did not reside in the United States, but resided in Cuba.

"The facts being thus, on the 15th April 1869 Mr. Criado procured a witness to make oath in the court of common pleas of New York City that Mr. Criado had resided within the United States for the continued term of five years, at least, immediately preceding his application.

"It is my conclusion that Mr. Criado practiced a fraud on the court which naturalized him by the intentional and dishonest misrepresentation of a material fact.

"The court took no testimony as to Mr. Criado's residence in the State of New York for one year.

"I am of the opinion that the case should be dismissed for want of jurisdiction."

Opinion of Mr. Lowndes, arbitrator for the United States, concurred in by the Marquis de Potestad, arbitrator for Spain; case of J. I. Rodriguez and Randolph Coyle, administrators of *Ramon Fernandez Criado y Gomez*, No. 29, Span. Com. (1871), December 26, 1882.

"The injury alleged in this case is the killing
Case of Zenea. by Spanish authorities of Juan Clemente Zenea,
 a naturalized citizen of the United States.

"The naturalization of Zenea is traversed by Spain.

"The evidence leaves it doubtful whether a record of the naturalization of Zenea is in existence.

"It is proved that Zenea was naturalized before he was twenty-one years of age. His naturalization was therefore in

violation of the laws of the United States. The evidence, however, does not make it clear that Zenea practiced a fraud upon the court, and we therefore do not feel justified in treating his naturalization as invalid."

Opinion of the Marquis de Potestad, arbitrator for Spain, concurred in by Mr. Lowndes, arbitrator for the United States; case of Louisa M. Zenea, administratrix of *Juan Clemente Zenea*, No. 136, Span. Com. (1871), December 26, 1882.

When the arbitrators, in the case above stated, say that it is "doubtful whether a record of the naturalization of Zenea is in existence," they refer to the fact that the court in which he was admitted to citizenship did not keep full records of the proceedings of naturalization. The rules of the commission required each claimant to show "the time and place and style of the court" before which his "declaration of intention" was made, and "the time and the place and the style of the court" by which his "letters of naturalization" were granted, and to exhibit with his memorial "authenticated copies of both these acts." These requirements seem at first to have been considered as satisfied by the production of authenticated copies of the declaration of intention, where such a declaration was necessary, and of the judgment or order of the court admitting the claimant to citizenship. Mr. Lowndes and the Marquis de Potestad, however, required a copy of the full record of the process of naturalization to be produced. This requirement disclosed the fact, which has often been remarked upon by writers on the subject, that the practice of the courts in this particular is not uniform. Not only do the forms of the judgment of naturalization vary, some of them fully and explicitly setting forth the material facts of which proof was exacted, while others merely recite that the applicant "produced such evidence, made such declaration and renunciation, and took such oaths" as were required by law; but some of the courts keep no record of the process beyond the judgment or order of admission. Such was the case with the court that naturalized Zenea; but the judgment or order, of which an authenticated copy was produced, itself set forth the material facts of which proof was required.

Juan C. Zenea, to whom the above case relates, was a native of Cuba. He was admitted to citizenship at New Orleans on December 24, 1852, under the act of Congress of May 24, 1824 (4 Stats. at L. 69), which provides that "any alien, being * * * a minor, under the age of twenty-one years, who shall have resided in the United States *three years next preceding his arrival at the age of twenty-one years*, and who shall have continued to reside therein to the time he may make application to be admitted a citizen thereof, may, *after he arrives at the age of twenty-one years*, and after he shall have resided five years within the United States, *including the three years of his minority*, be admitted a citizen of the United States." In the latter part of 1870 Zenea went to Cuba under a safe-conduct from the Spanish minister at Washington, professing that the object of his journey was to sound the head of the insurrectionary movement in the island on the subject of a capitulation to the Spanish Government. About the 1st of January 1871 he was arrested by the military authorities near Havana. On the strength of certain papers found on him he was charged with violating and making a treasonable use of his safe-conduct, and on August 25, after

conviction of treason by a court-martial, he was shot. His widow claimed damages from Spain for his execution. The advocate for Spain denied his American citizenship, in respect to which the facts were as follows:

The only record of the proceedings by which Zenea was admitted to citizenship was the decree of naturalization. There was no record of the testimony on which this decree was based. But the decree itself referred to the act of May 26, 1824, as the statute under which the court acted; and it recited that Zenea had "proved to the satisfaction of the court" that he arrived in the United States in 1846, "being then a minor under eighteen years of age," and that he had likewise proved "on the oath of Bernard Carillo and José B. Valdes" that he had "resided within the limits . . . of the United States for upward of five years immediately preceeding the date of this application." It is obvious that the allegation made and sworn to before the court that Zenea was in 1846 "a minor under eighteen years of age," was intended to meet the statutory requirement that he should have resided in the United States "three years next preceding his arrival at the age of twenty-one years," and that it conveyed and was intended to convey the representation that he had arrived at that age—a condition absolutely essential to his naturalization. It is equally obvious that the allegation made and sworn to that he had resided for five years in the United States was intended to meet that provision of the statute which says that the minor "may after his arrival at the age of twenty-one years, and after he shall have resided five years within the United States, including the three years of his minority," be admitted to citizenship. On the face of the certificate, therefore, it clearly appeared that a representation was made to the court that the applicant had attained his majority, to say nothing of the fact that where particular recitals are lacking the judgment of naturalization necessarily implies that the applicant averred and presented proof of compliance with the several conditions prescribed by law for admission to citizenship.

On December 6, 1853, Zenea, who had been implicated in Lopez's enterprises against Cuba, was sentenced by a court-martial at Havana to be executed for treason. At that time he was absent from the island. In 1855 or 1856 he returned to Cuba, and resided there, as he alleged, under a general amnesty, till 1865, when he went to New York. In the following year he made a journey to Mexico, and he afterward visited other countries of Spanish America, though, as he declared, he always returned to New York, which he regarded as his domicil. In 1869 he spent several days in Havana, and in October of that year he enlisted at New York as a private soldier in the expedition against Cuba which set out from that port in the steamer *Lillian*. He left the steamer, however, at Nassau. On the 8th of January 1871, at his trial before the court-martial in Cuba, he swore that he was thirty-eight years of age and domiciled in New York. He did not then assert his American citizenship, because, as he afterward said, he had been advised not to do so, and because he thought that his safe-conduct would protect him. If he was thirty-eight years old in 1871 he was naturalized at the age of nineteen. A cousin who had charge of him as a child declared in an affidavit presented to the commission at Washington, that in 1847 he was eleven or twelve years old, which would have made his age at naturalization only sixteen or seventeen years. In the preface to a collection of his poems published in New York in 1872 it was stated that

at the time of his execution in August 1871 he was thirty-seven years and six months old; that he was born in February 1834 at Bayamo, in Cuba, and that "he studied and lived almost always in the city of Havana." This would have made his age at naturalization seventeen years. There was also what purported to be a baptismal certificate, dated March 29, 1832, in which it was stated that he was baptized on that day as "a child thirty-five days old." This would have made him twenty years and ten months old at the time of his naturalization. The advocate for the United States, besides denying the sufficiency of these proofs, argued that the judgment of naturalization was "final;" that there was "no power on earth" that could "revoke it or reverse it at the present date;" that the arbitrator for the United States was only "the delegate of the Secretary of State," who possessed no such power; that if Zenea was not at the time of his naturalization twenty-one years of age, "nobody could help it," and that the commission was "not a court of appeal from the decisions of the courts of the United States admitting aliens to be citizens of the United States."

The arbitrators, as has been seen, held that it was "proved that Zenea was naturalized before he was twenty-one years of age," and that "his naturalization was therefore in violation of the laws of the United States," but that the evidence did "not make it clear that Zenea practiced a fraud upon the court."

Without intending to question the correctness of the decisions of the arbitrators in the cases of Angarica, No. 17, and Criado, No. 29, it may be suggested whether the facts in respect to naturalization in the case of Zenea did not render it yet more clearly obnoxious to the rules laid down in the agreement of December 14, 1882, under which those cases were dismissed. By those rules the fraud that vitiated naturalization was defined to consist of "intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment." Different views have been entertained as to what constitutes "residence" within the meaning of the naturalization laws, but the requirement that the applicant shall have arrived at the age of twenty-one years does not admit of construction; and where it is proved that the applicant obtained naturalization without having complied with that condition, that fact would of itself seem to create a strong presumption that he was guilty of "intentional and dishonest misrepresentation" or of "suppression of material facts."

The claimant's property was embargoed by the Spanish authorities in Cuba in February 1870 and released in March 1871. It appeared that he was born in Cuba. He made a declaration of intention to become a citizen of the United States in New York, August 2, 1852. He was not naturalized till August 12, 1867. Prior to that time, his residence was in Cuba, where his property was also. It seems that he was accustomed in the summer to come from Cuba to Saratoga, or some other summer resort in the United States. His home was in Matanzas, in Cuba. It did not appear that he had ever paid an income tax in the United States.

INTERNATIONAL ARBITRATIONS.

Mr. Lowndes, arbitrator for the United States, while rejecting the claim on the ground that the claimant had proved no damage, said that, although the evidence threw suspicion on the regularity of the naturalization, it did not in his opinion "make out clearly that fraud was practiced on the court;" and, consequently, he thought that the commission had jurisdiction of the claim, though he held that it should be dismissed, as the claimant had proved no damage.

The Marquis de Potestad, while also holding that no damage had been proved, expressed the opinion that the case should be dismissed for want of jurisdiction. It was therefore dismissed.

Felix Govin y Pinto, administrator of José Govin y Pinto, No. 38, Span. Com. (1871), December 26, 1882.

Case of Zaldivar. "The claimant's naturalization as a citizen of the United States has been traversed by Spain. While the evidence throws suspicion upon the regularity of the naturalization proceedings, we do not think it makes out clearly a case of fraud on the part of the claimant."

Decision of the Marquis de Potestad and Mr. Lowndes, arbitrators; case of Miguel Zaldivar, No. 127, Span. Com. (1871), December 26, 1882.

Zaldivar was naturalized by the court of common pleas in the city of New York on August 28, 1860. His declaration of intention was made June 18, 1857, before the same court. By the record of the proceedings by which he was naturalized, it appeared that he produced a witness who swore that he had "resided within the United States for the continued term of five years at least next preceding the present time." In the papers before the commission, Miguel Fernandez, a commission and shipping merchant in New York, swore that he had known Zaldivar since 1852, that he knew him in Puerto Principe in 1869, and that he knew he was an American citizen. On cross-examination the witness stated, in reply to the question when Zaldivar left Puerto Principe, that he used to come to the United States "many times and go back again," and that he was on his plantation in 1869. He admitted that he could not say whether Zaldivar resided in Cuba or in the United States from 1852 to 1860, though he said he supposed that Zaldivar "used to be in Puerto Principe unless he was traveling some place." He saw him in New York in 1856 or 1857.

The only knowledge he had of Zaldivar's American citizenship was that in 1856 or 1857 the latter showed him a paper stating that he was an American citizen. Another witness, who also lived in New York, said that he could not swear that Zaldivar was an American citizen, but that everyone recognized him to be such. Still another witness for the claimant, named Blackburne, a resident of New York, who swore that he knew Zaldivar was a citizen of the United States, said on a cross-examination that he

went to Puerto Principe in 1859, and that knew Zaldivar "almost as soon as he got there;" he knew him "anyway, in 1864." When he first knew him, Zaldivar was living at Puerto Principe, had a house there and his family, and he would call it his home; Zaldivar was there "perhaps half his time." He would generally come to New York in the summer months, when he lived in Eighth street part of the time, and lived in hotels a part of the time. He knew Zaldivar was a citizen of the United States, because one day on his plantation in Cuba, Zaldivar showed him his papers; he could not remember the date. The way Zaldivar came to show his papers was, that he and the witnesses were jesting with each other about their nationality, when Zaldivar declared himself to be a citizen of the United States, upon which they laughed at him. The witness also said that Zaldivar had two houses in Cuba, one a summer residence and the other a winter residence. When asked to reconcile this statement with his former statement that Zaldivar was in the United States in the summer time, he said that Zaldivar's family occupied the house in the country during the summer. For the defense, several witnesses in Cuba were asked whether, in 1869 or 1870, Zaldivar declared himself to be an American citizen, or spoke as if he were one, or whether he spoke as a Spaniard and a Cuban, and opposed the Government of Spain. The first witness knew nothing about it. The second and third knew nothing about it. The fourth knew nothing about Zaldivar's having declared himself to be an American citizen. As to expressing himself as a Spaniard and a Cuban, Zaldivar spoke to him at different times and was favorable to Spain. The fifth witness knew nothing about it, likewise the sixth and the seventh. The eighth did not know whether Zaldivar had declared his citizenship, but for some time he had "known" that Zaldivar was an American citizen. The last witness several times heard Zaldivar say that he was an American citizen, but he always saw him with his family in his house in Cuba. In defense of the claimant's citizenship, the advocate for the United States took the usual ground that the judgment of naturalization closed all inquiry, was complete evidence of its own validity, and could not be attacked collaterally by any evidence whatever.

On the 26th of December 1882, the day on which the five foregoing cases (Angarica, No. 17; Criado, No. 29; Zenea, No. 136; Govin y Pinto, No. 38, and Zaldivar, No. 127) were decided by the arbitrators, the Marquis de Potestad, with reference to certain cases then pending before the umpire, as well as to the application of the rules of decision announced by the arbitrators on the 14th of the month, made the following statement:

- "No. 9. Felix Govin y Pinto *v.* Spain.
- "No. 45. Cristobal Madan *v.* Spain.
- "No. 48. Antonio Mora *v.* Spain.
- "No. 49. Mrs. Mora *v.* Spain.
- "No. 69. John C. Rozas *v.* Spain.
- "No. 73. Ramon DeRivas y Lamar *v.* Spain.
- "No. 115. M. A. Montejo *v.* Spain.

"Although opinions on citizenship in these cases have already been entered, I deem it advisable, in view of the rules recently promulgated by my colleague and myself, to explain my mode of reasoning on the subject, in conformity with said rules.

"And first of all it is proper to state that the method now adopted does not differ in any essential point, in fact not at all, so far as it bears upon the recognition of a certificate of naturalization, from that which has been applied in this commission from its origin to the present time. The only innovation is, that whilst heretofore there seems to have been at times some confusion and misunderstanding that very much embarrassed the decisions of cases, it appeared best, in order to remove those obstacles, that a definite understanding should be had on specified points.

"The contention on the part of Spain, briefly stated, has been, and is, that the mere possession of a certificate, even if granted by a competent court, was not conclusive proof of citizenship.

"The rules now express that a certificate of naturalization shall only be considered *prima facie* evidence of citizenship. And being only *prima facie* evidence it follows that it is subject and liable to investigation relating to such circumstances as would, if well established, impeach and annul its force and validity, at least in so far as the objects of this commission would be concerned.

"The rules provide, therefore, that a certificate of naturalization may be impeached by showing 'that the court which granted the judgment of naturalization was without jurisdiction,' or by showing 'in conformity with the adjudication of the courts of the United States on similar matters that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment was practiced upon it (the court), or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law.'

"The fraud must be intentional. This is a universal principle used in the scrutiny of every crime or offense; it is what properly constitutes the punishable element in criminal proceedings.

"The inquiry then arises, How is the fraudulent intention to be proved? It certainly can not be from any assumption *a priori*. No one can fathom what passed in a human mind anteriorly to an act performed; it is only by virtue of outward circumstances relating to that act that conclusions in that respect can possibly be reached and a legal presumption derived.

"In order, for instance, to prove domicile or residence, there are rules established and accepted both as manifesting the intent and qualifying the acts expressive of that intent.

"It is the same when the question to be determined is, whether by a subsequent residence in the country of origin,

after obtaining naturalization in a foreign country, the new nationality has not been abandoned and the old one resumed.

"And so in this commission, in order to decide conformably to the rules adopted by the arbitrators, whether or no fraud has been practiced on a court granting naturalization, the inquiry would address itself to ascertaining if the party seeking naturalization misled the court by false allegations or suppressions of essential facts in the matter of residence, and if the testimony in the case should lead to the conclusion that the court had been so misled, the presumption would be legitimate that the false allegations and the suppressions had been intentionally made for a dishonest purpose.

"The weight to be given to evidence in naturalization cases must necessarily, like that which obtains in most matters controlled by evidence, depend on individual appreciation, but although the exact measure and proportion can not be expressed by any formula, I hold, nevertheless, that the following points have been conclusively established:

"1. That a certificate of naturalization is only *prima facie* proof of the allegations of citizenship.

"2. Such a certificate not being conclusive, it is liable to investigation with reference to certain facts showing want of jurisdiction or fraud.

"3. Those facts are such as may show in the matter of residence that the parties seeking naturalization have misled the court that granted the judgment.

"4. And if it shall appear from the testimony that any claimant did not in fact reside the required time, and that no honest mind could have concluded that he did, then the presumption must be that the court was deceived and that the misrepresentations or concealment were willful and dishonest. * * *

"It is in accordance with these principles that the arbitrators have dismissed the cases of José García de Angarica, No. 17, and Ramon Fernandez Criado y Gomez, No. 29, and I now proceed to review the cases which are before the umpire.

"Felix Govin y Pinto, the claimant in No. 9, was born in Cuba, and resided in Matanzas all his life up to the year 1869.

"It is abundantly proved that for ten or twenty years before 1868 he was a lawyer in active practice permanently settled there, and, moreover, as the practice of law was not possible without taking the oath of allegiance to the sovereign of Spain, this fact alone, without considering any other in the case, would destroy his allegation of citizenship elsewhere.

"There is no evidence that he ever 'removed' to the United States until 1869. He was suspected of complicity in the insurrection when he left Cuba, and it is proved by the books of the Cuban Junta that he made large contributions to aid the insurrection after he got to New York.

"These being the facts, this man pretends to have been naturalized in New York on the 10th day of July 1868. It is clear, then, first, that the court was forbidden to naturalize

Govin, because he had not resided in the United States for five years immediately preceding his naturalization as required by the act of 1813. Second, that frauds, consisting of international and dishonest misrepresentations or suppressions of material facts by Govin, were practiced upon the court. Certainly Govin knew all the facts which I have recited, and he intentionally and dishonestly made, or procured to be made, both misrepresentations and suppressions of material facts. It matters not whether his witness did or did not know these facts. If he did know them he was Govin's witness, and he willfully misrepresented and suppressed material facts. If he did not know them Govin did, and suffered him to swear falsely.

"Cristobal Madan, No. 45, was born a Spanish subject on July 7, 1807. He first came to the United States in the year 1818 at eleven years of age. He returned to Cuba in the year 1824, and did not again return to the United States until 1844. He swears that from that time to 1849 he returned to the United States every summer and sometimes spent winters there. From 1849 to 1851 he was in the United States. He had never declared his intention to become a citizen of the United States until the day he was naturalized, June 27, 1850. In the year 1850 no court of the United States was authorized to naturalize anybody who had not made a declaration of intention two years previous unless he fulfilled the conditions of the minor act of 1824.

"The district court of the United States for the southern district of New York was not authorized to naturalize Cristobal Madan.

"In addition to this it is perfectly clear that Madan practiced a fraud upon the court by intentionally and dishonestly making or procuring to be made misrepresentations and suppressions of material facts in regard to his residence.

"I have discussed this case very fully in my opinion dated November 15, 1881, and it fully appears in the case that this claimant had the strongest motive to commit a fraud.

"Antonio M. Mora, No. 48, was born in Cuba, a Spanish subject. He declared his intention to become an American citizen in 1853, but left the United States some time previous to 1859 without having completed his naturalization. From 1859 to 1869 Mora appears to have been permanently in Cuba acting as the business manager of the large and heavily encumbered estates belonging to his brothers and sisters. The evidence, especially that of Navarro, makes it quite clear to my mind that from 1864 to 1869, certainly, he resided in Cuba and not in the United States, and the answers of the claimant to interrogatories dispel any vestige of doubt. He shows a continual desire to misrepresent and suppress every material fact with regard to his residence.

"Ten days before the naturalization of this claimant an embargo was laid upon his property, which fact, I think, disposes of his claim; but I mention it again here as showing a

motive to commit a fraud upon the court. I think it clearly appears that the court had no authority to naturalize Mora in 1869, and that he committed a fraud upon the court by intentionally and dishonestly making, or procuring to be made, misrepresentations and suppressions of material facts.

"Mrs. Mora, No. 49, only claims American citizenship by reason of her husband's naturalization, and her American character must fall with his.

"John C. Rozas, No. 69, presents no declaration of intention, and his certificate of naturalization, which is *prima facie* evidence of his naturalization, is proved by his own witnesses to be utterly false in all its recitals. It recites that proof was made that John C. Rozas had resided five years within the United States. Rozas and his witnesses show before this commission that he did [not] in fact reside five years in the United States before his naturalization, and they also swore that no such proof was made to the court.

"Rozas shows that his service in the Army of the United States entitles him to naturalization, but there is no proof that this naturalization was ever granted to him, and the attempt of an interested party to supply the place of record evidence by the testimony of witnesses must, it seems to me, be inadmissible in any tribunal.

"Ramon de Rivas y Lamar, No. 73, I must now hold to be a citizen of the United States, and I have therefore retracted my opinion upon that single point in the case.

"M. A. Montejo, No. 115, I consider to be now concluded by the report of the American consul, filed by the claimant, with other papers, in 1875 or 1876, on the subject of his residence in Cuba and the fraudulent character of his naturalization. If this case is not within the letter of the agreement which my colleague and I have lately arrived at, it is certainly within its spirit, and I can not make an exception in favor of such claimant.

"Besides, I consider that his own answers to interrogatories show that he made intentional and dishonest misrepresentations of material facts in his oath before the court, and that his naturalization was procured by fraud."

In the cases of Govin y Pinto, No. 9; Madan, No. 45; Mora, No. 48; Rozas, No. 69, and Montejo, No. 115, referred to in the foregoing

statement of the Marquis de Potestad, decisions were rendered by the umpire, Count Lewenhaupt. In the case of Govin y Pinto, No. 9, the claimant demanded damages from Spain for the embargo of his property in Cuba, under an order of January 31, 1870. On August 4, 1879, the Marquis de Potestad, arbitrator for Spain, read the following opinion:

"The claimant alleges that he declared his intention to become a citizen of the United States on the 2d day of April 1859, and was naturalized on the 10th day of July 1868.

"The evidence proves beyond doubt that during the entire five years preceding his naturalization, and indeed for thrice that length of time, the claimant was a lawyer engaged in the active practice of his profession in Matanzas, Cuba, and lived there with his family in his own house. This proof is made by lawyers who practiced in the same place, by the judges before whom he practiced, and by other persons connected with him in business.

"It is also proved by official records, authenticated by the claimant's own signature, that within the five years preceding his naturalization the claimant assisted at elections where only residents of Matanzas could vote, and was a candidate for offices for which only residents were eligible, and was on one occasion elected.

"It also appears that the American consul at Matanzas, in answer to an inquiry of the State Department, reported, under date of May 20, 1870, 'that Mr. Govin y Pinto is a resident of Matanzas, and has resided there all his life up to the beginning of the year 1869.'

"It is, therefore, perfectly evident that the claimant procured the certificate of naturalization which has been exhibited here in violation of the statute of the United States of March 3, 1813, which prohibits the naturalization of any alien who shall not have resided within the United States for the continuous period of five years next preceding his admission to be a citizen, and that he has in so doing committed a fraud upon the United States.

"It is manifest, also, that for a Spanish subject residing within the Spanish dominions to procure a certificate purporting to make him a citizen of the United States is a fraud upon Spain, as well as upon the United States, and the certificate is wholly inoperative to entitle the holder to the benefits secured by the treaty between the two nations to the citizen of the latter.

"I am, therefore, of opinion that the claimant is not a citizen of the United States within the meaning and intent of the convention of February 1871." * * *

On the other hand, Mr. Segar, the arbitrator for the United States, said:

"On the 31st of January 1870 the governor-general of the Island of Cuba issued an order causing an embargo to be placed upon the property of Felix Govin y Pinto, an American citizen, then residing in New York, in his own house, No. 54 West Thirty-seventh street.

"In consequence of this order, the local governor of Havana issued another one on the 4th of February, by which he took possession of all the estate of Felix Govin y Pinto, and forbade all persons, under penalty of being tried as traitors before a court-martial, to pay him any debt, or bring or conceal any property belonging to him.

"This order, whose text has been printed in Spanish and in English, contains the statement that Govin y Pinto at that time did not reside in Cuba. The Spanish text reads that he was then a resident *en el extranjero*. (See evidence, pages 25 and 26.) Felix Govin y Pinto had been admitted to be a citizen of the United States on the 10th of July 1868, and the record of his naturalization before the court of common pleas for the city of New York has been appended to his memorial.

"The estates having been seized by a process of embargo, against the provisions of Article VII. of the treaty of 1795, between the United States and Spain, the Government of the United States made the proper representations to the Government of Spain, and succeeded in obtaining in November 1873 an order of the council of ministers at Madrid, to the governor-general of Cuba, recognizing the American citizenship of Felix Govin y Pinto, and causing his property to be restored to him. Upon the receipt of this order the governor-general issued the following decree:

HAVANA, November 14, 1873.

"Upon examination of the papers in the case of Felix Govin y Pinto for treason:

"Resulting that the property of the said Felix Govin y Pinto was embargoed merely on suspicion that he was working abroad in favor of the insurrection, in union with his brother, José Govin y Pinto, the property of whom has been already released:

"Considering that the representation of the Government of the United States asking for the release of the property of Felix Govin y Pinto, was favorably attended to by the Government of the republic, as confidentially communicated to this office by the department of colonial affairs, it is thereupon ordered by his excellency the governor-general, that the embargo placed upon the property of Felix Govin y Pinto be released, and that the said property be restored and returned to him, or to his lawful attorney. The said Govin y Pinto and his family are further authorized hereby to return to this island if they so choose."

"The preceding decree was carried into effect, as far as the release of the estates was concerned, on the 20th of January 1874. * * *

"The question raised alone is respecting the citizenship of Felix Govin y Pinto, the advocate of Spain denying, and the Government of the United States and even that of Spain insisting upon and conceding, respectively, that he is such a citizen of the United States.

"But, in the first place, the evidence upon which the advocate of Spain bases his attempt to go behind the records of the court of common pleas of the city of New York, is one, in my opinion, which can not be considered here, and which ought to be stricken from the record. My opinion upon this point was filed on the 13th of May, and to it I refer.

"In the second place, it seems to me very strange that while the houses and farms were released because of the American citizenship of their proprietor, the rents and yieldings of the same houses and farms should be retained, on the ground that there was not such a citizenship. Scarcely can I believe that the Spanish Government would support its advocate in an undertaking of this kind.

"The discussion, however, seems to be needless in this case. It is fully covered by the decision given by the umpire in the Fernando Dominguez case, and admits of no controversy. * * *

The umpire held that the claimant had "a right to appear before the commission as a citizen of the United States under the agreement of December 14, 1882."

Count Lewenhaupt, case of *Govin y Pinto*, No. 9, Span. Com. (1871). February 22, 1883.

Case of *Cristobal Madan*, No. 45.

The claimant, born in Cuba in 1807, and naturalized as a citizen of the United States on June 27, 1850, demanded damages for the embargo of his property in Cuba in 1869. The rules of the commission required that, where the claimant was a naturalized citizen, authenticated copies of his declaration of intention and of the record of his naturalization should be exhibited with his memorial. The claimant, instead of exhibiting such copies, filed a certificate signed by the clerk of the court in which he was naturalized, stating that he was duly admitted to citizenship on the day above mentioned. Such a certificate has been held to be insufficient to prove naturalization.¹ Nearly three years after the filing of his memorial the claimant filed an amended memorial, with which he exhibited an authenticated copy of a declaration of intention made by him on June 27, 1850, the day of his naturalization. Subsequently, when an authenticated copy of the whole process of naturalization was brought before the commission, it was found that the declaration of intention was in reality made on the same day as that on which the naturalization was effected.

The act of Congress of 1802 required the declaration of intention to be made at least three years prior to naturalization. The only statute that permitted such declaration to be made at the time of the admission to citizenship was the act of May 26, 1824, which applied only to persons who had resided in the United States as minors during the three years next preceding their majority. The record of naturalization recited that the

¹ *Müller v. Reinhart*, 18 Ga. 239.

claimant had "resided within the United States of America five years at least, and within the State of New York one year at least." It also recited that he "produced to the court satisfactory proof that he arrived in the United States *before he had attained the age of 18 years.*" The inference sought to be made from this recital, as well as from the fact that he was permitted to make his declaration of intention on the day on which he was naturalized, was that he gained admission to citizenship under the act of 1824.

It appeared that the claimant first came to the United States in 1818, when he was 11 years old; that he returned to Cuba in 1824, at the age of 17, and did not again visit the United States till 1844, when he was 37 years of age. He swore that from 1844 to 1849 he was in the United States every year from June to October, and that he "sometimes spent winters there;" and that from January 1, 1849, to the date of his naturalization, he was not in Cuba. The arbitrator for Spain, in an opinion delivered November 15, 1881, pointed out that it was essential to the validity of the claimant's naturalization under the act of 1824 that he should have resided in the United States at least from 1825 to 1828, the three years preceding his majority, and that unless he was admitted to citizenship under that act his naturalization was invalid, as he had not made a prior declaration of intention, as required by law. The arbitrator for Spain therefore held that the naturalization of the claimant must have been fraudulently obtained by the suppression of material facts, and that he should not be permitted to appear as an American citizen.

On the other hand, the arbitrator for the United States maintained that "the court required all that the statutes and the act of Congress require in entering up its judgment in the case;" that the certificate alleged that the statutes had been complied with, and that this was sufficient.¹ The umpire said:

"It is contended by Spain that in the year 1850 no court of the United States was authorized to naturalize anybody who had not made a declaration of intention two years previously, unless he fulfilled the conditions of the minor act of 1824; that the court was not authorized to naturalize him under said act, because he had not fulfilled the conditions prescribed in the act by having resided in the United States during the three years next preceding his arrival at the age of twenty-one years, and by having continued to reside there until the naturalization; that it is impossible to assume that the judge

¹ *Starke v. Insurance Co.*, 7 Cranch, 420; *Campbell v. Gordon*, 6 Cranch, 176.

thought that these conditions were not required; that it is also impossible to assume that the judge willfully violated the law, and that in consequence the claimant must be held to have practiced a fraud upon the court by intentional suppression of the material facts that he was not in the United States between 1825 and 1828, and that his residence had been interrupted by an absence of about twenty years.

"The advocate of the United States says:

"The fact is that the Spanish hypothesis of the suppression of evidence is founded upon still another hypothesis, and thus an attempt is made to prove a fraud by a succession of hypotheses, instead of evidence. The fundamental hypothesis is that Judge Betts in his administration of the law gave the same construction and effect to the statute that strikes the mind of the advocate of Spain as proper. There is nothing to show that he did, and the probability may be said to be that he did not, for we suppose that, so far as the construction of the act of 1824 is concerned, the general view of the courts has been that the act required only that the applicant shall have resided in the United States at least five years, three of them prior to his becoming of age, or during his minority, and did not require a residence in the United States from the age of eighteen to twenty-one, and from the age of twenty-one to the time of the admission to citizenship."

"The following is a copy of the record concerning the claimant's naturalization:

"At a stated term of the district court of the United States of America, held in and for the southern district of New York, at the city hall of the city of New York, on Thursday the twenty-seventh day of June, in the year of our Lord one thousand eight hundred and fifty.

"Present the Honorable Samuel R. Betts, district judge.

"The court was opened by proclamation.

"Cristobal Madan, at present of the city of New York, gentleman, came into court and applied to be admitted to become a citizen of the United States of America, pursuant to the directions of the act of Congress of the United States of America, entitled "An act to establish a uniform rule of naturalization, and to repeal the acts heretofore passed on that subject," approved 14th April 1802; and to the directions of the acts of the said Congress subsequently passed on that subject.

"And the said Cristobal Madan thereupon produced to the court satisfactory proof that he arrived in the United States before he had attained the age of eighteen years.

"And the said Cristobal Madan thereupon also produced to the said court a certificate of the declaration of intention, in due form of law, which certificate is in the words and figures following, to wit:

"United States district court

"For the Southern District of New York.

“SOUTHERN DISTRICT OF NEW YORK, ss :

“I, Cristobal Madan, do declare on oath that it is *bona fide* my intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign power, potentate, state, or sovereignty whatever, and particularly to the Queen of Spain, of whom I am now a subject.

“CRIST. MADAN.

“Sworn in open court this 27th day of June 1850.

“GEO. W. MORTON,

“*D'y Clerk of the Southern District of New York.*

“And the said Cristobal Madan thereupon also produced to the said court satisfactory proof that he has resided within the United States of America five years at least, and within the State of New York one year at least, during which time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States of America, and well disposed to the good order and happiness of the same; and the said Cristobal Madan having also made such declaration and renunciation as are by the acts of Congress required.

“Whereupon it is considered by the court that the said Cristobal Madan be admitted, and he is accordingly admitted, by the said court to be a citizen of the United States of America.’

“In the opinion of the umpire this record of naturalization is *prima facie* proof under the agreement of December 14, 1882, and Spain has no right to traverse this proof. The principal charge made is that the claimant deceived the judge by an intentional suppression of truth, with regard to the fact that he was not in the United States from the age of eighteen to twenty-one. The first point to be decided is whether it can be assumed that the judge thought that the fact was *material*, because otherwise no fraud can be charged. With regard to this question, the umpire is of opinion that, by the agreement the arbitrators have expressly concurred in the principle that the commission has no power to question the proceedings antecedent to the judgment of naturalization. The only power conferred upon the umpire by the agreement with regard to the present question, is to decide which facts among those stated before the court shall be considered as material. As there is no statement in the record with regard to the fact of the claimant's residence during the time referred to, the umpire is obliged to assume that in the opinion of the judge that fact was not material.

“This hypothesis is the only one by which it is possible to satisfactorily explain this naturalization; but even if it be assumed, for the sake of argument, that the judge ought to

have considered the fact as material, and that he did so consider it, the umpire is of opinion that the charge that the claimant deceived the judge by suppression of the truth is not proved. There is nothing which raises even a suspicion that the claimant suppressed any part of the truth in regard to his residence, and the umpire concurs in the opinion of the advocate for the United States, that the judge could not have been imposed upon by the claimant in the manner charged, unless he *suffered* himself to be imposed upon, or, in other words, was a party to a conspiracy to get up a spurious record of naturalization.

"With regard to the material fact stated in the record that the claimant had resided five years in the United States, it is assumed by the umpire that the judge understood it to mean three years during minority and two years next before naturalization, and in such case the statement was true and no fraud committed.

"Therefore, in the opinion of the umpire, the claimant is entitled to appear before the commission as a naturalized citizen of the United States under the agreement of December 14, 1882."

Count Lewenhaupt, case of *Cristobal Madan*, No. 45, Span. Com. (1871), February 22, 1883.

Case of Antonio Maximo Mora. "The umpire is of opinion that if the agreement of December 14, 1882, is interpreted in the light of the arbitrators' joint decisions in cases No. 17 and No. 29, the following rules must be observed in the present case:

"If the allegation of American citizenship is traversed by Spain, the claimant shall prove the allegation *prima facie*.

"The allegation is established *prima facie* by production of a certificate of naturalization or by other sufficient proof.

"Therefore the allegation can only be impeached by proof that the claimant practiced fraud on the court.

"The fraud must consist in intentional misrepresentation of a material fact.

"Testimony before the court by the claimant himself, or by his witness, that he had resided within the United States for a continued term of five years next preceding his admission shall be considered as intentional misrepresentation of a material fact, if, in the opinion of the umpire, there is proof that the claimant did not reside in the United States during that period.

"Residence in a place means bodily presence there for the greater part of one's time.

"The facts are as follows:

"The claimant was born in Cuba, 1818, a Spanish subject, and was domiciled there until 1853. On the 25th of August 1853 he declared, in New York, his intention to become a citizen of the United States. In 1855 he established in New York the commercial firm of Mora & Nephew. Between 1853 and 1859 he owned five houses in New York. In 1856 he married in Cuba. In June 1856 he formed a firm in Havana under the name of Mora, Alfonso & Co. He also, at some time not disclosed, became a member of the firm of Mora, Ponce & Co., in Cuba. In 1858 the firm Mora & Nephew was consolidated with another New York firm, Mora & Navarro, under the name Mora Brothers, Navarro & Co., and the claimant became the manager of the branch of this house in Havana. In the same year his mother died in New York, and by a deed of September 1859 the heirs agreed that he should continue as general manager of the plantation in Cuba, left by the mother to her nine children. The plantation was valued at \$540,000, but heavily incumbered. In 1861 the firm Mora Brothers, Navarro & Co. failed in New York, and in the same year the firms of Mora, Alfonso & Co., and Mora, Ponce & Co. were decreed to be in bankruptcy by a Cuban court, but the court sanctioned later an agreement by which the Moras were allowed to continue the management of the property, paying \$70,000 a year for nine years to their mortgage creditors and certain sums to other creditors. The only information given by the claimant concerning his property in New York between 1864 and 1869 is that he owned some lots of ground and an interest in a steamship line. He never kept house in New York before 1869. There is proof that he kept house and lived with his wife and family in Havana between 1864 and 1868, but he made frequent voyages to the United States. The principal testimony on which Spain relies with regard to the question of residence is that of José F. Navarro, a former partner, who testified as follows in 1881:

"Question. Previous to the arrival of Antonio Maximo Mora in the winter of 1868-69 you think he resided for about a year away from New York?

"Answer. Well, I couldn't say. In the mean time he had not been in New York, but the major part of the year he spent in Cuba.

“Question. Now, that covers the year 1868. Now, Mr. Navarro, can you (it would be difficult for you, I suppose)—can you remember about 1867?

“Answer. My memory is not very good as to dates, I wouldn't dare to say.

“Question. How much of the time, 1867, was he in New York?

“Answer. I couldn't tell how much.

“Question. You think he was here much of the time? Is that your answer?

“Answer. No; I don't think he was.

* * * * *

“Question. Now, during the most of that time (1861–1866 or 1867) where was Antonio Maximo Mora?

“Answer. He was either in New York or in Havana.

“Question. The larger part of the time in Havana?

“Answer. Larger part of the time in Havana, I think.

“When the claimant himself was cross-examined by Spain, where he resided between May 14, 1864, and May 14, 1869, his answers were evasive, and it seems evident that, under advice of counsel, he framed his answers on the theory that, according to American law, after the residence has been fixed a mere absence, however protracted, is immaterial, if such absence was only connected with the intention of returning. The claimant was naturalized by the superior court of the city of New York on the 14th of May 1869.

“According to the agreement of December 14, 1882, Spain has no right to traverse the certificate of naturalization. In the present case the certificate is conclusive, unless it be contended that the claimant practiced fraud upon the court. This charge is made. The certificate is still *prima facie* evidence, and it is not the duty of the claimant to furnish any further proof, but, under the rules, the presumption is that fraud was committed if there is proof that the claimant was not bodily present in the United States during the greater part of the five years, or two years six months and one day. There is proof that the claimant, from 1859 to some time in 1868, had, in Cuba, everything that constitutes domicile; that, thereafter, he established his domicile in New York; that during the five years he was part of the time in Cuba, but there is no proof that he was not during the greater part of the same time in the United States.

"Then on which side is the burden of proof?

"The advocate for Spain says:

"By the settled rules of law, when one party denies facts which are especially within the knowledge of the other, the latter person is bound to prove the facts if he is to have any advantage from them.'

"The advocate for the United States says:

"The burden, yes, the entire weight of proof in the case of an allegation of fraud rests with the party making it.'

"The umpire is of opinion that the burden of proof is on Spain, and he holds that the claimant has a right to appear before the commission as a citizen of the United States.

"No claim is made for the value of the estate, because the claimant trusts that the estate will be restored, but damages are claimed for illegal condemnation, confiscation, and detention of the claimant's property and of the income thereof.

"On the 20th of October 1879, the arbitrator for the United States awarded \$2,993,574, with 6 per cent interest until paid.

"The arbitrator for Spain has rejected the claim.

"On the 4th of May 1869 the governor-general of Cuba issued a decree of embargo against the claimant's property in Cuba, consisting of shares in several estates and a sum of money. The estates were already at that time in the possession of the authorities under a previous embargo decreed against the claimant's brother, J. M. Mora, under the belief that he was sole owner. With regard to the sum of money, the embargo was executed on the 5th of May 1869. Therefore the seizure was made before May 14, when the claimant became an American citizen, but it is contended by the advocate for the United States that the injury complained of is not the embargo of May 4, 1869, but the fact that on the 7th of November 1870 a court-martial issued a decree by which the property was declared confiscated and the claimant himself sentenced to death as a member of the Cuban junta.

"The umpire is of opinion that in case of seizure of property belonging to a Spanish subject the detention or confiscation of such property after the owner's naturalization is no new injury, and that as the claimant was not a citizen of the United States when his property was seized, this commission has no jurisdiction with regard to the claim for indemnity on account of said property.

"It is further claimed that compensatory damages are due for the wrong done the claimant by the sentence of death of the court-martial.

"This claim is disallowed.

"The umpire hereby decides that the case be dismissed."

Count Lewenhaupt, case of *Antonio Maximo Mora*, No. 48, Span. Com. (1871), February 22, 1883.

The claimant's certificate of naturalization, which was dated August 3, 1865, stated that he was admitted to citizenship under the act of Congress of 1802, and that at the time of his naturalization he produced in court a witness, one Captain George, who swore that he had resided in the United States for five years. It appeared, however, by the claimant's admissions before the commission, that he had not at the time of his naturalization lived in the United States for that period. This difficulty the claimant met by alleging that he applied to the court to be naturalized as a soldier under the act of 1862, which permitted persons who had been honorably discharged from the army to be admitted to citizenship without a prior declaration of intention, and on proof of one year's residence. A certificate of honorable discharge was produced. Captain George testified before the commission that he did not declare to the court that the claimant had resided in the United States for five years; that the claimant served in his company during the civil war, and applied to the court to be naturalized as an honorably discharged soldier; that the record of naturalization recited facts to the contrary, because the clerk, who made out the certificate on a printed form, failed to strike out the clauses in it applicable to naturalization under the act of 1802.

Count Lewenhaupt, umpire, held that "no fraud was practiced on the court, and that the claimant had a right to appear before the commission as a naturalized citizen of the United States, under the agreement of December 14, 1882."

Case of *John C. Rozas*, No. 69, Span. Com. (1871), February 22, 1883.

The arbitrator for Spain objected to the citizenship of the claimant, who was a native of Cuba, on the ground that he did not reside within the United States during the five years preceding his alleged naturalization, on September 9, 1869; and he particularly referred to a dispatch from Mr. Price, United States con-

sular agent at Nuevitas, in which there was the following passage:

"I must furthermore state that I have known Mr. Montejo for over twelve years, and he has never resided in the United States sufficient time to entitle him to an American citizenship, and undoubtedly obtained his papers when such documents were of rather easy acquisition. As I before stated, he obtained them since the insurrection broke out in this island; not six months elapsed from the time of his leaving Nuevitas, a Spanish subject, and, returning, he presented his naturalization papers, at which I was astonished. At the same time Montejo requested me to keep it a secret."

The arbitrator for the United States expressed the following views:

"The claimant's citizenship of the United States is attested by the certificate of naturalization of the superior court of the city of New York, and the evidence shows that, when arrested, the officers who searched him found in his pockets a certificate of naturalization, a passport, some money, and a document signed by the governor-general of Cuba, setting forth that the bearer of the present, Manuel Antonio Montejo, having satisfactorily shown himself to be an American citizen, all the authorities of the island, both military and civil, shall grant him, as such citizen of the United States, the protection and aid due him as long as his actions conform to the laws governing this province. The claimant had also registered himself at the United States consulate general at Havana, and it appears from the evidence that the Spanish officer who ordered his arrest knew him to be a citizen of the United States."

Count Lewenhaupt, umpire, held that the claimant had a right to appear before the commission as a citizen of the United States under the agreement of December 14, 1882.

Case of Manuel Antonio Montejo, No. 115, Span. Com. (1871), February 22, 1883.

David Kuhnagel, in the character of a citizen of France, made a claim against the United States for the seizure and appropriation of his property by the military authorities of the United States in Louisiana during the civil war. In his memorial he stated that on October 16, 1872, he was admitted to citizenship of the United States by the judge of the parish of Rapides, Louisiana, but that he had since learned that the petition on which his naturalization was granted contained matters that were not true; that the petition was not at the time read over to him, and that he did not become acquainted

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with its contents till May 7, 1881; and that among the matters in it which were not true, and which were not authorized by him, were allegations (1) that the date of his birth was the 18th of October 1834, (2) that he came to the United States with the *bona fide* intention of becoming a citizen thereof, and (3) that he was a minor when he came to the United States. He further stated that prior to his naturalization he had never made a declaration of intention to become a citizen of the United States.

On this statement of facts, counsel for the United States demurred to the claim on the ground that Kuhnagel was a citizen of the United States. In answer Kuhnagel's counsel produced a decree made on April 12, 1882, by Aristides Barbin, judge of the twelfth district court, Rapides parish, Louisiana, in a cause entitled "In re David Kuhnagel, No. 2701," in which it was declared that the decree made "in the late parish court," on October 16, 1872, admitting Kuhnagel to citizenship, was made by the court "in mistake of the real facts," the court being "misled by material mistakes inadvertently made in the petition," for which mistakes Kuhnagel was "not in any way responsible." The decree of Judge Barbin further declared:

"And being also further of opinion that the said David Kuhnagel is not a citizen of the United States, and has not hitherto, and never was admitted to become a citizen of the United States according to law: It is therefore, this 12th day of April, A. D. 1882, by the court adjudged, ordered, and decreed that the said decree of the late parish court of the 16th day of October 1872, in cause No. 825, be, and the same is hereby, wholly annulled, vacated, and set aside."

On these facts counsel for the United States maintained that the power conferred upon the courts by the United States statutes in respect of the naturalization of aliens was special and limited, and included no power to annul a certificate of naturalization previously granted; that it was unwarrantable to go behind such a certificate, and inquire whether the court which granted it observed the requirements of the statutes in the antecedent proceedings;¹ and that the control of a court over a judgment, order, or decree affecting the rights of parties, continued only during the term at which such judgment, order, or decree may have been entered.

On the other hand, counsel for the claimant contended that it was his right to file the petition on which Judge Barbin

¹ *Campbell v. Gordon*, 6 Cranch, 176; *Starke v. Ches. Ins. Co.*, 7 Id. 420.

issued his decree, and that the latter had the power, on grounds of fraud or mistake, to annul or vacate the former decree.¹

Counsel for the United States, in reply, maintained that in courts of law a decree, judgment, or order made at a given term was not subject to alteration or revision at any subsequent term of the same court, except in cases where special authority by statute had been given; that in such cases the proceeding was not by motion, but by a writ of review, supported by affidavits usually, and by a declaration; that courts of chancery were alike powerless to annul a final decree made when the term of the court had expired, though by the practice of equity courts whenever a suffering party wished to annul or avoid a final decree that had been made at a term of court already ended, he might obtain what was equivalent to a review by the preparation of a new bill, in which the grounds for the rehearing must be fully set forth and supported by the oath of the complainant; that the court in which Kuhnagel was naturalized was a court of law, and that the jurisdiction which it was then exercising was conferred upon it by a statute of the United States; that it had no equity power whatsoever, and that when it had passed upon the application of Kuhnagel to be admitted to citizenship and had made the decree, it had no power remaining except the power to issue a certificate of naturalization; and that it was immaterial whether such a certificate was or was not issued.

The disposition of the question is stated by counsel for the United States in his final report as follows:

"The majority of the commission—Baron de Arinos and Mr. de Geoffroy—gave an opinion in which they said: 'We accept the French citizenship of Kuhnagel, as we believe the certificate of his naturalization was obtained by misrepresentation of material facts.' In the case of Joseph Bouillotte, No. 130, the commission gave an opinion, in which they say: 'In the Kuhnagel case, this commission held that we had the right to examine the original proceedings for naturalization, and finding that the certificate of naturalization was obtained by misrepresentation of material facts, we held it to be null and void.' The reasons on which the majority of the commission acted are not of record, but it is understood that they were satisfied

¹ Adams's Equity, 419; Daniel's Ch. Prac. 1584; *Evans v. Bacon*, 99 Mass. 213; *Plymouth v. Russell*, 7 Allen, 438; *U. S. v. Castero*, 5 Sawyer C. C. 628; *Campbell v. Cannon*, 3d judicial district court of Utah; *Case of Kastellan*, For. Rel. 1875, part 1, No. 252.

that Kuhnagel was not a minor when he arrived in this country, and that inasmuch as a preliminary declaration had not been made by him previous to the 16th of October 1872, the proceedings then were null and void. The question, therefore, of the right of Aristides Barbin to make a decree annulling the decree of his predecessor of the 16th of October 1872 was not considered by the commission."

David Kuhnagel v. United States, No. 438, Boutwell's Report, 72; Commission under the convention between the United States and France of January 15, 1880.

A case analogous to the foregoing was that **Bouillotte's Case.** of one Bouillotte, in whose favor the parish court of Rapides Parish, October 7, 1868, on a petition signed by Ryan and White, attorneys at law, and not verified by oath, "ordered, adjudged, and decreed that the judgment of citizenship in favor of Joseph Bouillotte, to date and take effect from the 1st day of January 1854, be revived, restored, and reestablished, with the same force and effect as the originals had previous to their destruction by fire in May 1864." Bouillotte denied all knowledge of the petition, and declared that he had never authorized Ryan and White to make it. Ryan and White, while not recollecting the circumstances under which the petition was prepared and presented, positively declared that they would never have taken such a step without authority. The records of the parish court were burned in 1864, but the legislature empowered the judge to hear testimony and make decrees for the purpose of reestablishing them. Bouillotte denied having been admitted to citizenship in 1854. There was evidence, however, that on October 8, 1868, the day after the decree of reinstatement, he made oath, as a prerequisite of being registered as a voter, that he was a citizen of the United States, and that he took the same oath again on August 17, 1878. He denied having made such an oath, though he admitted that he had voted at local elections and once at a general election. A witness, whose reputation for veracity was sustained by two witnesses, and was not impeached by anyone, stated that he was present in court in 1853 or 1854 when Bouillotte took an oath preliminary to admission to citizenship. This statement Bouillotte denied. It appeared that many electoral frauds were committed in Rapides Parish from 1868 to 1880, and that on January 7, 1882, the judge of the twelfth judicial district, on Bouillotte's peti-

tion, and after hearing and arguments, made the following decree:

"And the court being of opinion that Joseph Bouillotte is not a citizen of the United States, and has not hitherto and never was admitted to become a citizen of the United States according to law, and that no record of his ever having been so admitted was destroyed by fire in May 1864, or ever had any existence, * * * it is therefore * * * decreed that the said decree of the late parish court of the 7th of October 1868 * * * is hereby wholly annulled, vacated, and set aside."

Counsel for the French Republic argued that Bouillotte had never changed his nationality; that under the laws of the State of Louisiana he had the right to vote at municipal elections and to hold municipal offices; that if he voted at general elections he did it under duress, exercised upon him in the course of the electoral frauds committed in Rapides Parish; and that the decision of the case by judicial authority was final and conclusive upon the commission.

Counsel for the United States maintained (1) that Bouillotte was not the ignorant and incompetent man that he represented himself to be in his attempt to repudiate his various acts; (2) that his birth in France was not satisfactorily proved; and (3) that if it were, the evidence of his naturalization, and his public representation of himself as a citizen of the United States, precluded the commission from treating him as a citizen of France.

The case was dismissed for want of jurisdiction, M. Lefavre dissenting.

Subsequently, a motion for a rehearing, supported by a brief, was presented by counsel for France. The motion was granted, and the case was reargued at length. Counsel for the French Republic contended that Bouillotte had never lost the *animus revertendi*, as defined in article 17 of the Civil Code of France; that the burden of proof in that regard was upon the defendant government and not upon claimant; and that the commission, having held Kuhnagel to be a French citizen, should render the same decision in respect of Bouillotte.

The majority of the commission—Baron de Arinos and Mr. Commissioner Aldis—sustained the position taken by the counsel for the United States, and in their opinion said:

"The defense is: That the claimant has established himself in the United States without any intention to return to France, and thereby has lost his French citizenship according to the Civil Code of France.

"We hold that the declaration of an intention to become a citizen of the United States and to renounce all allegiance to France (the first step in naturalization) is *prima facie* proof of the 'sans esprit de retour.' It may be rebutted by satisfactory proof to the contrary.

"In this case the following facts are proved: The claimant came to the United States in May 1850. In August 1850 he came to Alexandria, in Louisiana, and has ever since resided there—a period of nearly thirty-four years. He has never returned to France. He has a family and a home. He has been established in business as a carpenter and a merchant, and has been reasonably successful. He has owned real estate and buildings for many years. He has voted and held office. There is nothing to show that he has ever expressed the intention of returning to France. His parents in France are dead, and there is nothing to show that he has either friends or property there to return to."

The majority of the commission then reviewed the testimony, and concluded:

"In the Kuhnagel case the commission held that we had the right to examine the original proceedings for naturalization; and finding that the certificate of naturalization was obtained by misrepresentation of material facts, we held it to be null and void.

"In this case we examined the original proceedings and finding that they were not fraudulent, but that Bouillotte made his declaration voluntarily to become an American citizen, and to renounce his allegiance to France, we hold the declaration sufficient and in nowise affected by fraud.

"We find, therefore, that the claimant had established himself in the United States without any intention of returning to France, and thereby has lost his French nationality. The claim is therefore dismissed for want of jurisdiction."

The French commissioner, Mr. Lefavre, said:

"Without renewing the discussion with my respected colleagues upon the period of confusion in civil registers and in the evidence of citizenship resulting from civil war, I persist in my suggestion that the judgment of a regular United States court denies to Bouillotte the American citizenship, and asserts consequently his French nationality. Therefore I maintain and confirm my dissenting opinion in this case."¹

¹ Upon the reading of the decision of the commission, counsel for the French Republic entered the following protest:

"I protest on behalf of the French Government against the decision this day made and subscribed by two members of this commission in the case of Joseph Bouillotte v. The United States. According to the laws of France and to its well-settled jurisprudence, this claimant is a French citizen.

Joseph Bouillotte v. United States, No. 130, Bontwell's Report, 77; commission under the convention between the United States and France of January 15, 1880.¹

This commission was organized under a convention directing the commissioners to apply to the facts developed in each case the laws of the respective countries, particularly when, as in this case, the question is one depending exclusively upon municipal jurisprudence, and not to create a code of laws originating in its own will, resting on mere passing impressions, and in conflict with well-established rules and usage, and with public law, justice, and equity. The counsel for the French Republic reserves to his government the right to assert its own laws and to maintain its time-honored principles. France asserts its right to protect its own citizens everywhere throughout the whole world, and if decisions rendered here are of such a nature as to put them in jeopardy, the French Government reserves to itself the right to ask the Government of the United States for a revision of decisions entirely unacceptable."

Nothing came of this protest.

¹The following circular, embodying the substance of the provisions of the French Civil Code on the subject of citizenship and the manner in which it may be lost, was issued by the agent of the United States before the mixed commission under the convention above cited:

[Circular No. VIII.]

"FRENCH AND AMERICAN CLAIMS COMMISSION,

"Washington, December 6, 1881.

"To the Special Counsel and Attorneys on the part of the United States:

"For convenience of reference the substance of the provisions of the French Civil Code which refer to French citizenship, and the manner in which it may be lost, are herewith communicated to you.

"Section 17 provides that citizenship may be lost (1) by naturalization in a foreign country; (2) by the acceptance without permission of public functions conferred by a foreign government. A commentator upon this clause of the code lays down the following as the acts or functions, the acceptance of which causes loss of citizenship: (a) Titles and dignities which require certain fixed duties; (b) honorary positions under [*auprès*] a foreign sovereign; (c) employment in a public office given directly by a foreign government; (d) performance of the duties of an ambassador, minister plenipotentiary, or other duties of a diplomatic character for a foreign government; (e) employment abroad as a foreign consul; (f) a bishopric *in partibus*; (g) an oath of allegiance when the necessary accompaniment of an office.

"It is also held that these functions or honors or services must be conferred by or rendered to a foreign government which has a *legal* or *recognized* existence.

"The following acts or functions are said not to carry with them loss of citizenship: (a) Acceptance of titles, dignities, and decorations which are purely honorary; (b) acceptance of the freedom of a city or of certain provinces; (c) performance of the duty of foreign consul in France, because the *exequatur*, which is given to a Frenchman, contains a reser-

Footnote—Continued.

vation that he can not avail himself of his consular office; (d) services in a foreign 'Garde Nationale.'

"Section 17 further provides (3) that French citizenship shall be lost by domicile in a foreign country without intention to return. It may be said, with regard to this provision, that the intention to return is always presumed; that the code makes an express exception of domicile for commercial purposes, which is never considered as indicating an intent to remain; and, generally, that it is for him who alleges the intent to remain abroad to prove it.

"Section 18 provides that a Frenchman who shall have lost his citizenship may recover it by returning to France, by permission, and declaring his intention to remain, and that he renounces any privilege contrary to French law.

"By section 20, persons who have recovered French citizenship under sections 10, 18, and 19, can not take advantage of it until they have fulfilled the conditions imposed upon them by those sections.

"By section 21, a Frenchman who, without permission of the President of the Republic, shall enter a foreign military service, or shall join a foreign military corporation, shall lose his citizenship. He can return to France only by fulfilling the conditions imposed upon a foreigner who desires to become naturalized, and then without prejudice to any penalty provided for by the criminal law against French citizens who have carried, or shall carry, arms against their country.

"The law of April 27, 1848, as modified by that of May 28, 1858, provides that citizenship shall be forfeited by ownership of or traffic in slaves.

"By the treaties between France and Germany, all persons born in Alsace-Lorraine (wherever resident) became, by the cession of territory, German subjects; nevertheless the right was secured to them to elect French citizenship by making a declaration to that effect to a prefect, diplomatic officer, or consul before October 1, 1873. Failing such a declaration, all natives of the ceded territory are now German.

"In addition to the above general provisions there are certain others which apply specially to women and children, as follows:

" Women.

"Section 12 provides that a foreign woman who shall have married a Frenchman shall follow the condition of her husband, and the courts have held that she does not lose her French citizenship by her husband's death.

"Section 19 provides that a French woman loses her citizenship (1) by marriage with a foreigner; (2) if married to a Frenchman, by her husband's change of nationality. But if she becomes a widow she may recover her French citizenship, provided she resides in France, or returns there with the permission of the President of the Republic, and declares her intention of fixing there her domicile.

"It may be remarked here that the keeper of the seals, in a circular of the 30th of March, 1872, addressed to all the prefects on the question of the election of citizenship of an inhabitant of Alsace-Lorraine, says: 'A woman

Footnote—Continued.

married in Alsace-Lorraine who desires to put her nationality beyond all doubt must, with the consent of her husband, make a declaration of "option."

"Children.

"Children of French parents are French; the citizenship of the parents, and not the place of birth, under the law of France, determines the citizenship of the child.

Section 10 provides that a child born abroad of French parents who have lost their citizenship in France, may recover it by fulfilling certain formalities prescribed in section 9, to wit, by making declaration of his intention to fix his domicile in France. In case he resides abroad at the time of the declaration, he must supplement it by domicile in France within one year.

"Therefore, in brief, French nationality is lost in the following manner:

"1. By voluntary renunciation.

"2. As a penalty when a Frenchman has committed certain acts for which he is punished by the loss of his citizenship.

"3. By a superior force; for example, the cession of territory.

"4. In consequence of certain acts, as when a French woman marries a foreigner.

"GEO. S. BOUTWELL,

"Agent and Counsel on the part of the United States.

"JOHN DAVIS, *Assistant Counsel.*"



CHAPTER LV.

DOMICIL.

“The memorialist represents that he is a
Clow's Case. citizen of the United States; that in 1834 he
went to Texas, and together with one A. T.
Martin, with whom he had previously been connected in business in Tennessee, in June 1835 entered into copartnership with persons by the name of McKenney and Williams. * * * They established themselves as merchants and traders at Washington, on the Brazos River, and carried on business with great profit until February 1836, when, as he alleges, war broke out between Mexico and Texas. At that time the copartnership had a stock of goods on hand at Washington valued at \$8,000, and also goods stored at Fort Bend, San Filippe, and Columbia, on the same river, waiting for transportation to Washington, valued in the whole at \$46,500. All the goods at these latter places were taken by Mexican troops, and those at Washington, which the Mexican forces did not reach, were sacrificed by exposure and otherwise. * * * The memorialist as surviving partner claims for one-half of all the losses suffered by said copartnership.

“It is matter of public history that the Texan revolution broke out in 1835. A provisional government was established, troops were raised, and battles fought in that year. The independence of Texas was declared by a convention of delegates elected by the people of that State early in March 1836. The precise date of the transactions complained of by the memorialist is not stated, but it was undoubtedly in the month of April when Texas was invaded by the Mexican forces, under General Santa Anna, and immediately before the battle of San Jacinto, which took place on the 21st of that month.

“The circumstances detailed in the memorial leave no doubt but that it was the purpose of Martin and Clow to establish themselves permanently in Texas. Probably a considerable

portion of the property taken from them was transported there after the commencement of hostilities and was thus found by Mexico 'adhering to the enemy.'

"A citizen of a neutral nation, residing in a country between which and another war breaks out, may exempt himself from the liabilities of a hostile character by taking early steps to remove from the belligerent territory. If no such steps be taken he owes temporary allegiance to its government, and both himself and his property are to be regarded as out of the protection of the government to which his original and permanent allegiance was due. It is well known that in the early stages of the Texan revolution many citizens of the United States, allured by the prospects of its speedy emancipation from Mexican control, hastened to Texas to share in the good fortune that was likely to attend it. They thereby abandoned all right to claim the protection of their own government, and must abide by the result, whether for good or evil, which was consequent upon their own voluntary action.

"These principles are well established and have been uniformly recognized by the government and the judicial tribunals of the United States. (Wheaton, *Elements of International Law*, part 4, chap. 1.) In answer to the remonstrances of Mexico, the Government of the United States repeatedly disclaimed all control over and all responsibility for the actions of its citizens who emigrated to Texas. On more than one occasion it distinctly avowed that having changed their domicile they had changed their allegiance also, and with a change of allegiance there necessarily resulted a forfeiture of their right to claim the protection of the country which they had abandoned. In the opinion of the board the memorial does not set forth a valid claim against Mexico under the treaty of 2d February 1848, and it is accordingly rejected."

Memorial of *Robert J. Clow*: Opinion of Messrs. Evans, Smith, and Paine, commissioners, March 1850, under the act of Congress of March 3, 1849.¹

¹ On an application for a rehearing in this case, the commissioners, January 7, 1851, said: "On the 22d of August last the claimant filed an amended or supplemental memorial, setting forth that in removing to Texas in 1835 he had no intention of abandoning his citizenship in the United States; but that it was his purpose to return to the United States, after having enjoyed for a short time what was then a profitable trade in Texas. This additional statement does not remove the objections which existed to the validity of the claim. The intention to return, unless

Cooke's Case. "Alexander H. Cooke had been for several years a resident merchant in the territories of

Mexico, and about the 1st of September 1835 he moved from Matamoras to Dewitts Landing, where he remained until the 20th of March 1836. A revolutionary movement which had been going on in Texas for several months against the general government in Mexico broke out in November 1835, and the provisional government then established in Texas declared its intention to assume an open hostility against the Government of Mexico, and on the 2d of March 1836 the people of Texas, by their delegates in convention, published a formal declaration of independence. In the mean time open war existed between Mexico and Texas and the territory of the latter was invaded by the army of Mexico. The war was carried on in Texas with various degrees of success until in the month of April 1836, when the battle of San Jacinto was fought, which terminated in the defeat of the Mexican army, and in the entire evacuation of the territory of Texas by the invading army. It was in the progress of this war that the claimant lost his property. A portion of the invading forces in their line of march through Texas approached Dewitts Landing, the residence and place of business of the claimant, and finding the place deserted by its inhabitants (for every individual had fled except an old negro woman) the village was sacked, and it is to be presumed that all the merchandise found there was carried off or destroyed by the Mexican troops. In the loss of his merchandise under these circumstances, the claimant insists that he is entitled to indemnity from the Mexican Government, because he was a citizen of the United States and only residing temporarily in Texas and pursuing a lawful business. He insists that by the treaty of 1831 Mexico had guaranteed to citizens of the United States residing in the territories of Mexico security for their persons and property, and that under this treaty he was entitled to such protection from Mexico whilst he resided at Dewitts Landing. He further insists that his departure from Texas and his subsequent sojourn in the United States, together with

accompanied by early acts to carry it into effect, would not secure to the claimants the right of neutrality. A state of hostility had existed between Texas and Mexico several months before the injuries complained of by the memorialist were perpetrated; and during that period no act appears to have been done by the claimant manifesting his election to separate himself from the Texan cause. Under the circumstances the board sees no reason to reverse the decision already made."

former declarations of his intention to return to the United States to reside, are proof of his intention not to connect himself with the people of Texas.

"The law appears to be well settled that persons domiciled within the territory of a nation in which a revolution occurs and a dismemberment takes place have a right to elect whether they will take part with the revolutionary portion or with the other portion of the society or will remain neutral. If the party continues in the country during the contest, and until after the revolution has been effected, he will, as a general rule, be presumed to have elected to take part with the new government. This presumption may, however, be rebutted by circumstances. To rebut the presumption of any such intention on his part the claimant offers in evidence an affidavit of his brother, B. F. Cooke, who swears that in the year 1834 or '35 he received at the City Hotel, in New York, by the hands of a gentleman whose name he does not remember, a letter from A. H. Cooke, informing him that he was living at Dewitts Landing Point and engaged there in merchandize; that he was making money very fast, and intended when he had made a fortune, which he expected to do in a few years, to take up his residence in the United States. In further support of this intention he adduces his return to the United States and his continual residence here, holding at various times several civil offices under the State and United States Governments. The declaration of the claimant's intention, such as is said to have been made by his letter, can not be said to bind claimant as to any course he might see fit to pursue thereafter, for certain it is such declaration not only did not contemplate any particular period of time for his return to the United States, but it was not made when the law has declared that it should have been made to have the effect of determining his election, or rather of deciding that he had not elected to join the revolutionary party. Besides, the claimant fled in sight of the invading forces, and with all the rest of the people of Dewitts Landing who were of the revolutionary party. What other construction could be put on his flight than that he was one of that party and expected to follow their fortunes? His return to the United States under those circumstances can be considered in no other light than as a continuation of his flight and as a means of placing himself beyond the reach of danger. Neither such a return to the land of his birth nor his continued resi-

dence there afterward are sufficient to establish his determination before the cause occurred which occasioned such return. Mexico was and still is acknowledged by the United States as a civilized nation, and although her armies committed acts of barbarity in her wars with Texas, history speaks of those acts as committed upon persons found bearing arms, and not upon unoffending citizens.

"The board is also of opinion that the residence of the claimant at the time of the injury complained of subjected him to the laws of war then existing between Mexico and Texas. It was such a war as by the public law other nations were bound to yield to each party in its prosecution all the rights of war. One of such rights is to consider the property of neutral merchants resident in the enemy's country subject to the same rules as the property of the enemy.

"The board is of opinion and decides that the claim of Alexander H. Cooke is not a valid claim against the Republic of Mexico under the treaty of the 2d of February 1848, and the same is accordingly not allowed."

Opinion of Messrs. Evans, Smith, and Paine, commissioners, December 17, 1850, under the act of Congress of March 3, 1849.

**Case of Haggerty
and Others.**

"The claim set forth in this memorial grows out of the destruction of certain buildings and merchandise at a place called New Washington, in Texas, by the Mexican army under the immediate command of General Santa Anna in April 1836. The memorialists represent that in the year 1834, 'a number of individuals in the city of New York raised funds for the purpose of purchasing a piece of land known as Cloppers Point, situated on Galveston Bay, which had attracted considerable attention as a prominent place for a town site, and sent out Col. James Morgan as their agent to make the purchase and to manage the concern for the association, the intention being to put up buildings and establish a place of trade, and then dispose of the lands for town lots.' The land was accordingly purchased and laid out by a surveyor employed by the association for a town site and called New Washington. On the 23d of October 1835 articles of agreement were entered into by the parties interested, 'whereby the business of the concern was to be conducted at New Washington by the said Morgan, and the general direction of all the affairs of the association was committed to a board of managers to consist of three persons.'

The title of the real estate was to be held by Morgan in trust for the benefit of the parties interested. The original capital subscribed was about \$60,000, a principal part of which was paid in and was used in purchasing goods, building materials, lands, etc. Two vessels were also purchased and dispatched to New Washington with a considerable amount of goods; and were afterward employed to run as packets to New Orleans. A dwelling house and store and two warehouses were erected, and the business of the association commenced with flattering prospects.

"The memorialists say: 'New Washington soon began to attract public notice through all the country and bid fair to become not only of much commercial importance, but probably the *capital of the country, if, as likely at no distant period of time, it should become independent of Mexico.*' These expectations were dissipated by the destruction of the buildings and almost the entire amount of the merchandize by the Mexican army under the command of General Santa Anna in his invasion of Texas on the 19th and 20th of April 1836. The memorialists represent that they composed the board of managers of the association, and they claim in behalf of those members of it who are citizens of the United States indemnity for the losses they sustained.

"In the opinion of this board this claim is not valid against Mexico under the provisions of the Treaty of Guadalupe Hidalgo, by which the board is constituted. At the time of the injuries complained of Mexico and Texas were at open war. The Texan revolution broke out in the autumn of 1835. Battles were fought and armies were in the field, and at the close of that year Mexico had scarcely any force east of the Rio Grande. A provisional government was established in Texas in the month of November, and commissioners were sent to the United States for the purpose of borrowing money and obtaining other assistance for securing Texan independence. * * * Strong appeals were made by the leaders of the Texan revolution to citizens of the United States for aid and succor in the approaching struggle; and it was notorious that many of our countrymen, impelled by a love of liberty or a love of adventure, and some stimulated by a prospect of gain, rushed to Texas to take part in the conflict. The provisional government of Texas in the year 1835 established ports of entry at several places, and among them at Galveston; and imposed duties upon imports and tonnage.

"Meantime the Government of Mexico earnestly remonstrated to that of the United States against the interference of our citizens in their local and internal affairs; and by a decree of 12th January 1836, which was communicated to our minister residing in Mexico on the 14th January, closed the ports of Galveston and Matagorda both to foreign and coast-wise commerce, to take effect, for all vessels sailing from ports in the Gulf of Mexico, in thirty days from its promulgation.

"It can hardly be necessary to refer to other public acts connected with the Texan revolution to show the relations subsisting between Mexico and Texas, at the time the memorialists and their associates engaged in the enterprise out of which the claim now presented springs. They were well known in the United States, and the independence of Texas was confidently anticipated, and was in fact soon after achieved. The memorialists themselves set forth among the inducements they had to make the purchase and establish a town, the probability that it would become the capital of the country when its independence should be established, which was then regarded as likely at no distant period of time. * * *

"A neutral residing in a foreign country at the outbreak of a war has the unquestionable right to remove himself and his property from the territories of the belligerent nation; and, if he make his election to do so seasonably, can not be regarded by the other party to the war as adhering to the enemy. If, however, he remain, both himself and his property are liable to the fortune which betides the country of his adoption.

"There is nothing in the present case to indicate a purpose on the part of the association represented by the memorialists to withdraw their establishment from Texas upon the breaking out of the revolution. * * * Almost their entire operations in building and trading were commenced and carried on after that event, and when it was perfectly well known that Mexico was preparing to reconquer the whole country. The board does not, therefore, find in the case a foundation for the argument, addressed to it by counsel, that they were never permitted to make an election whether they would abide by the new government or not. The circumstances set forth in the memorial, together with the public history of the times, leave little room to doubt that a leading inducement to engage in the enterprise was a strong expectation of an entire and early emancipation of Texas from Mexican dominion. Its independence was formally declared in March 1836. The dele-

gates were elected for this purpose on the 1st day of February preceding.

"Nor can the board yield to the argument that the claim is sustainable because 'the property was sent to Mexican territory under the guaranty of protection by that government.' The treaty of 1831 is relied upon as affording security to the enterprise in which the association was engaged, and the laws of Coahuila and Texas relating to colonization are supposed to have a bearing upon the rights of the parties concerned. The persons and property to whom protection was guaranteed by the provisions of the treaty of 1831 were only such as were subject to the laws, 'usages, and statutes' of the country where they were found. The treaty gave no security or protection to persons or property contravening the laws of Mexico. The property which was destroyed in this case, instead of having been sent under the protection of the Mexican Government, was sent in defiance of it. It is not pretended that any duties were paid to Mexico upon its importation. If it was sent as to a Mexican country it should have been accompanied by manifests certified by the Mexican consul at the port of exportation, and should have paid duties to the Mexican treasury. If any duties were paid they were paid to a Texas custom-house. It does not appear, and it is by no means probable, that any one requirement of the Mexican law touching the importation of goods into the country was observed, or that the vessel took Mexican clearances or paid tonnage duties, except to Texas. Many of the goods were shipped after Mexico had issued the decree before alluded to closing the port of Galveston to all commerce. The agent of the association was himself a citizen of Texas, and the title to the land was in him.

"Under these circumstances it can not be maintained that the property in question was under the protection of the Mexican Government or of the securities afforded by the treaty of 1831. Nor, in the opinion of the board, do the colonization laws which have been cited in the argument apply to the case. Those laws relate wholly to the settlement and cultivation of the soil. The colonists were to become Mexican citizens, bound to obedience to Mexican laws. Foreign owners and nonresident proprietors were not contemplated.

"It has also been argued that the claimants were entitled to notice and opportunity to withdraw their property, as provided in the twenty-sixth article of the treaty of 1831. It is sufficient

to say, in answer to that, that that article relates only to a case of war between the parties to the treaty, viz, the United States and the Mexican Republic, and that at the time of the transactions complained of the two countries were at peace.

"It is further argued that 'the destruction of the property was wanton and unjustifiable by modern military usages.' This may be admitted without laying the foundation of a valid claim under the treaty of 2d February 1848. The question arising here is, whether the United States had, or could have, any just right to interpose on account of the manner in which the belligerent parties conducted the war towards each other. Mexico found the property which was destroyed in the present case adhering to the enemy, in the actual possession of and apparently owned by a citizen of Texas, and she treated it as enemy property, and the board is of opinion that under the circumstances of the case she had a right to do so. Upon what principle of public law could the United States have interposed during the progress of the Texan revolution to dictate the manner in which either party should wage the war in which it was engaged against the enemy? Many things undoubtedly took place under that short but bloody struggle, as in most cases of civil war which history records, at which humanity mourns. The present case is by no means the most flagrant in atrocity which then occurred. But the Government of the United States did not deem it proper to interfere on that account. The questions at what time, and under what circumstances, and to what extent neutral nations may rightfully interfere between belligerents, upon the ground that as between themselves the rights of war and of humanity are violated, have not yet been settled.

"It does not appear in the present case that the interposition of the Government of the United States was ever solicited by the memorialists or others interested in the association to claim the indemnity to which they now claim to be entitled. No reason is assigned why the claim was not presented to the joint commission under the convention of 11th April 1839, as required by the rule of the board.

"The board, being of opinion that the memorial does not set forth a valid claim against Mexico under the treaty, orders that the same be rejected."

Memorial of John Haggerty, Thomas Davies, and Alexander H. Dana: Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 7, 1851, under the act of Congress of March 3, 1849.

Case of Forbes and Parker. "The memorialists represent that in the month of February 1836, being then in the city of New Orleans, they formed a copartnership 'for the purpose of making a commercial adventure to Texas, each partner paying in the sum of \$1,500, which amount was invested in merchandise and shipped to Brazoria and Columbia, in Texas, on the 18th day of that month.' The memorial further sets forth that while ascending the Brazos to Columbia, Forbes, one of the partners accompanying the goods, 'for the first time learned the fact of the existence of a state of war or revolution in Texas.' He nevertheless proceeded to Columbia and landed the goods, which 'were stored in the warehouses of Walter C. White & Co., to whom they were consigned, with a view to be sold as rapidly as possible.' At this time the Mexican army, in several divisions, had nearly overrun all of western and middle Texas, and early in April reached the Brazos River. The inhabitants of the country fled upon their approach. Mr. Forbes with others abandoned Columbia, leaving his property to its fate. Upon returning to it, after the battle of San Jacinto, he found a portion of his property had been removed from its place of deposit, and some of it had been consumed or carried away by the Mexican troops who had passed through the place. The memorialists claim indemnity for the value of the goods thus taken by the Mexican soldiers.

"In the opinion of the board the claim is not valid, and can not be allowed. At the time of the shipment of the goods from New Orleans it was perfectly well known that Texas was in a state of revolt against Mexico. Large numbers of citizens of the United States had left that city, as well as other Southern cities, avowedly for the purpose of aiding in the establishment of Texan independence. Agents of the provisional government of Texas had been some weeks in the city of New Orleans borrowing money and obtaining supplies for the service of Texas. Mexico had interdicted commercial relations with certain ports of Texas. It is quite impossible, under these circumstances, that Forbes should for the 'first time' learn of the existence of the revolutionary struggle as late as March 1836. And even if the fact were so, it does not appear but that he could have then returned and removed his property from the country. Such, by public law, he was required to do if he would preserve his relations as a neutral between the

parties. The case rests upon the same ground as that of Haggerty and others, already decided by the board, and to the opinion in that case reference is made, as applicable to the present claim."

Memorial of *Forbes and Parker*: Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 7, 1851, under the act of Congress of March 3, 1849.

"It appears from the documents before us
Thompson's Case. that in 1833 Mr. Thompson became the purchaser of large tracts of lands in Texas from Mexican citizens, whose title was derived by purchase from the State, whereby an absolute title in fee was acquired; and that subsequently he purchased of a Mexican citizen, to whom it had been granted, the exclusive right of navigating the Trinity River by steam for the term of eighteen years upon certain conditions. That in 1833 he visited the country with a view to make arrangements for a permanent settlement there; that in December 1835 he removed his family, consisting in all of thirty-three persons, including servants, laborers, mechanics, and others in his employment, to Texas, and entered upon his lands; that he carried or sent thither a large amount of property, furniture, a valuable library, plate, carriage and horses, and many articles of luxury suited to the condition in which his family had been accustomed to live. He also sent the frame of a steamboat, a steam engine and machinery, and made extensive preparations for carrying on the enterprise he was engaged in. All his plans were broken up and his property was pillaged or destroyed by the Mexican army under Santa Anna in his invasion of Texas in March 1836. For the losses thus sustained the claim is presented.

"The memorial does not state, nor does Mr. Thompson, that he had not become a Mexican citizen by taking an oath of allegiance to that government. There is much reason to suppose that he did take such oath, as without it he could not hold the lands which he had purchased. * * * He states that he had purchased the lands 'in fee,' and by the laws of Mexico no unnaturalized foreigner could take such title. There is additional evidence to the same end. Among the papers filed is a memorial of Mr. Thompson addressed to the President of the Mexican Republic, which is without date, but which was presented by him after the injuries sustained. * * *

In this petition Mr. Thompson stated: 'Your memorialist invested large sums of money in real estate in Coahuila and Texas, intending to become a citizen of the country, and expended large sums of money in making the necessary surveys and location, etc.;' and that in the year 1833 'your petitioner went in person to the country to make the preliminary arrangements for settlement, taking and sending with his agents surveying instruments, etc.' He further stated 'that he purchased at a very great expense the right of navigation of the Rio Grande del Norte and Trinity Rivers, and constructed a large and valuable steamboat and engine, but was prevented putting the same in operation by the late war.' He also says: 'And your petitioner further states and shows that he actually went into the country with a very large and numerous family, consisting of thirty-three persons, *bona fide* settlers, and remained there until after the battle of San Jacinto; that he was taken prisoner and arraigned, his life and that of his family threatened, and otherwise ill treated, for their adherence to the constitution and laws of the Mexican United States.'

"The ground of his claim to indemnity thus addressed to the President of Mexico was his adherence and fidelity to Mexico. He did not assert any right as a citizen of the United States occupying a neutral position, and taking no part in the civil commotions then raging. He was there with his family, '*bona fide* settlers,' in pursuance of an intention formed long before of becoming a 'citizen of the country;' and the extensive plans which he had projected and the vast interests at stake all confirm the idea that he had become a citizen of Mexico. To that government and not to the United States he in the first instance appealed for some indemnity for the losses he had sustained.

"But if it were not so—if in truth he had never abjured his allegiance to the United States—there is another fatal objection to the allowance of his claim. He voluntarily left the United States at a time when it was well known here that a civil war had broken out in Texas, that a provisional government had been established there, that troops had been raised and battles fought, that Mexico was preparing to invade Texas with a considerable force, declaring her purpose to reconquer the whole country. He arrived in the country in January 1836, and must have been aware of the state of things then existing there; but he chose to remain. He put his previous plans, as far as he could, in execution. The independence of

Texas was soon after declared, and yet he did not avail himself of his rights of neutrality by withdrawing from the country or taking any steps or signifying any purpose to do so.

"He must therefore be regarded as making his election to abide by the fortunes of Texas, and having thus determined he could have no further claims upon the Government of the United States for protection. That protection he could only have by withdrawing from the country so involved in war, within a reasonable time after its commencement. He could not wait to see the result of it; and we are of opinion that as he went to Texas and with his family became '*bona fide* settlers' after knowledge of the disturbances existing there, and remained in the midst of those scenes until its independence was established, it is quite too late now to set up any claim founded on the idea of his entire neutrality in that contest. Mexico had a right to regard him as an enemy unless by reason of some circumstances not known to us he was specially exempt from that imputation—of which it appears from his own statements he was suspected by the Texan authorities. In any aspect of the case, therefore, we do not think the claim can be sustained."

Memorial of *R. S. Coxe, trustee of Gilbert L. Thompson*: Opinion of Messrs. Evans, Smith, and Paine, commissioners, March 20, 1851, under the act of Congress of March 3, 1849.

"It appears that Dr. Beales filed the preliminary application to become a citizen of the United States in May 1836, soon after the establishment of Texan independence, but was not admitted until May 1850, subsequent to the date of the Treaty of Guadalupe Hidalgo. It is contended on behalf of the claimant, in an elaborate argument submitted to us, that in point of fact the domicile and residence of Dr. Beales at the time of the injuries complained of was in the city of New York, and that he had it in view to make that his permanent residence, and that 'this alone was sufficient to change his national character, so as to entitle him to the protection of this government.' Authorities are cited to the effect that foreigners residing in a country are in many respects regarded as citizens of that country. This is undoubtedly true, and especially as regards the belligerent rights of other nations in respect to the country in which such foreigner has taken up his abode. As to such belligerent nation, while he remains in the hostile country, he is to be considered an enemy.

"But without questioning the public law as expounded in the cases referred to, we are entirely satisfied from all the proofs in the case that it was never the purpose of Dr. Beales to make his permanent residence in New York, as in argument is asserted. He first came to that city for a temporary purpose to 'work the colonization' of his grants. All his subsequent movements looked to a permanent establishment in Coahuila and Texas. * * * We are therefore compelled upon all the evidence in the case to come to the conclusion that the claimant had no such domicil or residence in New York as is contended for, and even if he had, that the protection which he could justly claim from the United States does not under the circumstances extend beyond the territorial jurisdiction of the country. He was entitled to security and protection here; but we think it cannot be maintained that the subject of another country, from the mere fact of his residence here, can require the Government of the United States to protect him in all or any of his pursuits in any quarter of the globe not originating here or having any connection with our trade or commerce, and especially against the civil commotions or local regulations of the country of his birth or adoption.

"Many foreigners, from all lands, are resident in the United States, and in the revolutions and commotions that are so frequently occurring in the world it may often happen that their possessions and property in other countries will be utterly wasted. Is it to be expected that this government will interpose to examine into the rightfulness of such proceedings, or to demand indemnity? We think not. Our laws and our institutions offer security and protection on our own soil; and in some cases, possibly, it may be that the government would be bound to throw its shield over commercial transactions carried on by resident foreigners from our ports. Authorities are not wanting to that point. But we are aware of no decision of any tribunal and no dictum of any writer on public law and no principle of jurisprudence which declares that a government is bound to afford protection to foreigners residing within its jurisdiction against injuries to local property in other countries, and especially against injuries resulting from political causes in such countries. * * * The language of the Treaty of Guadalupe Hidalgo is explicit: 'All claims of citizens of the United States' were released, and to be paid by the United

States. We do not regard the claimant, either at the origin of the claim or the date of the treaty, as a citizen of the United States."

Memorial of *John Charles Beales*: Opinion of Messrs. Evans, Smith, and Paine, commissioners, March 22, 1851, under the act of Congress of March 3, 1849.

The Messrs. Laurent's Case. The Messrs. Laurent, British-born subjects, went to Mexico in 1829 and settled there as merchants. Eighteen years afterward, in 1847,

during the war between Mexico and the United States, the Mexican Congress passed a law to authorize the hypothecation or sale of certain church property, for the purpose of raising money to meet the necessities of the government. At that time the Messrs. Laurent occupied a house belonging to the church, and, being notified that it was to be sold, offered to buy it. The government accepted their offer, and a contract was drawn up, under which they were to pay a certain sum for the house, and the government was to convey it to them with proper muniments of title. The Messrs. Laurent signed the contract, and deposited the money in the hands of a banker to await the execution of the contract by the government. But owing to some neglect the officer whose duty it was to execute the contract on the part of the government omitted to do so, and in the mean time a revolution occurred and the new president was authorized to annul the laws for the sale of the church property, which he did. The Messrs. Laurent protested, and while the matter was pending the forces of the United States entered the City of Mexico. The commanding general seized and confiscated the money as prize of war, on the ground that the debt was property belonging to the Mexican Government, and put the Messrs. Laurent in possession of the house, which they continued to occupy during the American occupation. After peace the church claimed the property and the claim was sustained by the Mexican courts, on the ground that Mexico would not recognize the acts of the government *de facto*, represented by the commanding general. Consequently the Messrs. Laurent were dispossessed of the house, and they sought, as British subjects, compensation from the United States for the confiscation of their money, before the commission organized under the convention between the United States and Great Britain of February 8, 1853.

The agent of the United States excepted to the jurisdiction,

on the ground that the Messrs. Laurent, who still continued to reside in Mexico, were not, on the facts disclosed, to be regarded as "British subjects" within the meaning of the convention.

Mr. Hannen, the British agent, said it could not be disputed that *prima facie* the claimants were qualified under the convention, as "subjects of her Britannic Majesty." They could not be excluded, unless by some *restrictive interpretation* of the words of the convention, based on a "uniform current of decisions of acknowledged authority;" and he was unable to see that the authority of any writer on international law had been quoted to sustain the position of the American agent. Mr. Hannen continued:

"The cases which are cited are far from satisfying me that the commission could legally adopt any such *exceptional construction* of the terms as is contended for. They are taken from the prize courts, from the privy council, from the common law, and from the equity courts.

"A misunderstanding of the cases in the prize courts appears to me to lie at the root of the argument contended for.

"It is quite true that, *flagrante bello*, merchants residing in the enemy's country are considered, with reference to the bel-ligerent rights of maritime prize, as subjects of that country, without reference to the country of their origin or allegiance, and without much reference to the length of their residence. Their domicile, *for this particular purpose*, is said to be sufficient to found the right of the maritime captor; but it would be stretching the principle of those decisions to an extent which was never intended, to say that they were not British subjects in the sense of this convention: for instance, and the example alone is sufficient to answer the whole question, Is there any jurist who would say that an injury offered to a British merchant residing in Mexico would not, all other means of redress being exhausted, justify the issue of reprisals on the part of Great Britain?

"I contend that the principles of international law do not warrant the *restrictive interpretation* sought to be put upon the *plain words* of the convention, and that the Messrs. Laurent are not disentitled to have their claim entertained by the commissioners."

Mr. Thomas, agent of the United States, in Mr. Thomas's Reply, said:

"The memorial of the claimant states that they are now residents in the City of Mexico; that they were residing there at the time this claim arose in 1847 and had been during many years previous. War between the United States and Mexico was legalized in May 1846, and more than

a year after this event they were still residents of Mexico, giving to that country the benefit of their industry and capital; and when the City of Mexico was taken by the United States forces they were found engaged in business, like any other Mexican citizens. The question is, To what government did they owe allegiance, and consequently under whose protection were they when the transaction took place, with the consequences of which they now seek to charge the United States?

"The principles of international law, recognized by the British court of admiralty, when applied to persons in the condition of these claimants, affix to them the national character of Mexicans, and their property found in Mexico is subject to all the consequences that attach to the property of native-born citizens resident there. Redress for any wrongs done to them or their property must, then, be sought in the tribunals of that country or through its government. The seizure by the United States of any property belonging to the claimants, which might have been found during the war on the high seas, where England enjoys a common jurisdiction with other nations, could not have been inquired into by her nor by any tribunal in which she could take part; for a still stronger reason, then, she can have no voice in deciding a question in regard to property which arose wholly within the enemy's country, and where England had no sort of jurisdiction, either over the territory, the persons, or property of the claimants.

"But these principles do not rest upon general reasoning alone. They have long been considered fundamental doctrines of international law, and have had the sanction of the British court of admiralty for the last half century, as I shall proceed to show."

In support of this argument Mr. Thomas cited the case of the *Indian Chief*, 1801 (3 C. Rob. 12); *The President*, 1804 (Id. 277; 1 Duer, 519); *The Ann*, 1812 (1 Dod. Adm. 224); *Drummond's Case* (2 Knapp P. C. 295); *Conway's Case* (Id. 364; 3 Bos. & Pull. 114); *Alberscht v. Sussman* (2 Vesey & B. 323); *The Matchless* (1 Hagg. Adm. 103); *Wilson v. Marryatt* (8 Term. R. 31); *Dawson v. Jay* (3 De G. M. & G. 764); *Willison v. Pattison* (7 Taunt. 439); *Kent's Comm.*

Continuing, Mr. Thomas said:

"The counsel of the British Government has said that this (Drummond's) case does not apply because the Laurents were not naturalized Mexican citizens. The laws of that country not authorizing the naturalization of Protestants, it is said they could not have become citizens, even if they had so desired. The decision in Drummond's case does not require that they should be naturalized citizens; it only requires that they should be domiciled there. It is of no importance whether

they enjoyed the privileges accorded to native-born citizens or not; that is a municipal question altogether. The law of nations does not look to see who, by the municipal law, enjoys the most complete rights of citizenship or who possesses them to a less extent, but only to discover who are the persons domiciled in the country, and they are declared to belong to it, and take their national character from it. But, in point of fact, the claimants were, to some extent, naturalized citizens.

"The counsel for the British Government, in order to show their British character, has produced here their annual oath, or obligation, by which they solemnly undertook to subject themselves to the laws of the country; and for this undertaking they were permitted to live there, to possess real property, and trade and enjoy the advantages of the government. This they did for eighteen years in succession. Now, I maintain that this was naturalization. Perhaps it did not give them all the rights of native-born Mexicans; neither do the laws of any country give *all* the rights of native-born citizens to those who are naturalized, but in this case the municipal law accorded to them the important rights of citizens of the country. * * *

"I submit that the authorities I have produced settle this question upon the broad and impregnable principles of the law of nations, as declared by the British courts and adopted in the policy of the government for a long period.

"These principles apply not only to these claimants, but to all persons whose claims arose while they were domiciled in Mexico. It can not be supposed that the two governments, in framing this convention, meant that you should look to the municipal law of either country for the definition of the words 'citizen' or 'subject;' on the contrary, it was undoubtedly considered that you would determine these questions by that international law which is always understood as furnishing the rule of interpretation in the construction of treaties. * * *

"I am asked by the counsel for Her Majesty's Government, whether I would maintain that a British-born subject found in arms against England could not be executed for treason. It is not necessary to the correct decision of the question under discussion that I should answer this interrogatory; but I will say, however, that I do maintain that very proposition, always supposing that the change of domicile is made in good faith. There must be fitness in point of time, and fairness of intent, and publicity of the act; when these circumstances concur, no nation would now be justified by the law of nations in executing for treason one of its native-born subjects found in the military service of another country with which it might be at war. In maintaining this proposition, I am perfectly aware that Sir William Scott has held that an adopted citizen must not be found in hostility to his native country, and that Blackstone and Lord Hale have held a like doctrine; but these distinguished judges recorded these opinions at a time when feudal institutions had a firmer hold on England than they have

now, and the latter two before the States and nations of America had taken their places among the independent nations of the world, and before half a million of people swarmed annually from the British Isles to light upon and make their homes in nearly every inhabited spot on the globe. * * *

"The rule laid down on this subject by the United States in the case of *Koszta* is the only one that can relieve the question of all difficulty. It is this: 'The conflicting cases on the subject of allegiance are of a municipal character, and have no controlling operation beyond the territorial limits of the countries enacting them. All uncertainty as well as confusion on this subject is avoided in giving due consideration to the fact that the parties to the question now under consideration are two independent nations, and that neither has the right to appeal to its own laws for the rules to settle the matter in dispute, which occurred within the jurisdiction of a third independent power.' This case arose in the jurisdiction of Mexico. England and the United States are the parties. The laws of England can not, therefore, give the rule, but the matter in dispute must be settled by the law of nations. * * *

"The writers on international law are very clear and uniform in their recognition of the rule that a person is to be regarded as the subject of that country where he has his domicile. Grotius says: 'By the law of nations all the subjects of the offending state, who are such from a permanent cause, whether native or emigrants from another country, are liable to reprisals, but not so those who are only traveling or sojourning for a little time.' Wheaton, in his treatise on international law, lays down expressly that 'whatever may be the extent of the claims of a man's native country upon his *political* allegiance, there can be no doubt that the natural-born subject of one country may become the citizen of another in time of peace for the purposes of trade, and may become entitled all the commercial privileges attached to this acquired domicile.' Here it is asserted distinctly that living in a country in time of peace and carrying on trade renders him a citizen of that country in view of national law; and I have already shown, by numerous authorities, that this doctrine is in conformity with British adjudications on this point.

"Having seen that a residence in a foreign country constitutes a person a domiciled citizen there, and renders that country answerable for his conduct to other nations, it may be worth while to inquire more fully what species of residence will render the party liable to have his property subject to the same rules as other citizens?

"Lord Camden, in delivering the judgment of the court in the cases arising out of the capture of *St. Eustatius*, stated, 'that if a man went into a foreign country upon a visit, to travel for health, to settle a particular business, or the like, he thought it would be hard to seize upon his goods; but a residence not attended with these circumstances ought to be

considered as a permanent residence.' Then, in speaking of the resident foreigners in St. Eustatius, he said, 'that in every point of view they ought to be considered as resident subjects. Their persons, their lives, their industry, were employed for the benefit of the state under whose protection they lived; and if war broke out, they, continuing to reside there, paid their proportion of taxes, imposts, and the like, equally with natural-born subjects, and no doubt came within that description.'

"Sir William Scott observes that time is the grand ingredient in constituting domicile. But he was clearly of opinion that mere recency of establishment would not avail if the intention of making a permanent residence there was fixed upon the party; and he referred to the case of Whitehill, one of the persons whose property was confiscated on the seizure of St. Eustatius. He was an Englishman, and had arrived at St. Eustatius only two days before it was seized by the British forces; but it was proved that he had gone there to establish himself, and his property was condemned. Thus a residence of forty-eight hours transformed the political character of an Englishman into that of a Dutchman; and it ought not to require a longer time to work a like change in an Englishman on his going to Mexico.

"I am very glad the counsel for Her Majesty's government has referred to 'Kent's Commentaries on the Law of Nations.' There is no author on either side of the Atlantic that stands higher as authority on international law than Chancellor Kent, and I propose to add his conclusive authority to that already cited. 'Concerning domicile, he states, 'if a person has a settlement in a hostile country by the maintenance of a commercial establishment there, he will be considered a hostile character, and a subject of the enemy's country in regard to his commercial transactions connected with that establishment. The position is a clear one, that if a person goes into a foreign country and engages in trade there, he is, by the law of nations, to be considered a *merchant of that country, and a subject for all civil purposes, whether the country be hostile or neutral*, and he can not be permitted to retain the privileges of a neutral character during his residence and occupation in an enemy's country.' 'This general rule,' he adds, 'has been applied by the English courts to the cases of Englishmen residing in a neutral country, and they are admitted, in respect of their *bona fide* trade, to the privileges of the neutral character.' This same principle, that for all commercial purposes the domicile of the party, without reference to the place of birth, becomes the test of national character, has been repeatedly and explicitly admitted in the courts of the United States. If he reside in a belligerent country, his property is liable to capture as enemy's property; and if he reside in a neutral country, he enjoys all the privileges and is subject to all the inconveniences of the neutral trade. He takes the advantages and disadvantages, whatever they may be, of the country of his residence.

'This doctrine,' says this distinguished writer, 'is founded on the principles of national law, and accords with the reason and practice of all civilized nations.'

"Would it be in conformity with this doctrine to give these claimants the advantages of British subjects at the same time that they are domiciled in Mexico, and enjoying the benefits of citizenship in that country? Such a thing is totally unheard of as that England should undertake to redress the grievances arising within the territory of another country. It is, I repeat, entirely opposed to the notion of independence in other countries, to the decisions of her own courts, and the practice of her government. If she can redress the grievances of an Englishman domiciled in Mexico, she can those of a Mexican (for the law of nations places them both on the same footing), and we shall have before this commission yet other Mexican claims.

"By the recent action of the British Government, these principles have received important and authoritative confirmation, which must have great weight with the commissioners in determining this question. The exact question for which I have been contending in this case has been practically decided by a dispatch from the secretary of foreign affairs, in answer to an application from the British consul at Riga, asking to be informed in what condition war would place British merchants residing in Russia. In reply, Lord Clarendon said, on the 16th of February, 'that, by the law and practice of nations, a belligerent has a right to consider as enemies all persons who reside in a hostile country, or who maintain commercial establishments therein, whether these people are by birth neutral, allies, or enemies, or fellow-subjects; the property of such persons, exported from such countries, is therefore *res hostium*, and, as such, lawful prize of war; such property will be considered as a prize, although its owner is a native-born subject of the captor's country, and although it may be in transition to that country, and its being laid on board a neutral ship will not protect the property.'

"This is a declaration that every person domiciled in Russia during the war will be regarded as a Russian. We have seen that it is merely an announcement of the law of nations on this point, and presents nothing new. If, therefore, persons are to be considered as Russian subjects who remain under that government during the war, the same rule must be applied to those who adhered to the Mexicans while the United States were at war with that country, and hence this commission is bound to declare that it has no jurisdiction in this case."

Mr. Upham, the commissioner of the United States, in delivering his opinion, said:

Opinion of Mr.
Upham.

"The first article in the convention provides 'that all claims of corporations, companies, or private individuals, *subjects* of Her Britannic Majesty, upon the Government

of the United States, and all claims of *citizens* of the United States against the British Government' from the year 1814 to the present time, shall be submitted to the decision of this commission. * * *

"It is quite clear to me that the correlative terms '*citizens*' and '*subjects*' were used by the contracting parties in the convention in contrast with and exclusive of each other; and that it was not contemplated by them that subjects of Great Britain could be regarded, at the same period of time, as *citizens* of the United States, or that citizens of the United States might in the same manner have the additional character of *subjects* of Great Britain.

"If, however, we affix to the term British subjects the meaning established by the municipal laws of England in their statutes, it will include vast numbers of American citizens, embracing not only all the emigrants from Great Britain who have become settled and naturalized citizens of the United States since the Revolution, but their children and grandchildren who may have been born there. (See 7 Anne, ch. 5; 4 Geo. II. ch. 21, and 13 Geo. III. ch. 21.)

"Thus, under this construction, every officer in the American Government might be entitled to enforce before this commission claims, as British subjects, against their own government, as their grandfathers may have been subjects of Great Britain. * * *

"It is possible that Great Britain may keep this provision upon her statute book in order that the children and grandchildren of emigrants from that country who may choose to return again to her jurisdiction shall be received at once into full fellowship as subjects; but in the decisions of her courts, in her international contracts, in her construction of the rights of actual subjects, and the disabilities of aliens, she holds, without exception, that a person going to a foreign country and becoming domiciled there, in the legal sense of that term, is to be regarded, for all civil purposes, as a subject and citizen of such country, entitled to the rights and subject to the disabilities arising from his domicile.

"There never has been any international difference of opinion between the two governments as to who are actual citizens and subjects of either power in their dealings and relations with each other, and there can be no doubt that this well-understood international meaning was adopted and used in this convention in reference to the terms citizens and subjects of either country. * * *

"The decisions of England and the United States, as well as those of every other nation, are uniform to the point that an individual going to another country, and becoming domiciled there for purposes of trade, is, by the law of nations, to be considered a subject of such country for all civil purposes, whether such government be a hostile or a neutral power.

"Authorities to this effect will be found in *Wilson v. Marryat* (8 Term Rep. 31); *M'Connel v. Hector* (3 Bos. & Pull. 113); *The Indian Chief* (3 Rob. Rep. 12); *The Anna Catherina* (4 Rob. Rep. 107; *Danous*, note, 255); *The President* (5 Rob. Rep. 277); *The Matchless* (1 Hagg. Ad. Rep. 103); *The Odin*, Hall, master (1 Rob. Rep. 296); *Bell v. Reid* (1 Maule & Selw. 726).

"American authorities to the same point will be found in the case of *The Sloop Chester* (2 Dallas, 41); *Murray v. Schooner Betsey* (2 Cranch, 64); *Maley v. Shattuck* (3 Cranch, 488); *Livingston v. Maryland Insurance Company* (7 Cranch, 506); *The Venus* (8 Cranch, 253); *The Frances* (8 Cranch, 363); *Los Dos Hermanos* (2 Wheat. 76). These authorities, with various others, are cited and approved by Chancellor Kent in 1 Kent's Commentaries, 75; and he alleges that the doctrine sustained by them 'is founded on the principles of international law, and accords with the reason and practice of all civilized nations.'

"All writers on international law concur in these views and adopt the maxim, '*Migrans jura amittat ac privilegia et immunitates domicilii prioris.*' (Voet, tome 1, 347; Grotius, book 3, p. 56, ch. 2, sec. 2; book 3, ch. 4, sec. 6; Vattel, book 1, ch. 19, sec. 212; Wheaton's International Law, part 4, ch. 1, secs 17 & 19.)

"The same principles are declared by public announcement of the present English ministry in reference to the existing war with Russia 'as the settled law and practice of nations,' and that, 'by such law and practice, a belligerent has a right to consider as enemies all persons who reside in a hostile country, or maintain commercial establishments therein, whether such persons are by birth neutrals, allies, enemies, or fellow-subjects.'

"And in conformity with this declaration and the previous decisions on this subject it was adjudged by the admiralty court a short time since, in the case of *The Abo*, that 'in time of war a person must be considered as belonging to the nation where he resides and carries on his trade, so far as the principles and rules of law are concerned, whether he resides in the enemy's or a neutral country.' (*The Times*, July 22, 1854.)

"The English authorities which have been cited expressly declare that a person domiciled in another country 'is to be taken as a subject of such country.' These are the words of Lord Stowell in the case of *The President*, above cited. And, in making such decision, he does not mean to be understood that such a person may be a citizen of another country and at the same time a British subject, as is contended before us; but he expressly declares, in *The Ann* (1 Dod. Ad. Rep. 224) that this can not be, because he says 'he can not take advantage of both characters at the same time.'

"The owner of *The Ann* was a British-born subject, and his wife and child resided in Scotland, but he himself personally was domiciled in the United States. He was therefore clearly

a British subject by the *municipal laws* of England, but Sir William Scott (Lord Stowell) held that, as regarded his *international intercourse and character*, he was not a British subject or entitled to redress as such, and his property was condemned accordingly, notwithstanding the decree in council declared 'that all property of British subjects,' seized under like circumstances, 'should be restored.'

"The international definition of 'subject' is also recognized and adjudged in *Drummond's case* (2 Knapp's Privy Council Reports, 295), where it was holden that though an individual might be formally and literally by the law of Great Britain a British subject, still there was a question beyond that, and that was whether he was a British subject within the meaning of the treaty then under consideration; and it was there contended that all treaties must be interpreted according to the law of nations, and that where a treaty speaks of the subjects of any nation it means those who are actually and effectually under its rule and government, and not those who for certain purposes under the mere municipal obligations of a country may be held to maintain that character.

"And in *Long's case* (2 Knapp's Privy Council Reports, 51) it was holden that a corporation, composed of British subjects, existing in a foreign country, and under the consent of a foreign government, must be considered as a foreign corporation, and is not therefore entitled to claim compensation for the loss of its property under a treaty giving the right of doing so to *British subjects*.

"In the same manner, and on the same principle, the converse of the proposition was holden in the *Countess of Conway's case* (2 Knapp's Privy Council Reports, 364), that a French native-born subject, residing in England, had the character of a British subject, and was entitled to claim compensation as such, against *his own country*, for losses under a treaty providing compensation to be made 'to British subjects.'

"These cases seem to me to be sound in principle and explicit in authority; and I am surprised, after these well-established and adjudicated decisions, that the doctrine is still contended for, that in the interpretation of the term *subject*, in this convention, we are to be confined to the meaning affixed to it by the English statute.

"It is desirable, before giving to it this construction, we should ascertain precisely what it means.

"By applying this construction to the convention, the second article would be made to read as follows: 'That all claims against the United States, of corporations, companies, or private individuals, resident subjects of Her Britannic Majesty, and of all native-born citizens of Great Britain, who may have emigrated to the United States since the revolution, and of their children and grandchildren who may have been born there, and all claims of citizens of the United States against the British Government, shall be submitted to the decision of the board of commissioners, whose decision shall be final,' etc.

"It seems to me that such an interpolation in the terms of this convention, or such a construction of it, would strike no persons with more surprise than its negotiators.

"It is said, however, in order to obviate the evident difficulty of regarding the treaty in this light, that a person holding the statute relation of *subject* to England may appear before this commission and prosecute his claim as such. but if he is domiciled in another country his case is to be adjudged and determined by the commission as though he were a citizen of that country.

"But I regard this as an erroneous and untenable position for any court or tribunal to take.

"Suppose, for instance, that an American citizen whose grandfather was born in England should come before this commission armed with the power and authority of the British Government to enforce his claim here against his own country, will it answer for this commission to say that by the law of England he is a British *subject*, and as such we must *hear him*, but we will adjudge his case precisely as though he were a *citizen of the United States*? Surely not. Like any other citizen of the United States, he must pursue his remedy before the ordinary constituted tribunals of his country or before Congress. It would be a futile attempt in us to undertake to make any award on the merits of his case, as it can not be supposed that either nation would sanction such an extraordinary assumption of power.

"This tribunal was not constituted to pass upon any such claim; neither was it constituted to pass upon the claim of any British-born subject who may have domiciled himself in Mexico, and who continued to reside there during a war between the United States and that country, 'carrying on,' in the words of the legal authorities, 'trade there, paying the taxes, and employing the people of the country, and expending his industry and capital in her service.'

"Such a person,' says Lord Chief Justice Alvanly, 'who resides in a hostile country, is a subject of such country. He is to all civil purposes as much an alien enemy as if he were born there, and to hold to a different conclusion would be to contradict all the modern authorities on the subject.' (*M'Connell v. Hector*, 3 Bos. & Pull. 114.)

"This foreign character, however assumed, is a substantial recognized civil relation, as much as the prior subsisting relation with England. The Messrs. Laurent, in this case, are citizens of Mexico, and their claim against the United States is a Mexican claim. Such a claim can only be adjudicated between the two governments where it originated. They alone are the national parties to it. And neither Mexico nor the United States is here with the necessary papers and evidence for its adjustment, for the reason that neither of those governments has delegated to us any such authority, and an attempt by us to bind them in the decision of such claims would be wholly nugatory.

"It is suggested in the argument in this case 'that the claim of English *subjects* can not extend to every case in which a British subject has been a party, but would only extend to claims upon the United States Government, preferred by persons who had not by their acts *forfeited their right* to appeal to the English Government for its interposition.'

"What would constitute a forfeiture of such right of a British subject is not stated; whether the act of the father would bar the son of his right as a British subject, or whether being born in a foreign country, where his father was domiciled, would have such effect. Many such questions would arise under such a mode of determining the national character. If, however, the question whether an individual is to be regarded as a subject of Great Britain is to depend upon the fact whether he has, *by his own acts*, forfeited the right to appeal to the English Government for protection, it seems to me this case is clearly of that character.

"The injury of which the Messrs. Laurent complain arose from their placing themselves in the position of *alien enemies* of the United States in the war with Mexico. They thereby forfeited their right to protection on the part of England, whose government was *neutral*, and could, neither aid, abet, nor countenance any of its subjects in such acts of hostility. They could only, on this principle, be regarded as British subjects while holding the position of the British nation, and when they departed from such position and became alien enemies of the United States they *forfeited the protection of England* and their right to appear before this commission.

"The United States has no remedy against Great Britain for the *conduct* of the Messrs. Laurent while domiciled in a foreign country as her *subjects*; and they, as British subjects, have no claim to redress against the United States, or to appear before this tribunal in that character.

"Domicil, under all circumstances, stamps upon the individual the character of *foreigner, neutral* or *alien*, as the case may be. Chancellor Kent says it is '*the test of national character*;' and that the only limitation upon the principle of determining character from residence laid down in any authority is that the party, so far as regards his own country, must not take up arms against it. (1 Kent's Com., 76.)

"The municipal relation of *subject* is, for the time being, wholly subordinate to the new relation impressed upon the individual, and can not exist as an *international relation*. His original right, as subject, may revive or revert if he returns to his native country, but it is otherwise inoperative.

"Each nation may well claim of other governments that its own native-born citizens, who are domiciled with them, should be equally protected by law with the native-born citizens of other countries. Invidious distinctions in this respect would manifest a spirit of hostility against the parent country that

could not be overlooked. But when individuals leave their own land, and have become domiciled in another country, and enjoy there the protection and the benefit of availing themselves of its laws, courts, tribunals, and appeals to its general government, as fully and freely as the native-born citizens of that country, for the protection of their rights and the business in which they are engaged, the original government of such persons has no claim to interfere in their behalf. Such persons become, by the settled adjudications of all countries, and the judgment of all writers on public law, in an international point of view, citizens of such country, as to all matters arising from such business and residence, and the treaties and conventions between foreign states are framed on this basis.

"An attempt on the part of this commission to overrule or revise the decisions of British or American courts as to the business matters, transactions, or liabilities of persons thus domiciled in either country, or to pass upon them while such courts were fully open for their hearing and decision, would be an utter perversion of the powers granted by this convention.

"Persons thus domiciled have the rights and the disabilities, under this convention, of the country under whose protection they have chosen to reside. An American native born citizen who has taken up his residence in London, and engaged in business there, has the same rights under this convention against the United States, for any claims arising from his business there, as any other citizen of London, but his claim is as a *British subject*; his domicile, by the settled construction of public law, affixes on him that character. The same is the case with an English native-born subject resident in New York; his claims under this convention can be those only of an American citizen, so far as regards the business of his elected domicile, or any adjudications upon it.

"And where an individual is domiciled in another country, different from that of either of the contracting parties to this convention, as in Mexico, for instance, his claim arising from acts connected with and partaking of such domicile is not included in a convention for the adjustment of the claims of British subjects and American citizens.

"Such a claim must be prosecuted through conventions made between the country of his adoption, under whose protection his business was carried on and his claim arose, and the United States. As regards any powers confided to us, he is to be holden as a Mexican citizen. Such a decision in no manner conflicts with or infringes on any international right of England as regards her subjects.

"For these reasons, I am of opinion that the exception taken to our jurisdiction over the claim of the Messrs. Laurent, as presented to us, is sustained, and that no authority has been delegated to this commission to adjudicate upon it."

Mr. Hornby, the British commissioner, delivered the following opinion:

Opinion of Mr.
Hornby.

"It is not disputed that the Messrs. Laurent are British-born subjects, nor pretended that, except in so far as their character of British subjects may be affected by *mere* residence abroad, they have done anything to divest themselves of this character. They have not been naturalized in Mexico; on the contrary, they have annually taken out a permission to reside in Mexico, in which permission they have been uniformly designated as British subjects, and generally they have, so far as lay in their power, preserved their English character. This being so, and having, as they conceive, some ground of complaint against the United States Government, they have appealed to the English Government for its interposition on their behalf with that of the United States. It appears therefore to me that this case comes within the *letter* of the convention, and is *prima facie* within our jurisdiction.

"But it is contended by the learned agent of the United States that though within the *letter*, the case is not within the *spirit* of the convention; submitting that the term 'British subjects,' used in the treaty, is not to be interpreted according to English law, but according to international law, and that by the latter a person *can only* be regarded as a citizen or subject of the country in which he is for the time being domiciled. I do not, however, understand it to have been assumed by the agent of Her Majesty's government that the claimants, being 'British subjects' within the terms of a British statute, are therefore *necessarily* 'British subjects' within the meaning of the convention. It is clearly not the statute law of England which is to give the rule of interpretation, but the obvious intention of the parties to the treaty.

"Now, it is undoubtedly true that treaties are to be interpreted according to international law, but international law does not affix an unvarying meaning to particular words, or prescribe any rule for the construction of treaties, other than that applicable to the interpretation of all written documents, namely, to discover and give effect to the intention of the contracting parties, which intention is to be collected from the language of the instrument of agreement, taken in connection with surrounding circumstances to which it has reference.

"The cases which have been cited by the American agent are authorities for the well-known principle of international law, that foreigners, domiciled in an enemy's country can not set up a *neutral* character as against an invading force on account of their *foreign* origin, so as to entitle them to immunity from the ordinary consequences of war; and with this undoubted principle, the declarations of the English ministers in reference to the present war with Russia, as well as the recent decision of the admiralty court in the case of *The Abo*, cited by the learned agent of the United States, are in strict conformity.

It may be also, when we come to consider the *merits* of the Messrs. Laurent's claim, that this principle will be found to govern the decision which we shall have to give for or against the claimants; but upon examination of the cases cited, it is clear they do *not* establish the principle which they have been supposed to prove, viz, that the term 'British subject,' as used in this treaty, can not, under *any circumstances whatever*, be intended to apply to British subjects domiciled out of Her Majesty's dominions.

"Several cases which were decided under the treaty of 1814 between France and England have been referred to.

"The object of that treaty was to provide compensation for all 'British subjects' whose property had been confiscated by the revolutionary government of France. If the construction which is *now* contended for by the American agent had been put upon the language of that treaty, it would have followed that no person domiciled in France could have been admitted to claim compensation under the title of 'British subjects,' and such a construction would have gone far to defeat the very object for which the treaty was entered into, as it is a matter of history that the property of many persons, established as merchants or otherwise in France at the time of the revolution, was seized upon the very ground that the owners were British subjects, which shows that mere domicile does not settle the question; and, moreover, on reference to the cases, I can not discover that the construction contended for by the learned agent was put upon the French and English treaty.

"Genessee's case, reported in the 2d volume of Knapp's Reports, p. 345, is one in which it distinctly appears that Messrs. Boyd and Kerr, the claimants, were established as bankers at Paris. Now, if the present objection were valid, it would have been a sufficient answer to that claim to have said Messrs. Boyd and Kerr had established themselves for commercial purposes and were domiciled in France; that they had voluntarily divested themselves of the character of British, and had assumed that of French subjects, and can not, therefore, claim the benefit of a treaty which was intended for the protection of those British subjects only who had not quitted their own country. Messrs. Boyd and Kerr, however, were held to be clearly entitled to compensation as British subjects, and by the decision of the same eminent judge, Sir William Scott, whose judgments in other cases have been quoted in opposition to the admissibility of the claim of Messrs. Laurent in the present case. Drummond's case, decided under the same convention, has been especially relied on. The reasons, however, which are expressly given for the decision in that case, show it was *not* determined on the mere fact of the claimant being domiciled in France, *but that* from special circumstances—such as accepting military employment under the French crown—he had voluntarily taken upon himself the character of a French subject, and having done so, the new French Government had

a right to treat him as such, and consequently that he was not entitled to indemnity.

"If there had been analogous circumstances in the present case I might have felt bound to hold that the Messrs. Laurent were not entitled to resume at pleasure, for their advantage, the character of British subjects, which, for their advantage, they had voluntarily renounced; but in the entire absence of such circumstances, I am of opinion that mere residence abroad does not deprive them of all title to the protection of the British Government, or can preclude that government from taking steps to procure for them redress if they have suffered an injury in violation of the law of nations, or absolve the American Government from the liability to redress such an injury.

"In the case of the *Ann*, a British subject, who had been domiciled in the United States during the war between that country and Great Britain, sought to be admitted to the benefit of the orders in council which were intended to provide compensation for those British subjects who had been inadvertently injured in the course of the war by the English cruisers. The claimant, having adhered to the enemy, was plainly not one of the class of persons for whose relief the orders in council were issued. The injury he sustained was, under these circumstances, in no way wrongful. The decision therefore was not, as we are now asked to decide, that the claimant, being domiciled abroad, could not, under any circumstances, be entitled to the character of British subject; but that he was not a British subject, within the meaning of the instrument then under consideration, entitled to redress. The *Indian Chief*, reported in 3 Rob. Rep. 12, as well as the *President*, in 5 Rob. Rep. 107, are both cases in which the claimants had acquired a hostile character against their own country, and as enemies had sustained losses which were rightfully inflicted on enemies. It was impossible, therefore, for them to establish a claim *against this country* upon the ground that they were British subjects in the face of the fact of their having been in a position of hostility to Great Britain. In these cases, however, the *merits* and justice of the claim were in question, and they did not depend, nor were they decided, upon a mere question of domicil. It does not appear to me necessary to examine the other cases in detail, inasmuch as *none of them*, in my judgment, show that the term 'British subject' necessarily excludes every person domiciled out of the British dominions. And it becomes our duty to ascertain, from the object and language of the present convention, the sense in which the words in question were employed by the contracting parties.

"The object of the convention is stated to effect 'a speedy and equitable settlement' of certain claims pending and which had become the subject of discussion between the two governments; and it is not merely for the settlement of the claims themselves, but rather to remove them from the arena of dis-

cussion between the two governments, that the present tribunal has been erected; and it is therefore provided that all claims, etc., which may have been or might be presented to either government for its interposition with the other should be referred to this commission.

"It is a *fact* that the applications to the English and American governments for their interposition, one with the other, *have not* been confined to citizens or subjects domiciled in their own country, but the claims of persons domiciled abroad have in several instances become the subject of correspondence between the two governments; it appears to me, therefore, that if the sense in which the term 'British subject' or 'American citizen' is to be construed be sought in the context of the convention, it will be found that the contracting parties contemplated American citizens or British subjects, wherever resident, whose claims had actually been or might properly become the subject of the interposition of the one government with the other.

"If, then, this be a correct mode of stating the question which we have to determine, it can not be denied that the *practice* of governments has been to extend their protection to such of their citizens as may be domiciled abroad, and to insist upon, and with success, redress for injuries. Instances in which the American Government has so extended its protection and demanded compensation have been mentioned, and the case of Don Pacifico shows that the English Government has considered itself entitled to interfere on behalf of an Englishman, though domiciled abroad. And many other instances might be collected from the history of recent times.

"Having regard, therefore, to the fact that both the English and American governments have from time to time interposed in respect to their subjects or citizens domiciled out of their respective countries, and that such interposition has in some instances led to the preferment of claims by the one government on the other which were pending at the time that the present convention was entered into, it is clear to me that the high contracting parties in entering into the present treaty intended to provide a tribunal for the settlement of all claims, whether preferred on behalf of subjects domiciled in the British dominions or elsewhere, and consequently that the claim of the Messrs. Laurent is admissible before us.

"I can not find any force in the argument, that if the Messrs. Laurent are admitted under this convention as British subjects, thousands of American citizens by birth having claims against the American Government, might also have presented them before the commissioners as British subjects by descent. If I am right in the rule of interpretation which I have adopted, it is clear that they could not, for it would be ridiculous to suppose that either of the contracting parties intended this international tribunal to adjudicate upon the claims of acknowledged citizens or subjects upon their own governments. The effect

also of acquiescence in the interpretation to be given to the words 'British subjects' in the treaty contended for by the learned agent of the United States, would be that henceforth no merchant residing in a foreign country could ever claim the assistance and protection of the government of the country of which he was a native, and to which country he owes allegiance. Thus an English merchant residing in France, or an American merchant residing in England, is to be considered as barred from appealing to England or America for protection and assistance.

"Mr. Everett, in his correspondence with Lord Aberdeen on the rough rice question, incidentally maintains the same view of the law and practice of nations which I have already expressed, although he carries it somewhat further than is necessary for the purposes of the argument in the present case. The American minister there insisted on his right to interfere under the treaty of commerce between Great Britain and the United States on behalf of an English firm, claiming compensation for pecuniary damage done in consequence of a nonobservance of the treaty, because one of the members of that firm was an American citizen, *domiciled* in England. If in this case *domicil* in England had ousted the American partner of his right to appeal to the United States Government for protection, or for its interference in obtaining for him the compensation due for an injury thus done to him, Mr. Everett was wrong in claiming the right to interfere, and Lord Aberdeen was wrong in admitting it.

"My judgment is founded on the following conclusions, at which, after a careful consideration of the arguments that have been advanced on either side, I have arrived. To recapitulate them, they are shortly as follows:

"That the Messrs. Laurent are admitted to be—whatever else they may also be—British subjects.

"That mere residence in a foreign country, in time of peace or war, does not deprive a merchant of his original citizenship or of the right to call for the protection of the government of his native country; although his continued residence in the country in time of war gives the right to the enemies of that country to consider and treat him as an enemy.

"That although such residence may clothe him with certain rights of citizenship and involve certain liabilities, it does not divest him of his original national character.

"That the practice and usage of nations sanction the interference of a government on behalf of its subjects or citizens resident abroad, as well as at home.

"That consuls and diplomatic agents are especially instructed to watch over and protect the subjects of the countries of their respective governments resident in the countries to which they may be accredited.

"That such being the usage and practice of nations, the words used in this treaty are to be interpreted in connection with and by the aid of such usage and practice.

"That, consequently, it was the intention of the contracting parties to the convention of 1853, that the commissioners appointed under it should decide according to justice and equity upon the claims of individuals in the position of the Messrs. Laurent."

The commissioners thus differing in opinion, **Decision of Mr. Bates.** Mr. Bates, the umpire, rendered the following decision :

"The claim by the Messrs. Laurent is for damage which, they allege, they received in the year 1847, from the conduct of the United States general, Scott, who captured the city of Mexico in that year. The treaty of peace between the United States and Mexico settled all claims of Mexican citizens against the United States. The Messrs. Laurent present their claim as British subjects. It is quite clear that none but British subjects or citizens of the United States can have any *locus standi* before this commission.

"It is denied, on behalf of the United States, that the Messrs. Laurent can claim to be British subjects within the meaning of the words 'British subjects' as used in the convention by virtue of which this commission was appointed; and this seems to me to be the correct view of the case, both on principle and with reference to the reported authorities on the subject.

"According to the municipal law of England, the Messrs. Laurent may be, for some purposes, still British subjects, but the language of the convention must be construed in accordance with the law of nations, and not according to the laws of any one nation in particular; and it is sufficiently clear that by the rules of international law and for the purposes of this commission, the Messrs. Laurent were, for the time being at least, Mexican citizens and not British subjects.

"There are many authorities which bear on this question. Lord Stowell, in giving judgment in the case of the *Matchless*, (1. Haggard, page 97), said: 'Upon such a question it has certainly been laid down by accredited writers on general law, and upon grounds apparently not unreasonable, that if a merchant expatriates himself as a merchant to carry on the trade of another country, exporting its produce, paying its taxes, employing its people, and expending his spirit, his industry, and his capital in its service, he is to be deemed a merchant of that country, notwithstanding he may in some respects be less favored in that country than one of its native subjects. Our own country, which is charged with holding the doctrine of unextinguishable allegiance more tenaciously than others, is no stranger to this rule. Its highest tribunals which adjudicate the national character of property taken in war apply it universally. They privilege persons residing in a neutral country to trade as freely with the enemies of Great Britain in war as the native subjects of that neutral country, although our own resident merchants can not without special permission of the crown.'

"The words of Lord Stowell apply exactly to the case of the Messrs. Laurent. They, as far as in them lay, had expatriated themselves; they had resided twenty years in Mexico carrying on their business, and with every intention of remaining there, as is sufficiently evidenced by their wishing to buy the freehold of the house in which they were living; and, according to Lord Stowell's judgment, ought to be considered Mexican citizens.

"In the case of the *President* (5 Robinson, 277), which vessel was captured on a voyage from the Cape of Good Hope to Europe, and claimed by Mr. J. Elmslie, as a citizen of the United States, it appeared that he had been a British-born subject who had gone to the Cape during the last war, and had been employed as American consul at that place. In giving judgment, Sir William Scott said: 'This court must, I think, surrender every principle on which it has acted in considering the question of national character if it was to restore this vessel. The claimant is described to have been for many years settled at the Cape, with an established house of trade, and as a merchant of that place, and must be taken as a subject of the enemy's country.' (The Dutch being then at war with England.)

"In a recent case, the *Aina*, decided in the admiralty court in June last: The claimant was a native of the free Hanse town of Lubec, and consul of His Majesty the King of the Netherlands, at Helsingfors, in Finland; he had lent money, before the war with Russia, on bottomry on the ship, which ship was captured by the British fleet in the Baltic. Dr. Lushington, in giving judgment, is reported to have said: 'Two questions have arisen with respect to the present claim; first, as to the national character of the claimant, whether he is to be considered an enemy or a neutral. With reference to this question, it is stated that he is a citizen of the free Hanse town of Lubec, and consul of His Majesty the King of the Netherlands, at Helsingfors, in Finland. Upon this I can put but one construction—that he is a resident in Finland, and carrying on business there. I take it to be a point beyond controversy that where a neutral, after the commencement of the war, continues to reside in the enemy's country for the purposes of trade, he is considered as adhering to the enemy, and is disqualified from claiming as a neutral altogether.'

"I am unable to see why the principle laid down so fully in these cases (and many more might be cited) should not be applied to that of the Messrs. Laurent. They had, as before observed, long been residents in Mexico, they had a fixed home there, with apparently every intention of continuing to reside there, inasmuch that they endeavored to buy a portion of the soil of Mexico.

"I think, therefore, that for the purposes of this commission they were Mexican citizens and not British subjects, and that

the commissioners do not form a tribunal competent to entertain their claims."

Commission under the convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. 120-160.)

**The Messrs. Uhde's
Case.**

After the decision in the preceding case of the Messrs. Laurent, the question of domicile again came before the commission in the case of the Messrs. Uhde, British merchants, who had resided in Matamoras, Mexico, since 1842. In June 1846 Matamoras was captured by the United States forces, and a circular was issued opening the port to the introduction of merchandise. On November 6, 1846, the American schooner *Star*, which had been chartered by the Messrs. Uhde to bring a cargo from Havana to Matamoras, arrived at Brazos Santiago, and the master, having obtained from the deputy collector there a permit to discharge the cargo at Burita or Matamoras, transferred the cargo to a steamboat and landed it at Matamoras without payment of duty. In reality, both Burita and Matamoras were outside of the revenue district of the collector at Brazos, so that his permit gave no right to land goods there, and both places were under military government; and a few days later the goods were seized on the ground that they had been introduced by a fraudulent evasion of the customs regulations at Matamoras. The Messrs. Uhde contended that the seizure was wrongful, but when their claims came before the commission their right to appear under the convention as British subjects was denied by Mr. Thomas, the agent of the United States, on the same grounds as he maintained in the case of the Messrs. Laurent.

Brief of Dr. Phillimore.

In behalf of the Messrs. Uhde a brief was produced from Dr. Robert Phillimore, in which he said:

"I do not see that the authority of any jurist is referred to by Mr. Thomas, and the cases which he cites are far from satisfying me that the commissioners could legally adopt any such exceptional construction of the terms as is contended for. They are taken from the prize courts, from the privy council, from the common law, and from the equity courts.

"A misunderstanding of the cases in the prize courts appears to me to be at the root of Mr. Thomas' argument.

"It is quite true that *flagrante bello* merchants residing in the enemy's country are considered, with reference to the belligerent right of maritime prize, as subjects of that coun-

try, without reference to the country of their origin or allegiance, and without much reference to the length of their residence.

"Their domicile, *for this particular purpose*, is said to be sufficient to found the right of the maritime captor; but it would be stretching the principle of those decisions to an extent which was never intended to say that they were not British subjects in the sense of this convention; for instance, and the example alone is sufficient to answer the whole question, is there any jurist who would say that an injury offered to a British merchant residing at Mexico would not, all other means of redress being exhausted, justify the issue of reprisals on the part of Great Britain?

"The case of *McConnell v. Hector*, decided, in 1802 (3 Bos. and Puller, 314), that persons who had incorporated themselves with the commerce of the enemy, *flagrante bello*, may not sue in this country.

"The case of *Albrecht v. Susman* (2 Vesey and Beames, 326) decided that the *quasi diplomatic character* of consuls made no difference as to the law on this point.

"The *Countess of Conway's case* (2 Knapp's Privy Council Reports, 367), when examined, appears to be adverse to Mr. Thomas's argument, for Mr. Baron Parke decided, in that case, that the party must show 'that she was a British subject in some sense,' and that 'one of these two things must be shown, either that the Countess was a natural-born British subject, or that, having been born abroad, she was domiciled in England, and in that character entitled to the protection of a British subject at the time of the confiscation.' Now, Mr. Uhde is a natural born subject of Great Britain, and his native character, by a particular regulation of the Mexican state, is most carefully preserved.

"I am of opinion that the principles of international law do not warrant the restrictive interpretation sought to be put upon the plain words of the convention, and that Mr. Uhde is not disentitled to have his claim entertained by the commissioners."

Mr. Thomas, agent of the United States, in
Reply of Mr. Thomas. reply, said:

"Chancellor Kent is a jurist of acknowledged authority everywhere, in England and America, and he says, 'the position is a clear one, that if a person goes into a foreign country and engages in trade there he is, by the law of nations, to be considered a merchant of that country, and a subject for all civil purposes, whether the country be hostile or neutral.'

"In support of my view of the law on this point I would cite Dr. Phillimore's own work on domicile, page 133, where he quotes entire, and with approbation, the case of the ship *Ann*. This vessel was seized in the river Thames in the year 1812. The master was a British-born subject, and his family still resided in Scotland, but he was residing in America. An order in coun-

cil decreed that all vessels under the flag of the United States, *bona fide the property of His Majesty's subjects*, purchased before the war, should be restored, and the question was whether the master of the *Ann* was a British subject? Sir William Scott, whose decision Dr. Phillimore approves, said 'he can not take advantage of both characters at the same time. He has been sailing out of American ports. It is quite impossible he can be protected under the order in council, which applies only to those who are clearly and habitually British subjects, having no intermixture of foreign commercial character.' Here is, from Dr. Phillimore himself, the exact interpretation of the words 'British subject,' for which I am contending. But he says, again, at page 146 of the same work: '*Every man is viewed by the law of nations as a member of the society in which he is found.* Residence is *prima facie* evidence of national character, susceptible, however, at all times of explanation. If it be for a special purpose, and transient in its nature, it shall not destroy the original or prior national character; but if it be taken up *animo manendi* (with the intention of remaining), then it becomes a domicile, superadding to the original or prior character the rights and privileges as well as the *disabilities and penalties of a citizen, a subject of the country in which the residence is established.*'

"According to this rule of Dr. Phillimore, the claimants being found in Mexico were, by the law of nations, members of that society and subjects of that country; they are not, therefore, included within the provisions of a treaty to settle claims of 'British subjects' upon the Government of the United States.

"Dr. Phillimore admits that persons residing in the enemy's country are considered as subjects of that country in reference to their property on the high seas. If this is true of their property on the ocean, why is it not equally so of this same property when it is located in the country itself? It is then much more hostile and clothes the owner who is with it more especially with the enemy character. Suppose an American citizen should now be residing in Sebastopol, his property on the ocean would be liable to seizure and confiscation, for, his domicile being there, he would be invested with the national character of a Russian subject, and what he might have within that fortress would, if possible, render his Russian character even more complete. Will it be contended that if his property there should be injured or destroyed the British Government must settle with him on a different principle from that of the native-born Russian found in Sebastopol? According to Dr. Phillimore's argument in favor of British-born subjects domiciled in Mexico during the war, he is entitled to be considered as a neutral, and if hereafter there should be a convention to settle the claims of American citizens upon Great Britain, he may claim compensation for injury done to him or his property in Sebastopol. I apprehend the British Government will never adopt any such rule.

"Dr. Phillimore, to show that I have stretched the principle of the admiralty decisions too far, supposes an injury offered to a British merchant residing in Mexico, and all other means of redress being exhausted, asks, 'Would not any jurist say the English Government would be justified in making reprisals?' I will answer this by asking whether the United States would be justified in making reprisals for an injury that may be done to one of her citizens that may be found in Sebastopol? Every man found there (by the law of nations) is an enemy of Great Britain, and will be treated as a subject of the Emperor of Russia. When peace is made, the American citizen so situated will not be permitted to say that he is not bound by it, but that England has yet to make a separate settlement of his claims for property seized or destroyed. A treaty of peace binds every person in the country and settles all their claims; and upon this principle the treaty of peace between the United States and Mexico disposed of the claim of every man in that country upon the United States.

"It is not true, then, to say that the English Government would be justified by the law of nations in making reprisals for an injury done to a British-born subject residing in Mexico during the war between the United States and that country. She could no more interpose, as a matter of right, in behalf of a British-born than she could in favor of a Mexican-born subject, if they both there engaged in business.

"What Dr. Phillimore says of the case of *McConnell v. Hector* (3 Bosanquet and Puller, 114) is true, but he makes no reference to the essential point in that case on which I relied. He says: 'This case decided that persons who had incorporated themselves with the commerce of the enemy during war can not sue in this country.' Yet if he stops there, the impression is left that this is all that was declared to be law by that case. Lord Alvanly did not arrive at that conclusion without having first laid down the doctrine that 'while an Englishman resides in the hostile country he is a subject of that country.' It is clear, on this authority alone, that the claimants can not be regarded as British subjects in their Mexican transactions. He says the case of *Albrecht v. Susman* (2 Vesey and Beames Rep. 323) decided that the quasi-diplomatic character of consuls made no difference as to the law on this point. It also decided, however, that the consul was a subject of the enemy's country if he continued to reside there during the war, and for a still stronger reason must the subject, holding no official position, and remaining in the enemy's country, be so regarded.

"Conway's case (in 2 Knapp's Privy Council Reports) fully sustains the doctrine that a foreigner domiciled in a country is considered by the law of nations a subject of that country.

"Dr. Phillimore's opinion that the term 'British subjects,' used in the convention, embraces British-born subjects domiciled in Mexico, or engaged there in trade, and hence parties to the war between the United States and that country, is not

therefore sustained by any of the cases he has cited, nor by his own authority."

On the question of domicile, Mr. Bates, the umpire, said:

"Messrs. Uhde and Company were merchants of Matamoras, where they had resided from the year 1842, carrying on trade there, having a house of business and a home in that city. They continued to reside there after the declaration of war by the United States against Mexico in 1846, and until 1851. According to the interpretation of the law of nations by the highest courts in Great Britain, it is a point settled 'beyond controversy that where a neutral, after the commencement of hostilities, continues to reside in the enemy's country for the purposes of trade he is considered as adhering to the enemy, and as disqualified from claiming as a neutral altogether.' (See Dr. Lushington's judgment in the case of the *Aina*, reported in the *Jurist* of July, 1855.) However good the claim of Messrs. Uhde and Company, as conquered Mexicans, against the United States, by the interpretation of the law of nations, as given by the decisions of the courts of Great Britain, may be, the claim ought to be excluded from this commission. The Government of the United States have, however, entertained the claim in the correspondence between the diplomatic agents of the two countries, and for this reason we hold it should be considered and settled without further delay."

Commission under the convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. 436-453.)

Opinion of Commander Bertinatti. "The domicile of the claimant in Costa Rica does not deprive him of the right of claiming the protection of his native government in the case of open injustice, such as is the case of imprisonment without cause and not followed by any trial."

Bertinatti, umpire, December 31, 1862; *Flurel Belcher v. Costa Rica*, No. 23, convention between the United States and Costa Rica of July 2, 1860.

Mexican Claims Commission. The question of the effect of domicile on national character arose before the commission under the convention between the United States and Mexico of July 4, 1868, on the motion of the agent of Mexico to dismiss various cases on the ground that the claimants in them had, by reason of their domicile in Mexico, forfeited all right to appear before the commission as claimants against that government. There were also claimants against Mexico whose assertion of the right to appear as citizens of the United States rested solely on their alleged domicile in the latter country.

At first the commissioner on the part of the United States, Mr. Wadsworth, apparently under the influence of the Koszta case, as popularly but imperfectly understood, seemed to be inclined to make domicile the criterion of national character. In the case of *Marcos Schaben v. Mexico*, No. 100, he said :

Mr. Wadsworth's
Earlier View.

"Moreover, the man is entitled to the protection of the United States against all persons and powers. He lived in that country with permanent intentions. He was settled there with his family and had been for many years, as a citizen. His domicile was complete and perfect. A house and family and a long residence and the exercise of the voting privilege fix the domicile. The United States was entitled to his allegiance and he could not refuse it. She could not suffer any person or power to wrong him without insisting upon redress as truly and thoroughly as if he had been a native born on her soil."

Mr. Ashton, agent and counsel of the United States, took a different view of the question.

In one of the cases in which the agent of Mexico moved to dismiss the claim of an alleged citizen of the United States on the ground of his domicile in Mexico, Mr. Ashton filed a printed brief,¹ devoted to the discussion of the question "whether native-born and naturalized citizens of the United States, who were domiciled in Mexico, but who were not citizens of the Mexican Republic under the municipal constitution and laws of that country at the time of the origin of their claims," were "'citizens of the United States,' in the sense of the treaty." Two theories had, said Mr. Ashton, been propounded as to the meaning of the words "citizens of the United States" and "citizens of the Mexican Republic" in the convention. One was that the term "citizens" was used in the sense of a supposed rule or doctrine of the *law of nations*, which, as it was said, attributed to every man, in time of peace as well as of war, the nationality of the country in which he had his domicile; the other was that the term was used by the contracting parties in the sense of their *municipal law*, so that persons who were citizens of the one country in the sense of that law should remain such, though domiciled in the other country, until they had been naturalized or otherwise adopted as citizens of the latter under its municipal laws. The first was the "restrictive" and the second the "natural" interpretation of the convention.

¹ *M. De Leon v. Mexico*, No. 593.

The internal municipal law, constitutional or statutory, of every state, said Mr. Ashton, determined the individuals who constituted the body politic, and the members of the body politic were termed subjects or citizens, as distinguished from aliens, foreigners, strangers.¹ The character of a citizen or subject was acquired by birth or by naturalization. Many countries, however, refused to recognize the right of voluntary expatriation on the part of their subjects. The supposition that such a right existed had been acted upon from the beginning by the Executive of the United States, though the inclination of the courts had been against it. By the act of Congress of July 27, 1868 (15 Stats at L. 223), the right of expatriation was declared to be "a natural and inherent right of all people;" but in the contemplation of this law, as shown by its terms, expatriation included and presupposed naturalization. There was no law of the United States by which the domiciliation of an American citizen abroad deprived him of his national character. On the other hand, the municipal law of Mexico did not give to the acquisition of domicile in that country the effect of naturalization. The Mexican constitution of 1857 treated as citizens: (1) Persons born, within or outside of the republic, of Mexican fathers; (2) foreigners naturalized in conformity with the laws of the republic; (3) foreigners who, under certain conditions, acquired real estate in the republic or had Mexican children. Moreover, by the convention between the United States and Mexico of July 10, 1868, on the subject of citizenship, signed only six days after the claims convention, it was expressly provided that citizens of the United States who had "been made citizens of the Mexican Republic by naturalization" should be "held by the United States as citizens of the Mexican Republic," and "be treated as such," and vice versa. This was a distinct declaration of the conditions under which the citizens of each country should be deemed to have become citizens of the other. "Five years' residence and naturalization are required," said Mr. Ashton, referring to the convention, "to invest an American citizen with Mexican nationality." The only case, observed Mr. Ashton, in which it was generally held that domicile would determine citizenship was that of a person claiming or owing double allegiance, as a person born in one

¹ Phillimore, *Int. Law*, I. 94; Wolff, *Inst. du Droit*, II. 140.

country of parents who were citizens of another country. Here domicil "might properly determine for practical purposes" the national character of such person as between the two countries. In concluding this branch of his argument Mr. Ashton laid down the following propositions:

"1. That every state exercises the power of determining who shall enjoy the right of membership of the political society or body politic of which it consists.

"2. That those who are invested by the municipal constitution and laws of a country with this quality or character, and *none others*, are citizens of the state.

"3. That nations proceed in their municipal legislation upon the idea that the citizens of other countries have the right to change their nationality and incorporate themselves with new political societies.

"4. That all nations provide by their laws the terms and conditions upon and in pursuance of which this change of nationality may be and is effected.

"5. That, except in pursuance of those laws, and upon the terms and conditions so provided, no member of any political society can incorporate himself with a new state and become a citizen or subject of such state.

"6. That, until a change of nationality is thus effected, the old relation subsists, unless the individual has done some act which, under the laws of the state of his origin, has the effect of denationalizing him, as is the case under the French law, where a citizen of France assumes public office under a foreign government or becomes naturalized or domiciled in a foreign country, either of which acts has the effect of depriving him of the character of a citizen of France, although he may not have become a citizen or subject of any other state.

"7. That *expatriation* includes not only *emigration* out of one's native country, but *naturalization* in the country adopted as a future residence.

"8. That the United States have, by statute, expressed their will upon the subject of expatriation, and treated it as effective only upon naturalization; and

"9. That the United States and Mexico have, by a treaty, cotemporaneous with the present convention, recognized the right of their respective citizens to expatriate themselves, and provided that it should be accomplished through and by means of naturalization, in addition to residence within their respective jurisdictions."

Mr. Ashton said he believed that, under the municipal law of some countries, domicil conferred citizenship in the full civil and political sense, as in Bavaria, where citizenship might be acquired by means of a domicil taken up by an alien who

gave proof of his freedom from personal subjection to any foreign state.¹ Said Mr. Ashton:

"If that were the case in Mexico, Americans who become domiciled in that country would become both *de facto* and *de jure* citizens of the Mexican Republic, and thus would be excluded from a right to claim against that country under the present convention. But, ordinarily, this is not so, and it is not the case in Mexico. By becoming domiciled in Mexico our people are not made citizens of the Mexican Republic. They are required to be naturalized.

"No length of time of commercial or personal domiciliation in Mexico is able to confer upon an American citizen the quality of a Mexican or Mexican citizen. The constitution and laws forbid it. They provide expressly the mode and manner in which that quality may be acquired by a stranger, and by direct implication exclude the conclusion that domiciliation has the effect of converting a foreigner into a Mexican. I have referred to the provision of article 30 of the constitution of 1857, and now direct attention to the minute and specific provisions of the law of January 30, 1854, defining who are '*foreigners*' and who are within the designation of '*Nationals or Mexicans*.'"

After citing Vattel, Phillimore, and Westlake upon the distinction between the citizens of a state and domiciled aliens in respect of national character, Mr. Ashton proceeded to state what was the "real place" of the doctrine of domicile "in the system of public law, what rights and duties it determines, and what relation it has to the character and status of individuals." The consideration of this subject was, he said, "rendered necessary, perhaps, by the course of discussion in certain celebrated cases which came before the commission for the settlement of claims between Great Britain and the United States under the convention of February 8, 1853." Referring then to the case of the Messrs. Laurent, Mr. Ashton said:

"The case went to the umpire, Mr. Bates, who dismissed the claim. It has seemed to me that the argument for dismissal, when divorced from the facts of the case, is calculated to mislead. It was not a question whether a British subject domiciled in the United States was a 'British subject' in the sense of the treaty, but whether an Englishman domiciled in Mexico, a third state, was a British subject within the meaning of the treaty. Therefore the case did not involve the question presented in the case now before this commission. As against the United States it might have been that he was

¹ Phillimore, Int. Law, II. 352.

entitled to the protection of Mexico, though, as against Mexico, he might have properly received the protection of Great Britain. The view was not unsound that, if the claimant was entitled to Mexican protection for any injury committed by the United States, his character, *quoad hoc*, was that of a Mexican citizen and not that of a British subject in the sense of the treaty of 1853, and that he was not therefore entitled to prefer a claim under the convention.

"The question, in another form, arose in the case of the 'Texas Bonds,' when the point discussed, though not determined, was as to the character of a native British subject domiciled in the United States. It also was debated in the cases of 'Charles Uhde & Co.' and 'Kerford & Jenkin.' The criterion of citizenship, which the argument in those cases inclined to, was simply commercial domicile—such a residence as would, in time of war, impress a hostile character upon so much of the commercial property of a merchant as was connected with his place of domicile. This criterion was supposed to be of universal application in time of war and in time of peace, making a citizen of the United States residing for purposes of trade in England a British subject, and, conversely, a British subject domiciled in the United States a citizen of this country.

"But, as I have said, the real point at issue in the British and American cases was not the question now under discussion. I can not accept the interpretation of such a treaty, which would adopt as a universal criterion of citizenship of a country the fact of domicile. A person domiciled in a foreign state does not lose the protection of the government of his own country as against the state of his domicile, though he may gain the protection of the government of the country in which he is domiciled as against a third power."

As observing and pointing out the distinction between citizenship and domicile, Mr. Ashton cited *Udney v. Udney*, L. R. Sc. App. 1866-'69, pp. 45, 47; Cockburn on Nationality; Dalloz, *Droits Politiques*, Nos. 1 and 2, *Droits Civils*, No. 8; Phillimore, *Int. Law*, IV. 148 (Domicil); Savigny, *Private Int. Law*, Eng. Ed., 81; Westlake, *Private Int. Law*, 382; Heffter, *Droit Intern. Public de l'Europe*, secs. 37-38; *Commissioners v. Devereux*, 13 Sim. 29; *In re Bruce*, 2 C. and J. 436.

Mr. Ashton further contended that, except where the peculiar legislation of a state decitizenizes members of the body politic who emigrate without an intention to return, or where the municipal legislation of another state confers upon domiciled persons the rights of political citizenship, the citizens of a country who acquire a domicile abroad neither "lose the protection of the government of their country," nor make it "incumbent upon that government to refrain" from protecting

them "against the injustice of the nation within whose territories they may reside." He might, he said,

"exclude from this proposition, perhaps, without affecting its essential truth as an absolute proposition of international law, the class of persons who emigrate to a foreign country with an avowed purpose of becoming citizens of the latter, and who manifest that intention in some authentic way, conformably to the laws of such foreign country. For example, persons who come to this country from England or Germany and declare their intention to become citizens of the United States under our naturalization acts, may be incapable of claiming the protection of their former government during the probationary period between the time of their declaring their intention and the actual consummation of the naturalization process. The class of persons whose situation and relations are now to be considered are those who, in pursuit of health, pleasure, or business, leave their native country and take up their domicile in a foreign land, who have no present intention of returning, or may even have an intention not to return to their native country, whose native country does not denationalize them by reason of such establishment abroad, and where the laws of the country in which they settle do not impart to them its national character by making all domiciled foreigners citizens of such country."

In respect of this class of persons, he held that their government retained the right of intervention. All jurists agreed that it was the first duty of a government to protect its citizens.¹ The case of John S. Trasher illustrated this principle. Mr. Webster, in his report to the President in this case, had assumed, said Mr. Ashton, that Trasher had become, by some process of naturalization in Cuba, a subject of Spain; and the question directly considered was whether he could claim, as a citizen of the United States, the benefit of the treaty of 1795. Subsequently, however, it appeared that he had merely been subjected to the process of domiciliation; and Mr. Webster then sent the following instruction:

"DEPARTMENT OF STATE,

"Washington, July 5, 1852.

"SIR: Referring to the dispatch from this Department, addressed to you, under date of April 7, in which the receipt of your letter on the law of domicil, as understood in Havana, was acknowledged, I have now to inform you that the subject has received the full consideration which its importance demands.

¹ Grotius, lib. 2, cap. 25; Vattel, lib. 2, cap. 6, sec. 7; Heffter, *Droit. Int.* secs. 15 and 60; De Martens, *Précis*, etc., liv. 5, cap. 3, secs. 93 and 95; Phillimore, *Int. Law*, I. chap. 10, II. chap. 2; Lawrence's *Wheaton*, 176, note, 549.

"The official dispatch to Mr. Barringer on the 13th of December last, and the communication to the House of Representatives of the 23rd of the same month, in respect to the case of Mr. John S. Trasher, were particularly confined to the state of facts which at that time had been placed before the Department. Upon the law and the facts, as they were then presented, it was considered doubtful whether Mr. Trasher could rightfully claim the privileges secured to American citizens by the treaty of 1795. But it was carefully stated in each of the communications above referred to that no communication addressed to the Department had been received from Mr. Trasher himself, and that it was a matter of regret that the Department had not before it his own statement of the case.

"Since that time additional information has been obtained from your own dispatch, as well as from other sources, respecting the Spanish law of domiciliation, both in regard to its practical operation and the manner in which it has been construed by the Spanish authorities themselves and by foreigners who have taken out letters of domiciliation.

"It appears that the royal proclamation of October 21, 1817, by which provision was made for domiciliating foreigners, was issued at the request of the civil authorities of Havana, for the purpose of increasing the white population of the Island of Cuba by Spaniards from the peninsula and the Canary Islands, and by emigrants from friendly European nations. The reasons assigned for its issue were the small number of inhabitants in proportion to the extent of the island and the condition of its agriculture and its limited physical resources, so that 'one of the most important possessions of the Royal Crown was unpeopled and defenseless, and its fields without cultivation.' Many privileges were granted to those who took advantage of the invitation thus extended to them, such as exemption from taxation for fifteen years, perfect liberty to return to their native country at any time during the first five years, and free exportation of the property which they brought with them.

"As they were 'strangers' they had permission to leave in case of war with their native country. These and other parts of the proclamation exhibit very clearly its intent that there was no disposition on the part of the Spanish authorities to exercise the power of forcibly domiciliating foreigners, even if such power were not contrary to all natural law. It is true, that on his arrival the foreigner was required to take out a domiciliary letter, but according to the Spanish law, this 'simply authorized a foreign subject to reside in the island more than three months, and to employ himself in commerce or any other useful industry,' and it may be added, that any conditions or restrictions introduced into the domiciliary oath inconsistent with the letter and spirit of the royal proclamation above referred to, or the provisions of Spanish law, must necessarily be null and void.

"It does not appear that the foreigners who came to the

island and took out letters of domiciliation considered that by so doing they forfeited their rights of citizenship in their respective countries, or assumed any obligations inconsistent therewith. This, too, appears to have been the general understanding of the Spanish authorities themselves. Throughout the whole Spanish law there is observed a wide distinction between domiciliation and naturalization. This is fully admitted in the communication of Mr. De la Concha to Mr. Calderon, of May 28, 1851, and also in the 14th and 24th articles of the above-mentioned proclamation. Thus it appears that notwithstanding the terms of the oath of domiciliation are so rigid, yet, taken in connection with the provisions of law above cited, the American residents in Cuba have never, in point of fact, regarded themselves as having changed their allegiance by taking out letters of domiciliation. They appear to have considered these letters as mere formal requisites to an undisturbed temporary residence for commercial or other business purposes. In point of fact, it is believed that these papers are usually procured by purchase, that no oath is taken, and no act done on the part of the American resident, except the payment of a small fee. Change of *domicil* is matter of intention, and, notwithstanding residence in fact, there must be the *animus manendi*. Change of allegiance, which is manifested by the voluntary action, and usually by the oath of the party himself, ought always to be accomplished by proceedings which are understood on all sides to have that effect. It is certainly just that acts which are to be regarded as changing the allegiance of American citizens, should be distinctly understood by those to whom they are applied, as having that effect; that the practical as well as the theoretical construction of such acts, should be unequivocal and uniform, and that no acts should be deemed acts of expatriation, except such as are openly avowed and fully understood.

"I am, sir, etc.,

"DANIEL WEBSTER.

"W. L. SHARKEY, Esq.,
United States Consul, Havana."

Mr. Seward, said Mr. Ashton, affirmed the "right" of intervention "in a proper case" for the protection of citizens domiciled abroad.¹ In the *Rough Rice* cases claims were made by the United States in behalf of persons who were members of British houses of trade, but it did not appear that Lord Aberdeen attempted to resist the reclamation on the ground that the American Government had no right of interference in respect of these parties.² It was, moreover, to be observed that in the treaty between the United States and Mexico of April 5, 1831, there was an express stipulation promising to

¹ Dip. Cor. 1866, II. 456.

² Br. and For. State Papers, 1844-45, p. 141.

citizens of the one country in the territory of the other the "special protection" of the latter.

Mr. Ashton made a full examination of the judicial decisions cited in the Messrs. Laurent's case, maintaining that they afforded no authority for the proposition that domicile determines national character, except, as in some of them, in matters of neutral or belligerent right in time of war. In conclusion he said:

"The preceding discussion has had for its object to show that it was the obvious intention of the negotiators of the present convention to comprehend, by the words they employed to describe the persons entitled to appear as claimants, *de jure* citizens of the United States; that native-born and naturalized citizens of the United States, though domiciled in Mexico, are entitled, as within the designation of citizens *de jure*, to present their claims and to have them adjudicated according to public law, justice, and equity; that such persons, by taking up their domicile in Mexico, have not forfeited the protection of, or abandoned their allegiance to, the United States; that as against such acts on the part of Mexico as, under the circumstances of the respective cases, constitute injuries to those citizens, the United States might and may rightfully and lawfully interfere for their protection, whatever may be the right or duty of Mexico in respect to injuries inflicted upon persons in that situation by the governments of other states; and that, to this extent, the present convention affords, and was meant to afford, full and adequate protection to all such citizens.

"These conclusions appear to result necessarily from the adoption of the natural, rather than the restrictive, interpretation of the effective words of the convention. As between a construction of those words which would include within them all whom they, in their natural, obvious, and ordinary signification, described, and a construction which would restrict their application to a portion only of those whom the words describe in their common acceptation, a jurist can not hesitate in regard to the alternative to be accepted.

"I would say again, in concluding this argument, that the words of the treaty are not 'nationality' or 'national character,' but 'citizens of the United States' and 'citizens of the Mexican Republic'—words of precise and determinate signification in the municipal laws of the two countries.

"The public law of nations does not define, create, or take cognizance of citizenship, except as defined, created, and recognized by the municipal laws of independent nations. It is a creature of those laws. The law of nations recognizes in persons a capacity to acquire the citizenship of the country of their adoption, but the method of the acquisition of such citizenship is left entirely to the provisions of the municipal law. In the language of international law, a person is not described as a citizen of the country in which he is domiciled, or has his

permanent home; though for some purposes and in some relations, principally those which affect the rights of belligerent maritime prize, a person, according to the language of the public law, possesses the national character of the country of which he is a permanent resident.

"Even in time of war, as between belligerents, the citizen of a country domiciled in the enemies' territory is not declared by the law of nations to be a *citizen* of the hostile country. If he commit acts of hostility against his native country he is liable to be punished as a traitor, because he owes superior allegiance to that country; and yet his property is liable to capture on the high seas as the property of an enemy.

"I say, therefore, that international law furnishes no definitions whatever that are applicable in the interpretation of a treaty like the present, and it would be a distortion of the doctrines of the law of war, to which I have referred, to apply them as a rule for the construction of the provisions of the treaty under consideration.

"The question is, What is the character of citizens of the United States domiciled in Mexico, *as between the United States and Mexico*; not as between *Mexico* and a *third* state? They are citizens either of one country or the other. If they are not citizens of the United States, they are citizens of Mexico; and if citizens of that republic, they must have been so constituted by operation either of the municipal laws of the country or the law of nations. But the laws of Mexico do not make them citizens of that republic; and, therefore, if they are citizens of that republic at all it must be by virtue of the law of nations. We have seen, however, that the law of nations does not constitute or create anyone a citizen of any country.

"They can not, therefore, be citizens of Mexico. They must be, what they are, citizens of the United States.

"So long as a state permits its citizens domiciled in foreign countries to retain their national character, and they do not voluntarily throw off that character and transfer their allegiance, they are entitled, within the limitations of the public law, certainly where no fault or blame is imputable to them, to receive all just protection from the proper authorities of the state against positive maltreatment and violation of right and justice by the government within whose jurisdiction they reside.

"If it be assumed that the state has the power, without their consent, to deprive such citizens of their nationality, the sovereign authority of the state is the sole judge of the question whether it is wise or profitable to retain as citizens persons who have removed beyond its jurisdiction, and who manifest their purpose never to return to their native country. In France it has been so regarded; for it is by a public law of France, as we have seen, that citizens are in certain cases deprived of their national character. As a question of public policy, it is for the exclusive determination of the lawmaking

power of the government. A supreme law of the land, it may be safely said, is the only power which can absolutely dissolve, independently of the will of the citizen, the political tie which binds him to his country and his government.

"And until that power is exerted the citizen, however situated, who has not, by his own voluntary action, thrown off his nationality and abjured his allegiance, is entitled to receive such measure of protection from the government as under the circumstances of the case it may be proper and just it should afford, and the principles of public law permit.

"It is not to be presumed that the United States, having permitted their citizens to reside in Mexico without loss or impairment of their nationality, and having a right, under the law of nations, to protect their citizens who are so domiciled in that country, intended to exclude and except them from the provisions of a treaty which expressly declares that it is for the benefit and protection of *all* citizens having claims against the Mexican republic. Mexico has no right to claim that they shall be excepted from the operation of the treaty. They are not *her* citizens. She has not admitted them into *her* body politic. Nor have they transferred their allegiance to any other state. When, therefore, Mexico agreed to indemnify *all* citizens of the United States whose claims should be approved by this commission, she must have intended that this class of American citizens should be included within the convention.

"Both governments having thus agreed to extend the benefits of the convention to the American citizens whose relations and rights we have considered, any construction of the convention that would exclude them would be in derogation, and not in furtherance, of the intention of the contracting parties. It would be to *make* a treaty for the parties, not to *construe* the treaty they have made themselves. Considerations of public policy can not be entertained upon the construction of a statute or treaty when the intention is evident and clearly expressed, for judicial tribunals know public policy only as declared and evidenced by the laws."

Doubtless it was at least partly due to the foregoing argument that Mr. Wadsworth modified his views on the subject of domicil in the manner which will be hereafter disclosed.

Decision of Dr. Lieber. In the case of *Rafael M. Miller v. Mexico*, No. 490, MS. Op. I. 599, the question of domicil was considered by the commission's first umpire, Dr. Lieber, who on August 2, 1871, rendered the following decision:

"Domicil in a foreign country does not denationalize, unless there be a distinct law to that effect in the native or adopted

country of the respective person. If Miller was an American citizen [he was a native citizen of the United States] when he went to Matamoras, he remained such as long as he remained there, unless he became by some distinct act or other a citizen of the Republic of Mexico."

Domicil and Declaration of Intention. But, while it was thus held that the mere acquisition of a foreign domicil did not in itself divest the claimant of his citizenship, there was another class of cases in which the jurisprudence of the commission was for a time involved in uncertainty, perhaps chiefly owing to the failure of the first umpire to lay down any definite principle of decision. This class consisted of cases in which the claimants, besides asserting the acquisition of a domicil in the United States, also alleged that they had made a declaration of intention to become citizens thereof. And this class was subdivided into cases (1) in which the claimants, subsequently to the origin of their claims, actually became naturalized, and (2) in which the naturalization was never completed.

Cases of Jarr and Hurst. The first cases decided in which domicil was coupled with a declaration of intention were those of *Peter Jarr v. Mexico* and *James Hurst v. Mexico*, Nos. 391 and 393, respectively, on the American docket. It appeared that Jarr, a native of Denmark, and Hurst, a native of Norway, in December 1852, being then domiciled in San Francisco, California, and having previously declared their intention to become citizens of the United States in accordance with the naturalization laws, shipped as sailors on board of the American passenger schooner *B. L. Allen*. In August 1853 this vessel was seized in the port of Acapulco, Mexico, for an alleged violation of Mexican law, and the claimants, with the rest of the crew, were taken on shore and imprisoned. Hurst was also wounded by one of the Mexican police on the deck of the schooner. Subsequently the American consul at Acapulco demanded the immediate discharge of the vessel and the release of the master and crew. The case became the subject of correspondence between the American minister and the Mexican minister of foreign affairs, and the proceedings were finally ordered to be discontinued and the prisoners to be set at liberty, the minister of foreign affairs stating, however, that it was an act of grace and was performed with the understanding that the captives should not present

any reclamation. The American minister accepted this announcement in a friendly spirit and the discussion was closed, but the claimants subsequently presented a complaint and a demand for indemnity, and it was submitted by the Government of the United States to the commission. The claimants, subsequent to the origin of their claims, completed their naturalization and were at the time of the conclusion of the convention of July 4, 1868, naturalized citizens of the United States.

The Mexican agent moved to dismiss the claims for want of jurisdiction, on the ground that the claimants were not at the time of the alleged injury citizens of the United States.

Mr. Ashton, agent and counsel for the United States, filed in the case of Peter Jarr an argument in opposition to the motion to dismiss.

In this argument he maintained:

1. That the claimant was "to be held and deemed a citizen of the United States from the date of his declaration of intention to become a citizen, by the application of the *doctrine of relation*."¹

2. That the claimant by his "domicil" in the United States "so far possessed our national character as to be subject to our protection against the injustice of all nations, except the country to which he owed superior allegiance," and by his "declaration of intention to become a citizen of the United States, and to renounce his allegiance to his native country," "so far severed his relations to that country as to lose all right to claim its protection against the United States or any other power;"² that these considerations derived additional force from the fact that the claimant was a member of the crew of a vessel of the United States.³

¹As inferential authorities for this proposition, Mr. Ashton cited *Cruise on Real Property*, v. 510, 511; *Viner's Abridgement*, tit. Relations, 290; *Landes v. Brandt*, 10 Howard, 369; *Grisar v. McDowell*, 6 Wall. 379; *Blackstone's Comm.* II. 249, 250, IV. 381, 482; *Co. Litt.* 8a, 129a; *Jackson v. Beach*, 1 Johns Cas. 401; *Sutleff v. Forgey*, 1 Cowen, 69; 5 Id. 715; *Priest v. Cummings*, 16 Wend. 617; 20 Id. 345; *McGaw v. Galbraith*, 7 Richard's Rep. 74.

²In support of these propositions Mr. Ashton invoked Vattel, Bk. 2, chap. 8, sec. 104; Phillimore, *Int. Law*, III. 21, II. 24; Westlake, *Private Int. Law*, 50; the *Kosztka* case.

³Letter of Mr. Webster to Lord Ashburton, case of the *Creole*, Webster's Works, VI. 303; *The Creole*, Report of B. and Am. Comm. 244.

3. That persons in the predicament of the claimant were "citizens of the United States in the sense of the convention of July 4, 1868."¹

Mr. Wadsworth, the United States commissioner, said that he agreed with the agent of Mexico that "the subsequent completion of

naturalization under the laws of the United States does not by *relation* carry the citizenship from the date of the declaration of intention," and that "unless claimants on other grounds shall be held 'citizens' within the meaning of the treaty, they have no standing here, and the motion to dismiss must be allowed." But he contended that domicile in the United States, coupled with a declaration of intention, constituted citizenship within the intent of the treaty. He referred to the case of Koszta and to various authorities expressing the view that emigration *sine animo revertendi* constitutes expatriation, and

¹ At the close of his argument Mr. Ashton submitted the following propositions:

"That the terms 'citizens of the United States,' used in the treaty, should be deemed and construed to describe and include all persons whom the United States are entitled to protect against Mexico.

"2. That native-born and naturalized citizens of the United States, who were domiciled in Mexico, though not citizens of the Mexican Republic by naturalization, at the time of the occurrences of which they complain, are 'citizens of the United States' within the meaning of the treaty and entitled to appear as claimants before this commission.

"3. That the naturalization of an alien relates back to the first step in the process, and constitutes him a citizen from the date of his declaration of intention.

"4. That persons who have duly declared their intention to become citizens of, and are *bona fide* domiciled in the United States, are subject to the protection of the United States against injuries by the authorities of Mexico, within and without the territory of the United States.

"5. That such persons are 'citizens of the United States' according to the true construction, and within the just meaning of the treaty, and entitled to have their claims entertained by the commissioners.

"6. That persons who have not taken the initiatory step toward naturalization, but who are domiciled within the territory and jurisdiction of the United States, are entitled at least to the protection of the government against Mexico within the territory of the United States, and in the enjoyment of all rights springing out of their residence, and in the performance of all lawful acts in or originating from the territory, and in respect to all such subjects-matter at least, such domiciled persons are to be deemed and treated as 'citizens of the United States' within the meaning of the treaty, and may prefer claims as such against Mexico before this commission."

said: "I am disposed, then, to regard Hurst and Jarr, at least at the moment of making their recorded declaration of intention in the courts of the United States, as no longer under any allegiance to or possessing the nationality of any sovereign but the United States." He concluded his opinion as follows:

"I should feel no hesitation, therefore, in giving to the word 'citizen' the *extensive* construction authorized by the rules of public law and sound criticism contended for by the learned agent of the United States in his compact and able argument in Jarr's case, if it were needful; but I think, as he has well argued, the claimants are 'comprised within the signification of the terms employed' by the convention, and are in those terms 'citizens' of the United States.

"It should be borne in mind that Jarr and Hurst were taken from the deck of an American vessel, and so were within the jurisdiction of the United States at the time the alleged injuries were committed. I hold that they were then 'citizens of the United States' within the meaning of the treaty, and refuse to allow the motion to dismiss on the ground specified by the agent of Mexico."

Opinion of Mr. Palacio. Mr. Palacio, the Mexican commissioner, held that the motion should be granted. In a very exhaustive argument he maintained that as the conditions of naturalization were established by the municipal law, by which alone the process was regulated, international law could not relax or dispense with them. "If," said Mr. Palacio, "the United States has established for naturalization a precise and essential form, if it has made it dependent upon determined acts, naturalization consequently will only take place when these acts are perfectly completed, and not before, nor by other approximate, analogous, or similar means." Mr. Palacio, moreover, contended that the naturalization treaty between the United States and Mexico of July 10, 1868, made naturalization essential to the acquisition of citizenship. He adverted to declarations of the United States to the effect that a declaration of intention did not confer citizenship. The United States had uniformly declined to issue passports to persons who had only made a declaration of intention. Among the Secretaries of State who so refused was Mr. Marcy, the author of the letter in the Koszta case, and Mr. Seward, who negotiated the claims convention.¹ During the civil war, when persons who had made a declaration of intention were

¹ Report of the Royal Commission of Great Britain on Naturalization, 42, 43, *et seq.*; Lawrence's Wheaton, note 126.

called upon for military service, President Lincoln, in his proclamation, gave them sixty-five days in which to leave the country, thus acknowledging their alien status and giving them the option of retaining that and abandoning their intention to become citizens of the United States. In the naturalization treaty between the United States and Mexico it was expressly declared: "The declaration of intention to become a citizen of the one or the other country has not for either party the effect of naturalization." Mr. Wadsworth, in his opinion, had quoted a passage from the work of Sir Alexander Cockburn on *Nationality* (London, 1869, p. 202), expressing the view that a person who takes up his abode in a foreign state, with the intention of becoming a citizen of it, does not continue to be a citizen of the state from which he came, so long, at least, as he remains in the country to which he has voluntarily transferred himself. Mr. Palacio replied that this was a statement by Sir Alexander Cockburn rather of what the law should be than of what it was, and added:

"But admitting the opinion of Sir Alexander as the actual international law (and it is impossible to give him a greater token of respect), the terms in which he expresses it, and the reasons on which he rests, show that it implies two conditions. One is that the person who has declared his intention to become naturalized ought to enjoy the privileges of naturalized citizens during the probatory term established by law between the declaration of intention and the final act of naturalization, but not after the expiration of said term, if he voluntarily fails to complete his naturalization. The other limitation is that the protection accorded to the one who has declared his intention to become naturalized ought to be essentially attached to his real and actual presence in the territory of the country of which he intends to become a naturalized citizen; but said protection is not to follow him in a foreign country, nor is it to produce the effect that he should be regarded in other nations as a true and perfect citizen of that country. The reasons of mere equity and public convenience, and those founded in the integrity of the territorial sovereignty and jurisdiction of each nation (which give support to the opinion of the wise English jurist) do not go, certainly beyond the limits fixed by me; and I have not the slightest doubt that said jurist would explain his opinion as I do. I deem it unnecessary to enter into a further examination of this theme, because its grounds are too evident to one capable of understanding what can make the doctrine of which I am speaking acceptable. Reduced to these limits, I will not have any objection to accepting it as a rule for my decisions and opinions. In an absolute manner, and without limitation of time or place, I think it too broad and comprehensive."

The differences of the commissioners having
Opinions of Dr. Lieber. been referred to the umpire, Dr. Lieber, he delivered on April 24, 1871, in the case of Jarr, the following opinion:

"The treaty and convention under which this commission acts distinctly lays down that claims of American citizens against Mexico, and *vice versa*, shall be entertained by the commission, and none other. It is maintained on the one side that the case of Peter Jarr must be dismissed, because both governments have settled it; and on the other side it is maintained that it must first be determined and ascertained whether Peter Jarr was a citizen of the United States within the meaning of the treaty at the date of the injuries of which he complains and for which he claims damages; otherwise there would be no question for decision in the case.

"I am clearly of the latter opinion. Before Peter Jarr's case can be admitted, as it were, into the hall of the commission he has to legitimize himself as a citizen of the United States. If he is not a citizen of the United States his claims, however just they may be, can not be brought for decision before the joint commission.

"Jarr states himself that at the time when the injuries were inflicted on him by the Mexican authorities in the harbor of Acapulco he had declared his intention to become in due time a citizen of the United States, following the law of naturalization of the United States, but that not sufficient time had elapsed for becoming finally and fully a citizen of this commonwealth.

"It will be necessary for the commissioners to decide whether Jarr, a domiciled alien, having declared his intention to become a citizen of the United States, was a citizen of the United States within the meaning of the convention before they can go further. If he was not, the commissioners can not hear him; if he was, his claim must be examined and adjudged."

In the case of Hurst, the umpire, Dr. Lieber, delivered the following opinion:

"The case of James Hurst, seaman, is in every essential the same with the case of *Peter Jarr v. Mexico*, No. 391, except the amount claimed for damages, and, despite of the sympathy which the case may be calculated to excite in favor of claimant, it is not in the power of the commission to exceed the distinct limits of its jurisdiction, laid down by the very document whence we derive all our authority, and without which we could not act at all.

"It is necessary, therefore, as decided in the case of *Peter Jarr v. Mexico*, for the commissioners to determine whether the claimant, a domiciled alien, having declared his intention to become a citizen of the United States, at the time the wrongs which he complains of were done him, was a citizen of the

United States in the meaning of the convention. This must first be settled. If he was not a citizen the case can not go on."

When these opinions were received by the commissioners they again took the cases into consideration, and, according to the journal of the commission, Mr. Palacio made for the commission in each case the following announcement:

"Mr. Commissioner Palacio announced that the umpire having decided that the question of citizenship should be decided previous to any other, and it appearing that claimant was at the time when the alleged injuries occurred an alien domiciled in the United States under a declaration of intention to be naturalized and actually residing in the same, we are of the opinion that he is entitled to be heard by this commission.

"But his claim was finally settled and concluded long before the convention under which we are sitting was made, and for that reason it ought to be dismissed."¹

Though the claims were thus dismissed, it appears that Mr. Palacio ultimately conceded that the claimants might be heard as citizens of the United States. The precise grounds of this concession are not disclosed, but it appears by Mr. Palacio's original opinion that he had been inclined to concede that a person domiciled in the United States who had made a declaration of intention might be admitted to a hearing on two conditions: (1) That he should not fail to complete his naturalization, and (2) that his claim to protection should "be essentially attached to his real and actual presence" in the United States. Mr. Palacio probably thought that this second condition was fulfilled in the cases of Hurst and Jarr by their service on an American vessel.

On November 7, 1871, the umpire, upon the strength of the commissioners' views in the cases of Jarr and Hurst, made an award in favor of a claimant, the circumstances of whose case, as the umpire found them to exist, presented a different question. This was the case of *Christopher Gosch v. Mexico*, No. 320, in which indemnity was claimed for losses growing out of the seizure and detention of a wagon train by General Negreto, of the Liberal army, in April 1865. It appeared that Gosch was born in Württemberg, January 30, 1836, of natives of that kingdom. In 1852 his father obtained permission to emigrate,

¹ MS journal, I. 351.

and came to the United States with his family late in that year. It was alleged that shortly after his arrival in the United States he made a declaration of intention to become a citizen, and that five years later he completed his naturalization. The documentary evidence of these acts, however, was lacking, and the proof of them consisted merely in depositions of certain persons who claimed that the naturalization took place in their presence. They did not state the date of the naturalization, otherwise than by saying that it took place a little over five years after Gosch's arrival in the United States. According to this he could not have been naturalized before late in 1857, or early in 1858. This was after the claimant, the son, became of age, which was on January 30, 1857. Where the claimant was at the time of the alleged naturalization of his father did not appear, though in a statement made by him in 1865 it was declared that he had been residing in the State of Chihuahua, Mexico, for eight years, which would have made him leave the United States in the latter part of 1857.

Mr. Palacio, the Mexican commissioner, entirely rejected the claim on the ground that the claimant was not a citizen of the United States within the meaning of the convention.

Mr. Wadsworth took a contrary view, saying that at the moment Gosch, senior, declared his intention to become a citizen of the United States, he and his family were without country or king, unless they were citizens of the United States; that they became, at that moment, connected with the state of their adoption in the political relation of subject and sovereign, and that, by this tie, the United States in its intercourse with all foreign nations, including the kingdom of Württemberg, might hold and claim each member of the family until the connection was in fact dissolved.

The decision of the umpire was as follows:

"The case of Christopher Gosch is surrounded by uncertainty of facts and doubts in law.

"According to the decisions of the commissioners in the case of *Peter Jarr v. Mexico*, docket number 381, and several other cases, claimant, it would seem, is a citizen of the United States in the meaning of our convention. Yet this is a novel case, for claimant reached his twenty-first year when his father had not yet been naturalized, but had only declared, according to the law, that it was his intention to become a citizen of the United States—a declaration which, according to the clerk of the respective court could not be found because his predecessor did not keep an index to the book in which he entered the

declarations. It may be well enough to meet with something ridiculous, for once, in the course of the dry business before us, but it makes a very contrary impression to find so contemptible an assertion gravely repeated.

"Gosch resided always in Mexico, even, if I am not mistaken, before he became of age, and was the partner of a Mexican citizen, the chief, it seems, in the mercantile house. What was the nationality of the house according to previous decisions? Gosch, moreover, has pursued his case before the Mexican Government, which has made restitution, partial according to Gosch, but which Gosch has accepted as far as it went. He now turns round and continues his case before our international commission.

"The accounts against the Government of Mexico are made out on the unfortunately common principle of exaggeration so transcending that he who investigates them finds himself often deprived of the power of discernment between fair, possible reality, and inventive fancy."¹

Having thus stated his views of the case, the umpire concluded by making an award in favor of Gosch, "under all these circumstances," to the amount of \$15,297.26. The father's declaration of intention was not proved, its existence, even, was scouted by the umpire; and the claimant, who at the time of the injury complained of was living and doing business in Mexico, had then spent the whole of his majority in that country.

Case of Hellman. The same question—of domicile coupled with a declaration of intention—again arose in the case of *Caroline Sprotto, assignee of Moses L. Hellman, v. Mexico*, No. 83. As the case was stated by Mr. Wadsworth, Hellman, a merchant residing in New York, lawfully introduced a quantity of goods into Mexico during the war with the United States. The goods were seized by Mexican custom-house guards and distributed among the captors. This happened about six months before Hellman's naturalization. The case, said Mr. Wadsworth, was that "of a party living in the city of New York, under a declaration of intention to become a citizen of the United States, * * * injured in property, sent out by him as an American merchant to a foreign country, who afterward completes the process of naturalization, and is admitted to all the rights and privileges of a citizen of the United States." Mr. Wadsworth maintained that he should be permitted to appear as a citizen of the United States.

¹ MS. Op. II. 209.

Mr. Palacio declined to concur in this result. He said:

"Moses L. Hellman, in whose name the claim is made for the reason that he is supposed to be the owner of the things lost, is a German by birth. He became a naturalized American citizen on September 3d, 1850, about seven months *after* the events which gave origin to this claim occurred. It is, therefore, clear that in the proper and genuine sense of the word, he was not a citizen of the United States when he supposes that he suffered the injuries. I think, however, that if there should be a direct and convincing proof that he was at that time a resident of the United States and had declared his intention to become naturalized, and that the term which, according to law, ought to intervene between the declaration of intention and the final naturalization had not elapsed, he could be considered, with such requisites, entitled to the protection of the Government of the United States, just the same as the citizens of this nation. Of those requisites, however, I see no sufficient evidence; and as they are distinct facts capable of being proved, I am not disposed to admit them without proof. If it be said that the fact of having obtained his naturalization proves what I require, I will answer that the inference is not conclusive, because the duty he had to state and prove those circumstances is not a proof that they really existed. We very often see that what ought to be done is not always done. Many legal acts presumed to be performed with such and such requisites are performed without them. I once committed the error of inferring that an individual ought to be a Mexican citizen because he performed an act which could not have been performed if he had not had such a character, but the decisive reply to my argument was that things are not always done as they ought to be done. Such may be the case here, and consequently the fact that Moses Hellman became a naturalized citizen of the United States in September 1850 does not prove that he resided there in February of that year; that he expressed his intention to become naturalized, and that he obtained his naturalization within the two years fixed by the law. Those are the only circumstances in which I think that the retroaction of the naturalization can be admitted. It has not been of rare but of very frequent occurrence that certificates of naturalization have been obtained by persons who have not fulfilled the legal requisites necessary for their obtainment, and although such certificates ought to produce their legal effects without scrutinizing the proceedings to which they owe their origin, yet the principles according to which a fact is proof more or less conclusive of others, are not altered in the least. The certificate of naturalization conclusively proves the naturalization, but does not prove in the same manner the antecedents of the naturalization. For this reason I am of opinion that Moses Hellman was not entitled to the enjoyment of the rights of a citizen of the United States before his naturalization, and that he ought not to be heard by this commission."

November 7, 1871, the umpire rendered the following opinion:

"The first question, namely, whether the United States can claim under our convention in behalf of claimant, assignee of Moses Hellman, deceased, must be answered affirmatively, since Moses Hellman, deceased, husband of Caroline Sprotto, a native German, became a citizen of the United States seven months after the event is said to have taken place which has become the foundation on which the claim is built. He must therefore have declared his intention of becoming a citizen long before the day on which the injury to his property was done by the Mexican authorities, and the commissioners have jointly decided in several cases referred to by Mr. Commissioner Wadsworth in his opinion on this case, *Caroline Sprotto v. Mexico*, that a person declaring his intention to become a citizen and keeping his domicile in the United States, is a citizen of the United States in the meaning of the convention of July 4, 1868.

"The objection that, possibly, his certificate of naturalization, which is among the file of papers relating to this case, has been illegally obtained, is not tenable. If there are indications of fraud, or suspicions of illegality, let them be shown and judged of. If there are none, the certificate is its own evidence of the lawful proceedings necessary to bring it about. An apple proves of itself that an apple tree produced it.

On the same day, November 7, 1871, a decision was rendered in the case of *Christina Eigendorff*, administratrix of *Franz Eigendorff*, deceased, and *Carl Hugo*, guardian of the minors *Haseloff*, v. *Mexico*, No. 581, for the forcible entry of a store and the destruction of goods by Mexican soldiers during a street fight in Matamoras on January 12 and 13, 1864. It appeared that Christina Eigendorff was the widow of Franz Eigendorff, to whom the alleged injuries were done. Franz Eigendorff was a native of Prussia and was brought by his father to Texas in 1854, at the age of 16, the father and his family having emigrated to the United States. Franz Eigendorff, being a Union man, and unwilling to serve in the Confederate army, obtained permission to leave Texas and went to Germany to secure some property. This he did in the winter of 1862-63. In 1863 he returned to America and entered into business at Matamoras. Some time after the destruction of his property he returned to the United States, where in 1868 he died. January 7, 1868, he was naturalized as a citizen of the United States.

Mr. Palacio, the Mexican commissioner, held that Eigendorff could not claim as a citizen of the United States, not being such at the time the claim arose.

Mr. Wadsworth, the American commissioner, took the ground that Eigendorff had from the age of 16 been domiciled in the United States by the election of his father; that he had had no other legal residence in the sense of domicile; that his residence at Matamoras was enforced and temporary; that he was kept there by the civil war, expecting to return to the United States; that he had sought, as a permanent inhabitant of the United States, hospitality in Mexico, and not domicile.

Dr. Lieber, the umpire, delivered the following opinion:¹

"According to the united decisions of the commissioners in several cases, previously under consideration, Francis Eigendorff was a citizen of the United States in the meaning of the convention of July 4th, 1868. He was a subject of the United States, under the protection of the government of the same, and his relation to the United States was not disturbed by his temporary residence in the territory of Mexico. His domicile remained in the United States, although driven from Texas (where he had his permanent dwelling place—his domicile) by the so-called secession of that State."

August 2, 1871, in the interval between the dismissal of the claim of Peter Jarr and the allowance of the demands in the cases of Gosch, Hellman, and Eigendorff, Mr. Wadsworth delivered, in the case of *August Perez v. Mexico*, No. 523, American docket,² the following opinion of the commission:

"The injury in this case happened in November 1861. Claimant, a native of France, was naturalized in Cameron County, Texas, May 13, 1870.

"From 1856 to 1866 (perhaps till this time, as his domicile was there at date of the memorial) he resided and did business continuously at Matamoras, Mexico, opposite Cameron County aforesaid, the Rio Bravo flowing between those places.

"There is no proof that the claimant ever lived in the United States at all. We must assume, however, that claimant produced record evidence of a declaration of intention on his part to become a citizen of the United States at least two years prior to the date of his admission to citizenship. But what are we to think of the other requirements of the United States statutes of naturalization? Did claimant prove that he had resided in the United States two years after his declaration of intention, five years in the United States and one year in the State of Texas? We must suppose that he did, since the court was not authorized to admit him to citizenship on the 13th of May 1870 without such proof.

¹ MS. Op. II. 255.

² MS. Op. I. 616.

"Yet claimant, in his memorial, swears that his domicile was in Matamoras; this was nine days after he was naturalized.

"It will not be necessary to decide whether the certificate of citizenship is entitled to any credit here, because it appears that after the declaration of intention (assuming that such was ever made) claimant left the United States and domiciled himself in Mexico and was so domiciled at the date of the injury complained of.

"He was not at that time a citizen of the United States in any sense or in any of the relations of citizenship. No tie of allegiance existed between him and the United States; that power had no claim on him whatever, and could exert none of the rights of sovereignty over him, not even the *jus avocandi*. It is not possible under such circumstances that the individual could have any claim to the protection of the state, nor in this case is it probable that claimant would have remembered the obligation to transfer his allegiance to the United States had not this trouble fallen upon him.

"It is difficult to conceive what interest the United States can have in the subjects of foreign powers residing in Mexico, *animo manendi*. The fact that, many years before, claimant had declared his intention to become a citizen of the United States is of no value, when, without executing that intention, he goes abroad not on a visit of pleasure or business, *animo revertendi*, but to establish his domicile in a foreign land. This is conclusive evidence that he has abandoned that intention, because he could not subsequently carry it out without keeping up his domicile in the United States.

"I take it for granted that it is plain it rested alone with the claimant to say whether he would ever assume the obligation of allegiance to the United States, being under none whatever at the date of his disaster. But a party can not be a citizen of any country on such unequal terms. Allegiance and protection are reciprocal. The right implies a duty, whether the subject or the sovereign claims its assertion. The claim is rejected."

Case of Kern.

The doctrine stated in the foregoing decision was applied by the commissioners in many cases. Thus, in the case of *Santiago Kern v. Mexico*, No. 750, American docket, the claimant, a native of Switzerland who, while residing in Mexico, suffered injury in respect of his property there, alleged that he had previously resided in the United States and had made a declaration of intention January 3, 1872. Mr. Palacio, delivering the opinion of the commission,¹ said:

"This commission has already declared that those individuals who, after having taken the preliminary step of declaring their intention to become naturalized citizens of the United States,

¹ MS. Op. II. 347.

leave the United States without completing their naturalization, and establish their domicile in a foreign country, are not entitled to be considered as American citizens."

This rule was applied by the commissioners in the following cases: *Henry Pugos v. Mexico*, No. 519, Am. docket, MS. Op. II. 71; *John Poloney v. Mexico*, No. 40, Am. docket, id. 391; *Peter Berg v. Mexico*, No. 253, MS. Op. III. 597; *Francisco Vizaya v. Mexico*, No. 747, MS. Op. II. 589; *John Focke v. Mexico*, No. 584, MS. Op. II. 408; *Jean Marie Fleury v. Mexico*, No. 312, and other cases, MS. Op. II. 525; *John Morrissey v. Mexico*, No. 266, Am. docket, id. 599; *John F. Murray v. Mexico*, No. 634, Am. docket, id. 246; *John Campbell Smith v. Mexico*, No. 471, Am. docket, MS. Op. V. 4.

Schreck's Case.

Claimant was born in Denmark, emigrated to the United States in 1849, declared his intention in 1854, removed to Matamoras in 1856, and remained in Matamoras till November 1861, when, having suffered the destruction of his dwelling, carriage factory, and stock at the hands of troops under General Carvajal, he returned to the United States, where he was naturalized January 26, 1870. Held, by the commissioners, that he could not appear as a citizen of the United States.¹

When Sir Edward Thornton became umpire of the commission he acted upon the principle that the word "citizens" in the convention meant citizenship according to the law of the contracting parties, and declined to recognize a declaration of intention or domicile, singly or together, as conferring citizenship. Mr. Zamacona, Mr. Palacio's successor, seems also to have acted upon that principle.

Opinions of Sir Edward Thornton, umpire, in *George O. Wilkinson v. Mexico*, No. 640, MS. Op. IV. 53, and *Camille Gros v. Mexico*, No. 311.

Ferrer's Case.

A Mexican vessel was seized for an alleged attempt to run a blockade, and was unlawfully held, with her cargo, and without trial, after her detention was known to be groundless. The claimant, as the shipper of a part of the cargo, claimed damages.

A question was raised as to his Mexican citizenship. He was a native of Spain, but in 1821, at the time of the declara-

¹ *John C. Schreck v. Mexico*, No. 537, Am. docket, MS. Op. III. 125. S. P. *Charles McManus v. Mexico*, No. 549, Am. docket, MS. Op. V. 154.

tion of independence of Mexico, was living in the latter country, where he was still residing when the vessel and cargo were seized. This circumstance Mr. Palacio, who delivered the opinion of the commissioners, held to be sufficient to constitute him a Mexican citizen, both under the law of nations and the laws of Mexico. But, apart from the naked question of citizenship, it was held that the claimant's domicile gave him, for the purposes of neutrality and of prize a Mexican status, citing Halleck's *Int. Law*, pp. 486, 701; 3 Phillimore, No. 128; Wheaton's *Elements*, Part IV, ch. 1, pp. 16 and 17.

It was also held that according to Article XVI. of the treaty between the United States and Mexico of 1831, providing for security of vessels sailing to and from an enemy's port, without distinction being made as to the owners of the merchandise, and for the freedom of goods in free ships, the claimant was protected, whatever his national status, the vessel being Mexican. The commissioners awarded the value of the merchandise at the place of its shipment, the cost of transportation, and 10 per cent as profit on the value, according to the practice of the prize courts.

José Ferrer v. The United States, No. 358, United States and Mexican Claims Commission, convention of July 4, 1868.

Anthony Barclay presented, as a British American and British subject,¹ a claim to the American and British Claims Commission: claims commission at Washington, under the Case of Anthony Treaty of Washington of May 8, 1871, for the Barclay. appropriation of property as well as for acts of pillage and destruction by General Sherman's army on three plantations in Georgia. It was alleged that the troops who committed these acts were acting at the time under the command of officers, and that the commander of the army was himself appealed to in vain for his interposition to stay the work of devastation.

The United States demurred to the memorial on the ground (1) that no facts were set forth constituting a claim; (2) that the acts complained of belonged to the category of incidents of war, for which there was no redress, and (3) that "the claimant, having been at the time of the alleged acts domiciled and engaged in trade and business within the enemy's country, can not claim the position of a subject of Her Britannic Majesty within the twelfth article of the treaty."

¹ *Anthony Barclay v. The United States*, No. 5.

It appeared by the memorial that the claimant, a native-born British subject, had for many years prior to 1858 resided in the United States, a part of the time as British consul at New York, and that from 1858 to the close of the war he resided in the State of Georgia, where he owned two plantations and leased a third, cultivating and carrying on all three.

In support of the demurrer Mr. Hale, counsel for the United States, contended that under the twelfth article of the treaty the terms "citizens of the United States" and "subjects of Her Britannic Majesty" were to be taken not in their strict meaning, under municipal law, of absolute citizenship for all purposes, or of paramount allegiance to a sovereign, but in the larger sense recognized by international law, in which sense it was contended that all persons were included within those respective expressions who by permanent domicile were within the protection of the government under which they resided, and who thereby owed to the country of their domicile that allegiance, perhaps temporary and qualified, exacted by such domicile. In other words, it was contended that within the terms of the treaty all persons permanently domiciled within the United States were to be taken as citizens of the United States, and all persons permanently domiciled within the jurisdiction of Great Britain were to be taken as subjects of Her Britannic Majesty.

The counsel for the United States cited in support of this doctrine the following elementary writers: Twiss' *Law of Nations*, (war,) 233, 298-9; *id.* 82, 83; 3 Phillimore, 603; 1 Kent's *Com.* 74; 2 *id.* 63; Lawrence's *Wheaton*, 557 to 567; Calvo's *Derecho Internacional*, 526 to 536; Halleck, 702, 705, 717; 3 Greenleaf's *Ev.* § 239; Story's *Conflict of Laws*, § 68.

He cited, also, from the British and American reports in admiralty and prize cases, the following cases: *The Indian Chief*, 3 Rob. 12, 22; *The Citto*, *id.* 38; *The Harmony*, 2 *id.* 322; *The Bernon*, 1 *id.* 101; *The Nayade*, 4 *id.* 251; *The Danous*, *id.* 255, n.; *The President*, 5 *id.* 277; *The Anna Catharina*, *id.* 167; *The Matchless*, 1 Hagg. Adm. 97; *The Schooner Nancy*, Stewart's Rep. (Nova Scotia, Vice-Admiralty) 49; *The Pizarro*, 2 Wheat. 227; *The Charming Betsey*, 2 Oranch, 64; *The Venus*, 8 *id.* 253; *The Francis*, 1 Gall. 314; *The Ann Green*, *id.* 274; *The Joseph*, *id.* 545, 568; Mrs. Alexander's *Cotton*, 2 Wall. 417; *The Venice*, *id.* 274; *The Peterhoff*, 5 *id.* 60.

Also, from the common-law reports: *Marryatt v. Wilson*

(in Ex. Ch.) 1 B. & P.; S. C. (in King's Bench) 8 T. R. 31; *McConnell v. Hector*, 3 B & P. 113; *Tabbs v. Bendelack*, id. 207, n.; *Bell v. Reid*, 1 Maule & Selwyn, 726; *Albrecht v. Sussman*, 2 Vesey & Beames, 322.

Also, from the British Privy Council cases, on questions arising under the treaty of 1814 between Great Britain and France; *The Countess of Conway's case*, 2 Knapp P. C. Rep. 364; *Drummond's case*, 2 id. 295.

He also cited the case of the Messrs. Laurent, decided by the umpire, Mr. Joshua Bates, under the convention of 8th January 1853, between the United States and Great Britain, given in the report of the commissioners under that convention, Senate documents, first and second sessions, Thirty-fourth Congress, vol. 15, No. 103, p. 120.

Also, the decisions of the commissioners under the treaty of Guadalupe Hidalgo, 2d February 1848, between the United States and Mexico, in the cases of Clow, Powell, Cook, Haggerty, Davis & Co., and Barkley, administrator, in manuscript in the State Department.¹

Also, the correspondence of the British foreign office, relating to the cases of Kirby, Smith, Rothschild, Ashburnham, Stewart, and others, printed in the British Blue Book of 1871, Paper No. 4, on the Franco-German war.

Also, from the parliamentary debates, the speeches of Lord Palmerston, Hansard, third series, vol. 146, p. 41; of Sir Richard Bethell, id. 49; and of Lord John Russell, id. 56, on the Greytown case. Also, the speech of Lord Palmerston on the question of compensation for property of British merchants destroyed at Uleaborg, id. 1045, 1046.

He also cited the letter of Mr. Marcy, Secretary of State of the United States, to Count Sartiges, the French minister (Ex. Doc. No. 9, Senate, Thirty-fifth Congress, first session); and Earl Clarendon's citation thereof (Hansard, third series, vol. 146, p. 53). Also, Lord Palmerston's speech on the case at Leghorn (Hansard, third series, vol. 113, p. 635); and the note on the same case in Vattel (Guillaumin's ed. 1863, Vol. II. p. 49); and the dispatch from Prince Swartzenburg to Baron Hötter, of 14th April 1850; and from Count Nesselrode to Baron Brunnov, of 2d May 1850, cited in Torres Caicedo, *Union Latino-Americano*, pp. 343, 348. Also, the opinion of Attorney-General Stanbery on the bombardment of Valparaiso (Attorney-General's Opinions, vol. 12, p. 21); also, Professor Bernard's "Neutrality," pp. 443, 444 to 457, n.

¹ *Supra*, 2657.

Besides the argument of Mr. Hale, Judge
Argument of Judge E. R. Hoar presented, as spécial counsel for
Hoar. the United States, an argument in support of
 the demurrer. He argued that an inhabitant in Mr. Barclay's
 situation was "a subject of the sovereignty within which he
 lives;" that "he and his property are alike subject to all taxes
 and imposts which that sovereign may or might choose to im-
 pose for purposes of peace or of war." (2 Kent's Comm. sec.
 25, p. 63; 3 Greenl. Ev. sec. 239; Halleck's Int. Law, 717, sec.
 2g; 702, sec. 7; 705, secs. 12, 13, 14; Twiss' Law of Nations,
 II. 233, 298-9, I. 82, 83; Morley's Int. Law, sec. 68, 168; Act
 of 1863, ch. 75, sec. 1; Act of 1864, ch. 13, sec. 6; Proclamations
 of the President, Aug. 6, 1861, and April 2, 1863; Wheaton's
 Int. Law, Dana's ed. secs. 321-4; Story's Confli. of Laws, sec.
 68; Kent's Com. (abridged ed.) I. 217, 222; *The Francis*, 1
 Gall. 314; *The Fire Queen*, 1 Gall. 267; *The Draxel*, id. 568;
The Indian Chief, 3 Rob. 12; *The Charming Betsey*, 2 Cr. 63;
The Venus, 8 Cr. 253; Mrs. Alexander's Cotton, 2 Wall. 417;
The Peterhoff, 5 id. 60; *The Venice*, 2 Wall. 274; *Nura Cathe-
 rine*, 5 Rob. 167.)

No power could call in question the absolute rights of the
 local sovereign, unless the sovereign of the inhabitant's birth;
 and even the latter could not do so, unless, perhaps, on the
 ground of some discrimination or some violation of international
 law. (Wheaton's Elements (Dana's ed.), n. 49, p. 145, bom-
 bardment of Greytown and of Antwerp; Halleck's Int. Law,
 691; Twiss' Law of Nations, I. 38; Whiting's War Powers (ed.
 of 1871), 335, 337; Lord Palmerston's speech on the case of
 Greytown, June 19, 1857, Hansard, 3d series, vol. 146, p. 41;
 Sir Richard Bethell's speech, *ibid.*; Lord Russell's speech, id.
 56, 57; Lord Palmerston's speech on compensation for the
 property of British merchants destroyed at Uleaborg, id. 1945,
 1946; Vattel, Guillaumin's ed., II. 49, the Leghorn case; Lord
 Palmerston's speech on the case of Leghorn, Hansard, 3d series,
 vol. 113, p. 635; the dispatch from Prince Schwartzenberg to
 Baron Hotter, April 14, 1850, respecting the affair at Leghorn,
 and the dispatch from Count Nesselrode to Baron Brunnow,
 May 2, 1850, on the same subject, in a Spanish-American pub-
 lication, "Torres Caicedo, Union Latino-Americano," pp. 343,
 348; opinion of Attorney-General Stanbery on the bombard-
 ment of Valparaiso, opinions of attorney-general, vol. 12, p. 21;
 correspondence between Mr. Marcy and Count Sartiges, Ex.

Doc. No. 9, Senate, Thirty-fifth Congress, first session; Earl Granville to Lord Lyons, January 11, 1871; Earl Granville to Mr. West, March 1, 1871; Mr. Hammond, March 28, 1871, in Blue Book for 1871, on Franco-German war.)

The treaty, Article XII., must be construed as not including the pending claim among the claims of "subjects of Her Britannic Majesty." (Case of Messrs. Laurent; Drummond's case, 2 Knapp, 310; *The Nancy*, Stewart, administrator, 48; *The Francis*, 1 Gall. 514; *Wilson v. Marryatt*, 8 T. R. 3; 2 Wheat. 227; 2 Cr. 64.)

Such property of an alien, domiciled in the enemy's territory, as the pending claim embraced, might be treated as the laws of war allowed the property of other inhabitants, native or naturalized, to be treated. It was subject even to reprisals, short of actual war.

The acts complained of were not beyond the rights of war.

Mr. Carlisle presented an argument in answer to the demurrer. Taking into view the allegations which the demurrer *pro hac vice* admitted, the demurrer amounted, he declared, to saying that the wanton and even malicious destruction of property was an incident of war, for which the law of nations furnished no redress. As to the objection founded on the claimant's domicile, Mr. Carlisle argued that the language of the treaty—"subjects of Her Britannic Majesty"—was broad enough to embrace the case, and that there was nothing to restrict it. Referring to the case of the Messrs. Laurent, Mr. Carlisle said:

"The learned commissioners on the part of Great Britain and the United States were opposed in opinion, and the judgment was given by the umpire, Mr. Bates, a respectable merchant, I believe, but having no pretensions as a publicist or jurist. He rested his decision upon three cases which he cites, neither of which has any relation to the question of the meaning of the word citizen or subject, as used in the treaty. They were all cases of the liability to capture of property on the high seas by reason of its national character. The national character then in question was that which was impressed upon the property. The inquiry was, of what country was the owner a merchant as to that property, and this was a question wholly irrespective of his permanent allegiance, or even of his domicile. Such a person, if he had commercial establishments in divers countries, might be held in respect of his different adventures to be a merchant of each of these countries, and his property on the high seas in time of war would be good prize or not, according to the national character so impressed upon

it. But this would have no relation to the question, 'whose subject or citizen is he?' * * * Kent says: 'National character may be acquired in consideration of the traffic in which a party is concerned. If a person connects himself with a house of trade in the enemy's country in time of war, or continues during war a connection formed in time of peace, he can not protect himself by having his domicile in a foreign country. He is considered as impressed with a hostile character *in reference to so much of his commerce as may be connected with that establishment.*' (Kent's Com. part 1, sec. 4.)"

The decision in the case of Laurent proceeded, said Mr. Carlisle, on the theory that the claimants were not within the intent and meaning of the treaty of 1853. Suppose that decision to be correct. Suppose it to be true that the United States, prosecuting a war with Mexico, had a right under the law of nations to treat all residents in Mexico as Mexicans, would it follow that their national character was changed in like manner with respect to Mexico herself?

Mr. Carlisle cited the case of Fayette Anderson and William Thompson, in which the Mexican Claims Commission, then in session, had allowed indemnity to citizens of the United States domiciled in Mexico, for damage done to their real property in Mexico by the Mexican army engaged in resisting the French invasion.

The distinction between the national character of property and the nationality of persons had been recognized by the Supreme Court of the United States. (The *Charming Betsey*, 2 Cranch, 120.) Citizens were entitled to protection irrespective of their domicile. (Act of Congress of July 27, 1868; Philimore's Int. Law, part 5, cap. 1.)

Mr. Carlisle examined in succession the cases of *Wilson v. Marryatt*, 8 T. R. 31; *Tabbs v. Bendelack*, 3 B. & P. 207, n.; *McConnell v. Hector*, 3 B. & P. 113; *Livingston v. Maryland Ins. Co.*, 7 Cr. 506; *The Pizarro*, 2 Wheat. 227; *Drummond's Case*, 2 Knapp, P. C. 295; and the *Countess of Conicay's Case*, id. 364.

Mr. Carlisle also cited Grotius, lib. 2, cap. 25; Vattel, lib. 2, cap. 6, sec. 7; id. lib. 2, cap. 17, secs. 263, 270; Wheaton, 355; Kent, vol. 1, sec. 4; the Constitution of the United States, Art. 3, sec. 2; the Judiciary act of the United States of 1789 (1 Stats. at L. 76, 78, secs. 9, 11); the act of 27th June, 1868 (15 Stats. at L. 243); the abandoned and captured property act of 12th March, 1863 (12 Stats. at L. 820); the correspondence between Lord Lyons and Mr. Seward in relation to the

case of Henry E. Green, United States Diplomatic Corr. 1863, part 1, pp. 515, 570; and the annual message of President Lincoln to Congress, of December 1863, official publication, pp. 2, 4.

The commissioners, December 16, 1871, unanimously disallowed the demurrer, announcing at the same time the following opinion:

"The first thing to be decided in this case is whether the commissioners have jurisdiction, which depends upon whether the claimant is, within the meaning of the treaty, a British subject.

"That he is in fact a British subject there is no doubt; but it is contended that, being domiciled in the United States, he is not one of those intended by the framers of the treaty to be included in that term. It is undoubtedly true, as appears from various cases cited in the argument, that the subject or citizen of one state domiciled in another acquires, in some respects, privileges, and incurs liabilities, distinct from those possessed in right of his original birth or citizenship. But he still remains the subject or citizen of the state to which he originally belonged, and we see no reason to suppose that it was the intention of either government to put the limited meaning on the words 'British subject,' contended for in the argument in support of the demurrer, so as to exclude from our jurisdiction a British subject who has never renounced his original allegiance, or become naturalized in any other country.

"The fact of the claimant having his domicile in one of the Confederate States will, of course, have a material bearing on the point, also raised in the demurrer, as to the liability of the claimant's property to seizure or destruction by the Federal Army. It is difficult to lay down a general rule applicable in all cases to the rights of an invading army, nor, in this particular case, is that necessary.

"The statements continued in the memorial are, for the purposes of this argument, to be assumed to be true. One of the statements in the memorial is, that part of the claimant's property was taken possession of by the Federal Army without any military necessity, convenience, provocation, or inducement, and plundered, and that part was wantonly destroyed.

"Supposing this to be true, we are not prepared to say that some liability might not be established against the United States Government.

"The demurrer is, therefore, disallowed; but the United States Government will be at liberty, if they think fit, to take issue upon the facts alleged in the memorial."

The claimant in the foregoing case asked for damages, principal and interest, to the amount of \$275,335.25. The commission, May 2, 1873, awarded \$18,875. Referring to this award,

Mr. Hale, the agent of the United States, in his final report, p. 50, said:

"In the case of Anthony Barclay, No. 5, allegations were made of wanton destruction of property, including valuable furniture, china, pictures, and other works of art, books, etc. The proof was conflicting as to whether the injuries alleged were committed by soldiers or not; but if committed by soldiers, it was plainly not only without authority, but in direct violation of the orders of General Sherman. In the award made in favor of Mr. Barclay I am advised that nothing was included for property alleged to have been destroyed.

"In the case of *James Crutchett v. The United States*, No. 4, a claim for property taken and appropriated by the United States in the District of Columbia, the memorial showed the claimant at the time of the alleged injuries, and for many years previous, domiciled at Washington.

"A demurrer was interposed specifying, among other grounds, that the claimant, being so domiciled within the United States, was not entitled to the standing of a British subject within the treaty.

"The case was submitted on this point upon the authorities cited in Barclay's case, as above noted, and the demurrer was overruled.

"The decisions of the commission in these and other similar cases established the doctrine that, so far as relates to the question of jurisdiction, the national character of the party is to be determined by his paramount allegiance, where that is not double, irrespective of the fact of domicile."

Hale's Report, 14, United States and British Claims Commission, Article XII. of the treaty between the United States and Great Britain of May 8, 1871.

CHAPTER LVI.

RENUNCIATION OR FORFEITURE OF THE RIGHT TO NATIONAL PROTECTION.

I. ACCEPTANCE OF A PRIVATEERING COMMISSION.

November 17, 1817, John Clark, a citizen of the United States and a resident of Baltimore, Maryland, being then in the Banda Oriental, or Uruguay, entered into the service of that government by receiving letters of marque from José Artigas, then chief executive of that republic, authorizing him and the private armed vessel *La Fortuna* to cruise on the high seas and capture as prizes of war the vessels and property of the subjects of Spain and Portugal, countries with which the United States were then at peace. In November 1818 Clark, while thus cruising, captured the Spanish brig *Medea*, with a valuable Spanish cargo. Subsequently he captured the Portuguese ship *Reina de los Mares*, with a valuable Portuguese cargo, which cargo he transshipped to the vessel *Good Return*. While on their way into port, to be adjudicated, both the *Medea* and the *Good Return* were seized by Commodore Joly, commanding the *Espartana*, a public armed ship of the Republic of Colombia. The *Medea* was afterward condemned as a prize to the *Espartana*, on the ground that her previous capture by Clark, in *La Fortuna*, was illegal. The cargo of the *Good Return* was ultimately ransomed by her master for \$28,000. Colombia was then at war with Spain, but not with Portugal.

There were other and similar seizures and spoliations committed by Commodore Joly in 1818 and 1819 of property captured by citizens of the United States cruising under privateering commissions from the Banda Oriental. Among

these seizures and spoliations were the *Erie* and the *Diligence*, two vessels captured as prize by Commodore Danels, a citizen of the United States and a resident of Baltimore, as commander of the privateer *Irresistible*.

The privateer *La Constancia*, whose circumstances and authority were the same as those of the *Irresistible* and *La Fortuna*, captured the vessels *San José*, *La Carlota*, and *La Gertrudis*. These also were seized by Commodore Joly.

When the Republic of Colombia separated into New Granada, Venezuela, and Ecuador, each of these states assumed a certain proportion of the obligations of the parent government, and a commission was established for the purpose of adjusting such obligations. Claims for the seizure of the prizes of the *Irresistible* and *La Fortuna* were presented to this commission, but were not allowed by it. The claims were afterward diplomatically pressed against the three separate governments for the payment of their respective proportions of whatever might be due. By a convention signed May 1, 1852, by Mr. I. Nevett Steele, chargé d'affaires of the United States, and Señor Joaquin Herrera, secretary of state of the department of foreign affairs, Venezuela adjusted the claims against her on account of the prizes of *La Constancia* and her tender *La Joven Constancia* for \$73,000. The other claims remained unadjusted by Venezuela. None of them had been adjusted by New Granada or Ecuador.

When the mixed commission met in Washington under the convention between the United States and New Granada of September 10, 1857, all the claims in question were presented to it for the allowance of New Granada's proportion of the indemnity alleged to be due. The commissioners differing in opinion, the claims were submitted to the umpire of the commission, Mr. Upham. While admitting that, as the claims originally stood, payment of them might have been demanded only through the Banda Oriental, Mr. Upham took the ground that the claimants had a personal beneficial interest in the property captured for their services and outlay under contract with that government; that, it appearing that Uruguay (the Banda Oriental) had declared to Colombia, "at the request of the representatives of the claimant, they prosecuting the claim as citizens of the United States," that she had no claim to make, "in her character as a nation," against Colombia, but,

Opinion of Mr. Upham.

“with respect to the rights of individuals,” would “leave them to such action as they could [can] sustain,” and as they might find convenient, the exception taken by Colombia to the form of prosecuting the claim, which form could in no wise prejudice her interests, was not entitled to much favor; that the *acquisition* of the property by the Banda Oriental, under its power and flag, was rightful, though the *parties in interest*, the captors, were citizens of the United States; that, as the Banda Oriental had acquitted her right in the property to the claimants, it was questionable whether the United States could set up an objection to the original acquisition of the property, as it was at most only her privilege and not her duty to do; and that the claimants had had the assistance of the Government of the United States, chiefly through its diplomatic representative at Bogota, in the prosecution of their claims.

Owing to an irregularity in the submission to Mr. Upham, his decision was set aside and the claims came before his successor, Sir Frederick Bruce, under the convention between the United States and Colombia of February 10, 1864, for the appointment of a new commission to dispose of the unfinished business under the convention of September 10, 1857. But, before Sir Frederick Bruce rendered his decision, the claims came before the mixed commission at Guayaquil under the convention between the United States and Ecuador of November 25, 1862, the obligations, if any, of the old Republic of Colombia in the matter having been apportioned among New Granada, Ecuador, and Venezuela. Later the claims against Venezuela also were disposed of by a mixed commission. Beginning with the decision of the Ecuadorian commission, the claims were successively, wholly, and finally disallowed. The opinions appear below.

Ecuadorian Commission: Opinion of Mr. Hassaurek. The opinion of Mr. Hassaurek was as follows:

“On the 17th of November 1817, John Clark, a native citizen of the United States of America, entered into the service of the Banda Oriental Republic, now Uruguay, which was then engaged in her war of independence against Spain and Portugal, to each of which two powers a portion of her territory belonged.

“John Clark obtained a commission as captain in the Banda Oriental Navy, and a patent authorizing him, as the commander of a private armed vessel, *La Fortuna*, to cruise against the

vessels and property of the subjects of Spain and Portugal. These letters of marque were issued by General José Artigas, who was then the chief executive of that country, and they were to continue in force for and during the term of eighteen months from the departure of *La Fortuna* from Buenos Ayres.

"The United States, it is hardly necessary for me to add here, was neutral in the war between Spain and Portugal and their colonies in America.

"Clark left Buenos Ayres with his vessel on the 5th of March 1818, and after cruising for several months, proceeded to Baltimore 'for the purpose,' as it appears from the statement of one of the claimants and the testimony in the case, 'of procuring provisions and men.' Having succeeded in this he left Baltimore on the 15th of September 1818, and in November of the same year captured the Spanish brig *Medea*, with a valuable Spanish cargo, and placed a prize master and crew on board of her, with instructions to take her to the neutral port of St. Bartholomew, to be held there subject to his orders. On the 19th of November the *Medea*, while on her way to St. Bartholomew, was seized by the Venezuelan man-of-war *Espartana*, under the orders of Commodore Joly of the Venezuelan navy, who sent her to the Island of Marguerita, where she was condemned on the 26th of November 1818 as a prize of the *Espartana*, on the ground that her capture by Clark was illegal.

"Subsequently (on the 15th November 1818) *La Fortuna* captured the Portuguese ship *La Reina de los Mares*, bound from Bahia, Brazil, to Lisbon, with a valuable cargo on board, which, for greater safety, as it is alleged, was transferred by Clark to the *Good Return*, said to be an American ship chartered expressly for the occasion. Whether the latter vessel had accompanied Clark on his cruise, or how it was that she suddenly made her appearance, where she came from, whither she was bound, and who her owners were, does not appear from the papers presented to this commission. The *Good Return* was also taken possession of by Commodore Joly, of the Venezuelan navy, who demanded the value of one-third of the goods on board as ransom, and compelled the captain of the *Good Return* to place her cargo in the hands of the Venezuelan agent at St. Bartholomew, to be sold at auction there, under the most unfavorable circumstances. A cargo of \$80,000, it is alleged, was thus sacrificed to make up the sum of \$26,000 demanded by Joly, and the proceeds of the sale, being about \$24,000, were retained and distributed by the commodore.

"The grounds on which these acts of lawlessness were justified by the Venezuelan authorities were: 1st, that General Artigas had no right to grant letters of marque, being a usurper and a rebel against the legitimate authorities of Buenos Ayres; and 2d, that the privateer *La Fortuna* left Buenos Ayres in March 1818, after having arrived at that port in January of the same year as a Buenos Ayres vessel, under the

name of *Patriota*, commanded by Captain Taylor, whereas the patent to Captain Clark had been issued on the 15th of November 1817; that consequently she was navigated under another name and another flag, and commanded by another captain, two months after the issuing of the patent to Captain Clark.

"In December 1819 the Republic of Venezuela was united to the former colony of New Granada under the name of the Republic of Colombia. Captain Clark presented his claim to the Colombian Government, and asked for indemnification, but in vain. In 1830 the Republic of Colombia ceased to exist by being constituted into three independent governments—New Granada, Venezuela, and Ecuador—and it is said that payment to the heirs of Clark has been made, through the agency of the United States, by Venezuela, of her proportion of the claim.

"By a convention entered into by the three republics on the 23d of December 1834, it was agreed that the debts which they had acknowledged or contracted, while they were united and constituted into one, should be paid by them in the following proportion: 50 per centum by New Granada, 28½ by Venezuela, and 21½ by Ecuador.

"Clark died several years ago, and the interest in his claims passed by will to his heirs and devisees, who, with a certain assignee, all of whom are residents and citizens of the United States of America, are the present claimants.

"The claim was presented by them to the United States and New Granada mixed commission for the adjustment of claims established by the convention of 1857, and, the commissioners having been unable to agree, an award was made by the umpire, Judge N. G. Upham, of Connecticut (*sic*), in favor of the claimants, for New Granada's proportion of the claim. The case is now presented to this commission in order to fix the responsibility of Ecuador for her share of the original amount and interest thereon up to date.

"The decision of a mixed commission like our own, in an identical case, is certainly entitled to great respect, but it can not be considered as an authority which we are necessarily bound to follow; and if, upon a careful examination of the law and the facts, it should appear to us that the decision was erroneous, we are bound by our own conscience and the oath we have taken as members of this commission, to follow our own convictions of right and justice, however sorry we may be to dissent from the opinion of gentlemen for whose ability, conscientiousness, and integrity we entertain the highest regard. The establishment of mixed commissions for the settlement of international claims is evidently an important step, suggested by the humane spirit of the age, in the direction of universal peace and civilization. But to realize the true benefits which the high contracting parties are entitled to expect from such commissions, the commissioners should consider themselves not the attorneys for either the one or the other

country, but the judges appointed for the purpose of deciding the questions submitted to them, impartially, according to law and justice, and without reference to which side their decision will affect favorably or unfavorably.

"Considering myself bound, in the present case, to dissent from the opinion of the umpire and the American member of the United States and New Granada mixed commission on claims, justice to the claimants and to my own country requires that I should state my reasons in full, so as to leave them open to the scrutiny of those to whom I am responsible for my official conduct.

"Before entering upon a discussion of the merits of the case, a preliminary but highly important question presents itself. It is whether this is a claim which can properly be preferred and enforced against Ecuador by the Government of the United States.

"I grant that the conduct of the Venezuelan squadron and the decisions of the Venezuelan prize court were unjustifiable upon any principle of international law, and that a great outrage was committed on the sovereign rights and interest of Uruguay; but what is that to the United States? Whatever losses and damages Captain Clark sustained in the premises he sustained not in his character as a citizen of the United States, but as an officer in the service of the Banda Oriental Republic, cruising under her flag, for her benefit, and against her enemies. If, therefore, the spoliations committed by the Venezuelan navy, and sanctioned by the Venezuelan courts, entitle him to indemnification, this indemnification must be claimed by the Banda Oriental Republic, now the Republic of Uruguay, and not by the United States. In the war with Uruguay and Spain and Portugal the United States were neutral; not so Captain Clark. Although a native citizen of the United States, he had identified himself with one of the belligerents, in violation, as I shall presently show, of the laws and treaties of his own native country. He was cruising under the Uruguay flag, against the commerce of two nations with which the country of his birth was at peace. He must therefore abide by the consequences. If, in the course of his career as an Uruguay privateer, any wrong was done to or any outrage committed upon him, it is to Uruguay he must look for protection and not to the United States.

"It is not my intention to enter into an examination of the questions discussed by counsel, whether, by his entering into the service of one of the belligerents, while our country was at peace with both of them, he forfeited his national character as an American citizen; and whether, upon his final return to the United States, his native character reverted, and by thus reverting entitled him to have his claim enforced by his native government. I believe that these questions are immaterial to the decision of this case. Whether Captain Clark was by

birth an American, Englishman, Frenchman, or Spaniard, as long as he commanded an Uruguay cruiser, under the Uruguay flag in the service of the Republic of Uruguay, and in the exercise of active hostilities against the enemies of Uruguay and the friends of the United States, he was to all practical intents and purposes an Uruguayan; but especially as to all questions of prize law and maritime warfare. If the Uruguayan Government was either unable or unwilling to protect him in the realization of his prizes, it was his misfortune, with which the United States have no concern. Captain Clark had not yet acquired an individual title to the vessels and cargoes captured by him. The title to a prize originally vests in the government represented by the captor. The rights of the captor are subsequently ascertained and fixed by judicial decisions. It is true, as alleged by claimant's counsel, that at the time his prizes were taken away from him he had at least a right of possession to them; but, again, I must say that that right he had, not in his character as an American citizen, but by virtue of his commission from one of the belligerents. The captain of an Uruguay cruiser represents Uruguay, wherever he may have been born. To Uruguay he is responsible, and Uruguay is responsible for him. If his prizes are taken away from him by third parties, he must complain to those from whom he derived his authority, and not to neutrals, who have nothing to do with the business one way or the other. Had he been in command of an American vessel and had that vessel been taken away from him by the Colombian navy, and justice been denied to him by the Colombian authorities, it would have been the right and duty of our government to protect him, and to see that he was fully indemnified. But why should the United States, while at peace with all the world, interfere in a controversy between Uruguay and Venezuela, with reference to certain Spanish and Portuguese vessels captured by privateers of the former, when neither the vessels nor the cargoes, nor any part thereof, were American? The United States will protect American interests; but why should they protect Uruguay interests, and take up a quarrel which Uruguay herself seems to have ignored, merely because one of the parties concerned in it, the commander of a foreign privateer, happened to be born in the United States? Captain Clark's nationality, *as far as his claim is concerned*, is determined by his commission and by the flag under which he fought. Any departure from this rule would soon involve us in troublesome questions with the whole world, if, in time of war, the Government of the United States should undertake to insure the captures of every American citizen, who, in violation of our neutrality laws and treaties, may see fit to enter the naval service of a foreign power, or to assume the command of a foreign privateer under a foreign flag.

"The conclusion therefore seems to me irresistible, that, although Captain Clark individually may have been an American citizen, his captures, while in command of an Uruguay privateer, were Uruguay captures; and that any claim to be preferred against Colombia, on account of the spoliations committed by the Venezuelan navy, must be preferred by Uruguay and can not possibly be made or enforced by the United States. That Clark's family resided in the United States, that he returned to the country of his birth and died there, does not change the aspect of the case, which is not determined by the nativity of the individual, but by the flag of the belligerent.

"But I am referred to a document executed by the Uruguay Government, relinquishing all its rights in the premises and authorizing the individual parties interested in the question to proceed 'as they may find convenient.' The original of this document is not before us. I must therefore rely on a translation given in the opinion of the umpire of the United States and New Granada mixed commission on claims. Said translation reads as follows:

"DEPARTMENT OF FOREIGN RELATIONS,

"Monterideo, 10th December 1846.

"The undersigned, Minister of Foreign Relations, has received the communication dated November 25 last, which Mr. Hamilton, consul of the United States of America, thought fit to address him, asking in the name of his Government that this Republic should declare that it will make no claim in future against the Governments of Venezuela, New Granada, and Ecuador, for the recapture of the vessels which had been taken by the cruisers *Irresistible*, *La Fortuna*, and *Constancia*.

"The undersigned is directed to say in reply, that, to satisfy the wishes of the United States, the Republic has no difficulty in declaring that the Oriental Republic of Uruguay has no claim to make on the part of her treasury, in her character as a nation, on account of the aforesaid vessels; but with respect to the rights of individuals, she leaves them to such action as they can sustain at the time of the declaration solicited, and consequently those interested may exercise those rights as they find convenient."

"FRANCISCO MAGARINOS."

"To Mr. HAMILTON,

"Consul of the United States of North America."

"The authority of the consul of the United States to negotiate for such a declaration does not appear. There is nothing before us to show that he was ever instructed by the State Department to request the Uruguayan Government for such a disclaimer. From the mere fact of his having been a consul, no diplomatic authority can be inferred in his favor. To clothe him with the character of a negotiator special authority would be required, which, if ever conferred, it would be an easy task

to prove by transcripts from the records and correspondence of the State Department. But there is no such evidence before us. We are left in darkness as to what authority, if any, had been conferred on the consul, and to what communication the above declaration is an answer.¹

"Why should the United States have requested Uruguay to cede her legal rights in the premises, and why should Uruguay have complied with this request, without having received the slightest consideration for such a compliance?"

"Umpire Upham states in his decision that the above declaration was made by Uruguay '*at the request of the representatives of the claimant*, they prosecuting the claim as citizens of the United States.' In the absence of all other evidence I am inclined to believe that this is a correct supposition, and that the above declaration was the result of a private arrangement effected between the claimant and the government of Uruguay, through the good offices of the United States consul at Montevideo, an arrangement with which the United States Government had nothing to do.

"It is equally clear that such a document does not better the case of the claimants. It casts away the only legal remedy they had without giving them another. It is not a cession of Uruguay's rights to the United States, nor does it confer any authority on the United States to prosecute the claim for the benefit of Uruguay or for the benefit of the individual claimants. And, even if it were a cession or an assignment, it is very questionable whether such a cession or assignment would or could have been accepted by the Government of the United States.

"And this leads us to the consideration of the question whether it would be right and proper on the part of the United States to father such foreign claims. Article 14 of the treaty of 1795 between the United States and Spain (confirmed with the exception of a few articles by the treaty of 1819) provides as follows:

"ART. 14. No subject of His Catholic Majesty shall apply for or take any commission or letters of marque, for arming any ship or ships to act as privateers against the said United

¹The action of the consul was taken under an instruction of Mr. Buchanan, Secretary of State, of August 27, 1846, in which it was stated that Venezuela hesitated to satisfy the claims for the reason, among others, that it was apprehended that Uruguay might afterward hold Venezuela responsible for her interest in the matter. "You will consequently," said Mr. Buchanan, "make use of your good offices for the purpose of obtaining a release in favor of Commodore Danels, and also in favor of those citizens of the United States who were interested in the prizes made by *La Constancia* and *La Fortuna*." These instructions were not published and were unknown to the commission at Guayaquil. They were presented to the mixed commission under the convention between the United States and Venezuela of December 5, 1885.

States, or against the citizens, people, or inhabitants of said United States, or against the property of any of the inhabitants of any of them, from any Prince or State with which the said United States shall be at war.

“Nor shall any citizen, subject, or inhabitant of the said United States apply for or take any commission or letters of marque for arming any ship or ships to act as privateers against the subjects of His Catholic Majesty, or the property of any of them, from any Prince or State with which the said King shall be at war. And if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate.’

“But not only in what he did, but also in the manner of doing it, John Clark violated the laws of his country, whose interference and assistance he now invokes to realize the profits of his piracy. By augmenting the force of his armed vessels at the port of Baltimore he plainly and directly offended against the act of Congress passed in 1794, and revised and reenacted in 1819, by which it is declared to be a misdemeanor for any person within the jurisdiction of the United States to *augment the force of any armed vessel* belonging to one foreign power at war with another power, with whom the United States are at peace; or to prepare any military expedition against the territory of any foreign nations with whom they are at peace; or to hire or enlist troops or seaman for foreign military or naval service; or to be concerned in fitting out any vessel to cruise or commit hostilities in foreign service against a nation at peace with them, &c., &c.

“The principle which underlies such enactments and treaty stipulations was forcibly stated by Mr. Thomas Jefferson, in his letter of 17 June 1793 to Mr. Genet: ‘By our treaties,’ he says, ‘with several of the belligerent powers, which are a part of the laws of our land, we [the United States] have established a state of peace with them. But without appealing to treaties, we are at peace with them all by the law of nature; for, by nature’s law, man is at peace with man, till some aggression is committed, which, by the same law, authorizes one to destroy another, as his enemy. For our citizens, then, to commit murders and depredations on the members of nations at peace with us, or to combine to do it, appeared to the Executive * * * as much against the laws of the land as to murder or rob, or combine to murder or rob, its own citizens.’ (See Lawrence’s Wheaton, p. 728.)

“What right, under these circumstances, has Captain Clark, or his representatives, to call upon the United States to enforce his claim on the Colombian republics? Can he be allowed, as far as the United States are concerned, to profit by his own wrong? *Nemo ex suo delicto meliorem suam conditionem facit*. He has violated the laws of our land. He has disregarded solemn treaty stipulations. He has compromised our neutrality. He has committed depredations against two nations with

which we were at peace. He has made himself liable to be prosecuted and punished as a pirate; and now he presents himself before our government with the request to collect for him the proceeds of his misdemeanors. Will our government, by doing so, offer a reward to evil doers for the violation of its own laws and treaties? What would be the object of enacting penal laws, if their transgression were to entitle the offender to a premium instead of a punishment? I agree with the attorneys for the claimants that it would perhaps not become Colombia to make this defense, after having committed an outrage against the rights of Captain Clark. But I do not look upon Colombia as interposing these objections. I hold it to be the duty of the American Government and my own duty as commissioner to state that in this case Mr. Clark has no standing as an American citizen. A party who asks for redress must present himself with clean hands. His cause of action must not be based on an offense against the very authority to whom he appeals for redress. It would be against all public morality, and against the policy of all legislation, if the United States should uphold or endeavor to enforce a claim founded on a violation of their own laws and treaties, and on the perpetration of outrages committed by an American citizen against the subjects and commerce of friendly nations. As an Uruguayan claim, this case would be entitled to the most favorable consideration of the then Colombian republics. But it is not and can not be an American claim. As the American commissioner, I could not sanction, uphold, and reward indirectly what the law of my country directly prohibits. *Quod directo fieri prohibetur etiam dicitur prohibitum per indirectum.* He who engages in an expedition prohibited by the laws of his country must take the consequences. He may win or he may lose. But that is his own risk; he can not, in case of loss, seek indemnity through the instrumentality of the government against which he has offended. For this reason it is the customary practice of nations nowadays, upon the breaking out of a war between two foreign countries, to warn their subjects not to take part in it, on either side, as by doing so they would forfeit their right to the protection of their home government. Such neutrality laws and proclamations are but reiterations of a plain principle of natural law.

"It is alleged, however, that the Government of the United States has made this claim its own by presenting it on former occasions to the three Colombian republics and urging its recognition. Granting this to be so, I do not believe that the members of this commission are bound by what action their governments may have taken on former occasions in each individual case. If it were so, there would have been no need of establishing a mixed commission, instead of which the two governments should have referred these claims at once to the arbitration of a third party. Governments, like individuals, are not infallible, and if the Government of the United States

ever encouraged or adopted this claim, I have no doubt it would reconsider the view it then took of the question, if the case should again be submitted to its examination. The present policy of the United States toward their Spanish-American neighbors is one of the most scrupulous good faith and justice. While ever ready and vigilant to protect the rights and interests of American citizens wheresoever or against whomsoever it may be, the United States will not oppress their sister republics with extravagant demands or unjust exactions. The spirit which, in times now passed, occasionally led to misunderstandings between the republic of the North and those of the Latin race has since died away, and its revival has been rendered impossible by the removal of its cause through the great events of the last four years.

"These observations I have deemed it necessary to add, as great stress has been laid by the attorneys for the claimants on the action of former administrations with reference to this and similar cases. With this, I believe, I have sufficiently explained the reasons why, in my opinion, our decision should be against the claimants."

Hassaurek, commissioner, for the commission, August 8, 1865; cases of the *Good Return* and the *Medea*, convention between the United States and Ecuador of November 25, 1862.

Colombian Commission: Sir Frederick Bruce delivered the following opinion:
Sir Frederick Bruce.

"These claims for the proceeds of captures made by American citizens commanding privateers under commissions given them by Artigas, the chief of the Banda Oriental, and of which they were violently deprived by the authorities of Venezuela, are presented under the convention as claims of American citizens against the United States of Colombia. The nationality of the parties is not disputed; but a question of great importance arises as to the jurisdiction of this commission to entertain them under the peculiar circumstances of their origin as 'claims of American citizens' in the sense in which these words are used in the convention. Upon this preliminary point I proceed to give my opinion.

"It is to be borne in mind that the commanders of these vessels did not wage war by virtue of any right they possessed as American citizens to engage in hostile operations. On the contrary, the United States of America were neutral in the conflict. No commission or authority was or could have been given to them by the United States to carry on hostilities against Spain and Portugal, and as American citizens they would have been liable to a charge of piracy or robbery on the high seas if they had not been able, by producing the commission of a belligerent power, to justify the captures they had made on the high seas of vessels belonging to the countries with which that power

was at war. The neutrality of a nation in a war waged between other powers renders obligatory, according to the law of nations, the observance of neutrality on every citizen forming part of its body politic, however difficult it may be for its government to enforce, by municipal statutes, on the individual members of the community a conformity with the duties thus assured by it. The acts, therefore, out of which these claims arise can not be considered by an international commission in any other light, when committed by citizens of the United States as such, than as unjustifiable outrages on the persons and property of the subjects of friendly nations, and the quality of American citizenship, which it is necessary to invoke in order to bring these claims within the scope of the constitution, operates as a fatal bar to their admission.

"I may observe further that as these captures were made under the flag of the *Banda Oriental*, and by virtue of the authority conferred on the captors by the commissions they held from that republic, the titles to the prizes vested in that republic, the ultimate disposal of the proceeds being a matter of contract between her and the officers she employed in capturing them. The insult and injury complained of were done to her flag and to her authority as a legitimate belligerent. She was responsible to the world for the proceedings of these privateers, and upon her exclusively devolved the right of protecting them in the exercise of their rights as recognized vessels of war. The Government of Venezuela could not have resisted a demand for redress, put forward by her in these cases, by alleging that the commanders of these privateers were not natives of the *Banda Oriental*, nor did that fact in any degree weaken *her* right to demand restitution or indemnity, or *their* right to their share in the indemnity when obtained from the government which had seized the prizes without legitimate cause. Had Clark or Daniels been natives of the *Banda Oriental*, they would have had no other channel for redress of the acts complained of but that afforded by the government of that republic. Considering, however, the light in which privateering expeditions, organized in neutral countries, are looked upon, the recognition of the right of these parties to claim as American citizens would lead to what would seem a singular and startling result. An officer in arms for his native country would have no redress except through his national authority for the violation of his rights in waging war; whereas a foreigner, taking part in a contest which did not concern him, would be able to invoke *first* the assistance of the government he served and from which he derived his authority, and *secondly*, if it failed or was unable to obtain satisfaction for him, he might claim the protection and support of his own government in making good his demands, although he had been engaged in defiance of its declarations founded on the clearest obligations of international law in carrying on war against nations with whom that government was at peace.

"It is sought, however, to remedy this defect as to jurisdiction by a reference to the correspondence of the chargé d'affaires of the United States at Bogota, and to the proposed agreement entered into by Mr. King for the settlement of the Danels claim. In estimating the precise weight to be given to the dispatches of the United States chargé d'affaires, it is to be recollected that the claimants are undoubtedly American citizens, and that upon the facts stated in their memorials a case of injustice and wrong is made out on their behalf. It is the habit of diplomatic agents under these circumstances, influenced by a natural feeling for their countrymen, and by equitable considerations, to bring such cases to the notice of the government liable, and to lend their aid in the settlement of them. But it is impossible to maintain that the mere presentation of a claim by a diplomatic agent binds his own government to insist upon it by all the means which on behalf of a claim recognized as valid and unobjectionable it is authorized to employ; still less can the reception of these notes by the government to which they are addressed be construed into an admission of the validity of a claim, or into a waiver of any objections to it, that may exist on the ground of jurisdiction or otherwise.

"The articles of agreement entered into by Mr. King, chargé d'affaires of the United States, and Mr. Prata, secretary for foreign relations of New Granada, contain an offer on the part of New Granada to compensate Danels, an American citizen, for such proportionate part of his losses as is assumed by her in virtue of the repartition of common debt between the republics, and acknowledge her obligation to pay \$50,000 to him in certain public stocks. This agreement, which was in the nature of a voluntary offer to settle a claim admitted by New Granada for the sake of peace and for the preservation of harmony and good understanding between the two countries, not having been accepted on behalf of the other parties interested, can not be held to confer upon them any new right or to debar New Granada in the present discussion of this claim from taking advantage of such objections as are suggested by the circumstances of the case to the admission of it by this commission. Had the agreement been completed and a perfect contract created, or a compromise accepted for political considerations entirely extraneous to this commission, the fulfilment of which was afterwards resisted, the commission would have been bound to examine whether the new title thus constituted in favor of Danels had been carried out, and would have been relieved from going behind it to examine into the merits of the case or into the principles on which the liability of New Granada had been sustained. But in the absence of any such contract or compromise I am clearly of opinion that the correspondence cited and the part taken by the Government of the United States in endeavoring to effect a settlement of the claims of its citizens arising out of the unjustifiable proceed-

ings of the Venezuelan authorities against the sovereign rights and interests of the Banda Oriental are insufficient to absolve the commission from examining whether, consistently with the principles of international law, they can or not assume jurisdiction over them.

"Nor does the renunciation executed by the Republic of Uruguay, which is confined to the waiver of any fiscal interests she might claim, affect the rights of these parties to her support or confer upon the United States any further title as against the offending republic than she previously possessed.

"In conclusion, I may state that it is a matter of great satisfaction to me in rejecting these claims for want of jurisdiction, to observe that the contrary conclusion, arrived at by my distinguished predecessor under the first commission, is expressed in terms which show that his mind was by no means free of doubt on the question; while, on the other hand, I am supported on the general question of principle by the decision of Mr. Hassaurek, delivered in the cases of the *Medea* and the *Good Return*, presented to him by the Ecuadorian commission, whose most able exposition of the principles of public law, which should guide a mixed commission in such cases, I beg to incorporate with this opinion, as expressing more in detail and in far better language than my own the grounds of my conclusion."

Sir Frederick W. A. Bruce, umpire, May 14, 1866; cases No. 175, *La Constancia*; No. 186, *Good Return*; No. 177, *Medea*; No. 178, John D. Danel, convention between the United States and Colombia of February 10, 1864.

Mr. Findlay, for the commission under the Venezuelan Convention between the United States and Venezuela, of December 5, 1885, delivered the following opinion:

"The great question in these cases is whether, assuming the lawfulness of Captain Clark's commission, issued by the Oriental Banda, and the unjustifiable snatching of the prey from his talons by Commander Joly of the Colombian navy, the claim can be supported before a tribunal like this, and restitution decreed, without a violation of the principles of sound international law and morality. It is admitted that the courts of the United States would have been bound to order a restitution of the vessels to their proper owners had they been brought within the jurisdiction of that country. This was the ruling in many similar cases of contemporaneous date, most of which are cited in the brief of the learned counsel for the last-mentioned claimants, but the law of which was laid down with great clearness and force by the Supreme Court in the earlier case of *Talbot v. Jansen*, in 3 Dal. p. 133.

"While, however, it is conceded that the courts of the United States would be bound to respect and enforce the neutral obligations of the country, in any case of seizure arising out of the

acts of one of its citizens, under color of a foreign commission, it is contended that when a controversy originates in a trespass of this kind, but does not concern the neutral who has been injured, but only the wrongdoer in his relations to a third party, who quoad him is a tortfeasor also, then the principle does not apply, and there would be no impropriety in the United States enforcing the claim; although in doing so it must necessarily sanction a breach of its own laws and the law of nations and violate solemn treaty stipulations.

"It is to be observed that this is not the view of the learned counsel who represents the United States in these cases, and who seeks to establish the responsibility of Venezuela upon the ground that she has recognized and admitted the claim and is estopped from disputing its validity or claiming exoneration by reason of the turpitude of the original seizure. With these elements out of the case we did not understand him as contending that the United States could prosecute a claim of this character without at the same time involving itself in the admission that a violation of its laws and of the international law, founded upon the strict observance of neutrality as the groundwork of the peace of nations, were matters not worth considering in such a controversy.

"It will be admitted that Venezuela has no concern with the question whether the United States holds a strict or a slack rein in the enforcement of its laws in any matter between it and some third party or its own citizens, and that it does not lie in her mouth to set up as against one of these citizens a plea of turpitude founded on a breach of these laws, and especially as an excuse for the nonpayment of money which, as between her and that citizen, she had no right to appropriate in the first instance and has no right now to withhold.

"Captain Clark was either a citizen of the United States or a citizen of the Oriental Banda, or he was a citizen of both countries. To have any standing before this commission he must have been a citizen of the United States. If he was a citizen of the United States, however, he could not have been a citizen of the Oriental Banda, unless he can claim a double citizenship of both countries.

"Treating him as a citizen of the United States pure and simple, he was clearly a violator of its laws and the law of nations when he captured on the high seas the property of persons who were at peace with the United States, and as such violator could have no hearing in the courts of the United States, and certainly can have none before this tribunal.

"As a citizen of the Oriental Banda, disentangled from other ties of allegiance, he is excluded from presenting his claim here by the express terms of the treaty, which only covers claims of citizens of the United States. Unless, therefore, a man may lawfully, at one and the same time, be a citizen of two countries, with the right to claim the protection of either, in consideration of the allegiance he owes to each, without

regard to the contradictions and absurdities which such an anomalous dual relation involves, the case of Captain Clark must be dismissed. The petition of E. J. D. Cross, adm'r *d. b. n., c. t. a.*, of the estate of John Clark, alleges substantially that he was a naturalized citizen of the Oriental Banda. It is a concession in the case that he was born a citizen of the United States. Now, could he be both—a citizen of the Oriental Banda for the purpose of escaping a penalty, prescribed by the law of the country of his nativity, for a violation of its neutrality, and at the same time a citizen of that same country after the very offense was committed—for the purpose of giving him a standing before a commission organized to hear claims of its citizens with the ulterior purpose of obtaining the fruits of his wrong doing? Upon this hypothesis he leaves the United States with no intention of renouncing his allegiance, and yet at the same time with the intention of doing so. He becomes a naturalized citizen of the one country with the full purpose and determination of remaining a native citizen of the other. He expatriates himself and yet does not expatriate himself; he is naturalized and yet not naturalized. He bears a commission which the Oriental Banda has a right to issue, but in what character, as citizen of that country or of the United States?

“When he captured the *Medea* and the *Reina de dos Mares*, was he a citizen of the United States, or of the Oriental Banda, or both? If he was a citizen of the United States it would have been its duty to protect him in his captures and wrest them out of the possession of Commander Joly, and wrest them, too, not for the purpose of restoring them to their owners, but to establish the right and possession of Captain Clark. In doing so, if such a thing were conceivable, the United States would have protected an offender against its laws, and at the same time involved itself in war with both Spain and Portugal. No one pretends that any attempt on the part of the United States to support the claim of Captain Clark at the time would have involved it in absurdities and serious consequences less extreme. On the other hand, if the captain was a citizen of the Oriental Banda, proceeding under a letter of marque regularly and lawfully issued by that country, then it is clear that the United States owed him no duty, and that he must look to the country of his adoption for whatever protection he required. The idea that at one and the same time he could accept and hold this commission as a citizen of both countries is simply preposterous.

“Again the burden of proof is on Captain Clark, or those claiming under him, to establish the fact of his expatriation, as a man must be a citizen of some country, and can not be an irresponsible nondescript, such as a citizen of the world, without the rights and corresponding obligations which spring from an established political status. He will be presumed to be a citizen of the country which has given him birth until he

has established by satisfactory evidence the fact of his naturalization and adoption as a citizen of some other country. Until this is done, and the fact of his expatriation satisfactorily demonstrated, he can not escape the consequences of the violation of the laws of the country from which he has emigrated, nor can that country escape responsibility for his acts. He may go so far as to take an oath of allegiance to another sovereignty, and then accept its commission, and yet not lose his character as citizen of the United States, so as to be amenable to its laws. (*Talbot v. Jansen.*) Now, in this case it is contended, on the one hand, by the representatives of Adams, the assignee of one-fourth of this claim, that Clark was born a citizen of the United States, made the captures as such, and died still bound by the ties of allegiance to his native country. On the other hand, to escape the consequences of this dilemma, his own immediate representatives set up the claim that he was a citizen of the Oriental Banda; but in doing so, plainly put themselves out of court, or rather erect an insuperable bar that prevents them from getting in. The difference in the attitude of the respective claimants is, that one class secure a *locus standi*, by the requisite jurisdictional averment, but in the course of the proceedings commit suicide, whereas the other class do not so much as cross the threshold of the court.

"It was contended that the United States had adopted this claim, and in a long course of diplomatic correspondence maintained its validity against Venezuela, and that by so doing, whatever turpitude affected the original transaction as between it and Clark, had been cleansed and condoned, and as it was the only party which could justly complain of his acts, the condonation had the effect of a full pardon and restored him to all his rights, more especially as against Venezuela, which had appropriated his property by the strong hand and without the slightest color of claim. Put the case, then, in its strongest light and assume that Clark, on his return to the United States, had been prosecuted for a violation of its neutrality laws in accepting a commission to depredate upon the commerce of a country with which the United States were at peace, and after conviction had been pardoned, could this commission award restitution to the claimants as prayed? Clearly not. This is not a United States court, in which the pardon of the President under the seal of the United States could be pleaded. The offense in this case was not a mere breach of the municipal law of the United States within the reach of the pardoning power of the Executive, but was essentially and distinctively an offense against the law of nations, beyond the competence of any power to pardon or condone. It is an elementary principle of this law that when nations are at peace all their citizens and subjects are at peace, and *vice versa*. War involves all alike in a common hostility. As a necessary deduction from this principle the right to make war is vested in the sovereignty and is taken away from the individual.

“To permit the individual citizen to make war upon a foreign citizen or subject whenever he considered himself aggrieved, would be destructive of the peace of nations, just as in the same sense, though on a much more limited scale, to permit each member of society to take the law in his own hands, would subvert the very foundations of social order. Treaties and municipal laws which recognize this principle are only declaratory or expository of the law itself, which is founded in international necessity.

“When Captain Clark, therefore, sailed in the *La Fortuna*, under a commission which authorized him to prey upon the commerce of Spain and Portugal, he still retaining his citizenship of the United States, which was at peace with both of these countries, he was embarked on a cruise which, if it did not constitute him a pirate, was at least a continuing trespass in violation, not only of the law of his own country and the treaty with Spain, but of the law of nations.

“Had he been arrested and taken into custody by the Spaniards his defense, doubtless, would have been that he was a citizen of the Oriental Banda, and as such protected by his letter of marque. He certainly would have made no attempt to defend upon the ground that he was a citizen of the United States, for the moment he did so he would have been punishable as a pirate for the offense against Spain under the treaty between that country and the United States. For his own protection, as well as the peace of nations, it was absolutely necessary that his status should have been defined with absolute precision.

“It is conceded that in the state of the law with respect to expatriation, when Captain Clark left the United States it would have been impossible for him to have renounced his allegiance to that country in accordance with any prescribed statutory mode, for the reason that Congress had never legislated on the subject. And yet, still, if he had left his own country for a lawful purpose, and with the deliberate design of being naturalized in another, and in good faith, evidenced by continued residence, had become a citizen of the country to which he had emigrated, it is not doubted that as to all acts subsequent to his naturalization he would be treated as a citizen of the country of his adoption. But he not only failed to demonstrate his expatriation by such open and accepted tokens as were available to him, but the claim now set up by his representatives is, that it was not his intention to expatriate himself at all; that he never removed his family from the United States; that they continued to reside in the city of Baltimore, and that he also resided there except when holding a commission in a foreign service. The brief of the learned counsel for the Adams claimants says, on p. 17, that—

“‘It is incontestable that Captain Clark was a native citizen of the United States residing in Baltimore all his lifetime except for the two brief periods before referred to, and the

time he was on the high seas under a commission from President Artigas.'

"Then, for the purpose of showing that he was treated as a citizen of the United States, notwithstanding his acceptance of service under another flag, the case of the *Bello Corunnes* in 6 W. p. 152, is cited. In that case there was another Baltimorean, Captain Barnes, who commanded the privateer, the *Puyeredon*, bearing the flag of the Buenos Ayrean Republic. He had assumed the character of a citizen of the power that had commissioned him; captured the *Bello Corunnes*, a vessel belonging to Spaniards, off the southwest coast of Cuba, and which, in a pretended endeavor to reach a port in the United States, was stranded on Block Island. There were three classes of claimants who intervened in the proceeding instituted in the United States court for the condemnation of the vessel for a violation of the trade laws of the United States.

"These were, the Spanish consul for the owners; the salvors; and Captain Barnes, as the captor; and the court, in speaking of the latter's claim, after showing that the *Puyeredon* was American owned, says: 'But they are also of the opinion that she must be held to be American commanded, since even if the doctrine could be admitted that a man's allegiance may be put off with his coat, it is very clear that Mr. Barnes's citizenship is altogether in fraud of the laws of his own country.'

"Then is added the paragraph quoted in the brief: 'His family has never been removed from Baltimore, and his home has been always either there or upon the ocean.'

"It will be observed that Captain Barnes, clearly perceiving that his claim to recovery could only be founded on his citizenship of Buenos Ayres, claimed in that character and right only, just as in the present case the immediate representatives of Captain Clark, differing from the representatives of his assignee, Adams, claim that their ancestor was a citizen of the Oriental Banda. In all probability the cases of Clark and Adams, with respect to citizenship, were precisely the same. Both were citizens of the United States by birth, and both had a merely colorable citizenship of another country, and both, to repeat the language of the court just cited, were making use of it, 'in fraud of the laws of their own.' The argument of the learned counsel is addressed altogether to the point of establishing Clark's citizenship of the United States, and in this connection he says that it is 'hardly worth an argument to demonstrate the absurdity of the contention * * * that a citizen of the United States forfeits his citizenship by a violation of its laws.'

"Having established this point, and brought Clark within the letter of the treaty, he seems to forget that in administering justice, which is the prime function of this commission, there is a more important question to be examined than Clark's citizenship, and that is the character of the claim itself. It is just

because Clark was a citizen of the United States, and in that character committed acts of hostility against the citizens of another country, with which his own was at peace, that prevents us from considering his claim. It would be very absurd indeed to hold that a citizen forfeited his citizenship by a violation of the neutrality of his country, but it is quite true and proper to maintain that no man shall invoke or receive the aid of any court, municipal or international, in recovering the fruits of his own wrongdoing.

"If authority is needed on so obvious a proposition, founded alike on sound law and sound morality, it can be found in the case of the *Bello Corunnes* just cited.

"The fact that the defendant against whom reclamation is sought is a wrongdoer also does not alter, but only serves to give point to the principle. Admitting to the fullest extent that Venezuela or Commander Joly was a flagrant trespasser in depriving Clark of his captures, that the commission he received was regular and lawful in all respects, and that the Oriental Banda, under whose flag he sailed, was invested with full belligerent rights, among which privateering was unquestionably one at the time of these occurrences, the stubborn fact still remains that Clark himself, the party through whom these claimants derive title, was a flagrant trespasser also, if indeed a harsher term might not be justly applied in characterizing his spoliation. It is not necessary for Venezuela to make the defense; it is the duty of the court, *sua sponte*, to apply the principle whenever the record discloses a fit case for its application. (*Oscanyàn v. Arms Co.*, 103 U. S., p. 261.)

"As between Venezuela and the claimants, outside of the duty to make restitution to the owners in the case of the vessel belonging to Portugal, with which Venezuela was not at war when the capture was made, there is a strong equity, appealing for relief. Venezuela or Colombia was at war with Spain, and so far she was embarked in a common cause with the Oriental Banda; and crippling the commerce of the common enemy helped the cause of both. The seizure of the *Medea*, a Spanish vessel, by Joly, under these circumstances was an ungenerous act, and the refusal of Venezuela to refund the value of this capture, after the Oriental Banda had waived whatever claims it had in favor of Clark, would have been dishonorable. But Venezuela, it appears, has actually paid the full amount of both claims, although the parties to whom payment was made, and some other circumstances connected with her conduct in the matter, have been made the subject of severe animadversion by the representatives of the United States at Caracas. With the view we take of the main question it is not necessary to discuss this branch of it. Whether payment was made or not, or whether Venezuela is bound to pay what, as to a part of the claim, "might be considered a debt of honor," are questions quite apart from any matters which, we

think, are proper for us to consider. Captain Clark was a citizen of Maryland, as well as of the United States, and although his rights and duties with reference to other countries are to be ascertained and established by his character as a citizen of the United States, which is the sovereignty of external communication in that dual republic, yet still, the law of his own State, as expounded by its highest court in a case similar to his own, ought not to be without significance and effect. The case of *Gill, Trustee, v. Oliver's Executors* has been referred to and is cited by counsel in his brief, p. 27. It is reported in 11 H. p. 520, and came up on writ of error from the court of appeals of Maryland. The question involved was, whether a trustee in insolvency should have the proceeds of a certain award made by the Mexican commission under the convention of 1839, in favor of one Goodwin, or whether they should go to the executors of Oliver, to whom he had made an assignment of the claim.

"The claim originated in the supply of muskets and munitions of war under a contract with General Miña by the Baltimore Mexican Company, executed in Maryland in 1816. Goodwin became insolvent in 1817, and Gill was appointed trustee in 1837. Under the laws of Maryland all the property, rights, and credits of the insolvent, of whatever kind, passed to the trustee. The Mexican commission made its award in the Goodwin case in trust for the parties interested, in 1839. In the mean time Goodwin had sold the claim to Oliver, and died. At the time of the award, therefore, there was an outstanding transfer of all Goodwin's property as of the date 1837 in Gill, trustee, and a sale of the Mexican claim to Oliver, and the question was, as stated, Who should have the money, the trustee, or the executors of Oliver, who had died before the case got into the courts?

"For some reason the Maryland court failed to have the case reported; but in a subsequent case, involving the same questions, which went up to the Supreme Court from the circuit court of the United States, it appears that that court had the record of the former case, which contained the decree of the Maryland court, before them, and quote from it as follows:

"They (that is, the court of appeals of Maryland) are of the opinion that the entire contract (the Miña contract) upon which the claim of the appellee (Gill, the trustee) is founded, is so fraught with illegality and turpitude as to be utterly null and void, conferring no rights or obligations upon the contracting parties which can be sustained or countenanced by any court of law or equity in this State; that it has no moral obligation to support it, and that, therefore, under the insolvent laws of Maryland, such claim does not pass to or vest in the trustee of the insolvent debtor."

"It would be difficult to employ much stronger language, and yet every word is applicable to the present claim, because

the court finds all this illegality and turpitude to flow from a breach of neutral duty. The case referred to is the case of *McBlair v. Gibbs* (17 H. 249; 21 Curtis, p. 479). The original case of Gill, trustee, etc., in 11 H., was dismissed for want of jurisdiction, because the court did not find that there was any question involved under the judiciary act on which a writ of error could be founded. The decision of the Maryland court was thus left to stand, and he would be a bold man who would undertake to maintain that it can be shaken, either on principle or authority.

"It is well known that the chief justice (Taney) did not agree with his brethren as to the jurisdiction of the Supreme Court, and afterward filed an elaborate dissenting opinion, in which he reviewed the controversy growing out of the Mexican claims at great length. In the course of this opinion, in speaking of the action of the commission in allowing the claims, he says:

"Of course it was their duty not to allow any claim for services rendered to Mexico or money advanced for its use by American citizens in violation of their duty to their own country or in disobedience to its laws. For the Government would have been unmindful of its own duty to the United States if it had used its power and influence to enforce a claim of that description or had sanctioned it by treaty.' (*Williams v. Gibbs*, 17 H. 262; 21 Curtis, 492).

"We do not understand that the observations of Justice Grier, quoted in the brief, are at all in conflict with this opinion of the chief justice. Doubtless the risks taken by the Mexican company, in Baltimore, in furnishing military supplies to General Miña ought to have enhanced the justice and equity of its claims against the *new government of Mexico*, which had its origin in the revolution begun by Miña. The court, as we understand it, besides making what was an extrajudicial utterance, the case having gone off on a point of jurisdiction, only means to say that the Mexican Government in 1825 did a very proper and honorable thing in recognizing the justice of these claims.

"So here we might express our individual opinions that Venezuela is in honor bound to make restitution, provided, of course, she has not already done so, by an appropriation for not only this claim, but also that arising out of the seizure of the Portuguese vessel. But we have said enough on this subject, and whatever may be the duty of Venezuela, being strongly of the opinion that the claimants have no standing before this commission, their petitions will be dismissed and claims rejected."

Findlay, commissioner, for the commission; *The Representatives of Captain John Clark et al. v. Venezuela*, Nos. 41, 43, 53, and 62, United States and Venezuelan Claims Commission, convention of December 5, 1885.

2. CONTRACT FOR MILITARY SERVICES.

"The claim presented in this case is for one
Young's Case. year's pay, with interest, alleged to be due for
 the services of Col. Guilford D. Young, as an
officer in the Mexican army. * * * At an early period of
the present commission, the board intimated an opinion that
this claim was not one of those embraced in the convention
of 2 February 1848. Since that time the counsel of the claim-
ants has presented an elaborate argument in support of the
claim. The board, after a careful examination of the argu-
ment and the authorities cited, has been unable to arrive at
the conclusion that it is a valid claim under the treaty.

"Colonel Young went from the United States to Mexico in
1816 for the purpose of aiding the Mexican patriots in their
struggle for independence. He accepted a commission in the
Mexican army, and after about twelve months' service was slain
in an engagement with the Spanish forces. The claim asserted
by his family for compensation for his services was one which
appealed very strongly to the justice and gratitude of Mexico
and should have been paid without hesitation. The board
would willingly make an award which should secure to them
such a compensation as his services merited, if it could do so
without a violation of sound principles.

"The interposition of the United States has frequently been
invoked in behalf of the claim, but has been invariably re-
fused. The minister of the United States at Mexico was sev-
eral times instructed by the State Department to use his
personal influence, unofficially, to secure its payment, but was
cautioned not to interpose officially. It has been the policy of
the United States ever since the adoption of the Federal Con-
stitution to observe a strict neutrality in the contests of all
other nations. An act of Congress passed as early as 1794
(and which was in force at the time Colonel Young entered the
Mexican service) made it a highly penal offense for any citizen
of the United States to accept and exercise a commission
to serve any foreign prince or state in war, within the juris-
diction of the United States. However much the sympathies
of the people of the United States may have been enlisted in
behalf of Mexico in her struggle for independence, their duty
to Spain, as an independent nation, and their own well-defined
policy of neutrality, forbade active interference in the contest.

“Colonel Young, by accepting a commission in the Mexican service and actually engaging in the war then in progress, forfeited all claim to the protection of his own government. He lost, for the time being at least, and so far as he was connected with that service, the character of an American citizen. A return to the United States might have restored his national character; but while he was in Mexico, engaged in her service, and an officer in her army, he ceased to be a citizen of his native country and could claim none of the benefits resulting from that character. The correctness of this principle has been recognized by the United States in reference to those citizens of this country who engaged in the war between Texas and Mexico. Mr. Ellis, the American minister at Mexico, in his correspondence with the State Department, stated: ‘The uniform practice of this legation has been not officially to interfere in behalf of persons who have placed themselves beyond the protection of our government by entering into the service of that of Texas.’ The same question, and arising upon a claim in all respects similar to the one now under consideration, was decided by the Baron Roenne, the umpire appointed under the convention of 11th April 1839. That claim was presented in behalf of the heirs of General Robinson for a compensation for his services in Mexico. The umpire decided that General Robinson, by entering the service of Mexico, had abandoned his national character, and the claim could not be sustained as that of a citizen of the United States.

“But it is contended that the heirs of Colonel Young were citizens of the United States at the date of the treaty, and having then inherited the claim of their deceased father, they are embraced by the terms of the treaty, and the claim should be allowed under its provisions. The rule of construction which the board has adopted in conformity with uniform precedents forbids the admission of this principle. It has decided in several cases that a claim, to come within the terms of the treaty, must have been American in its origin as well as at the date of the treaty. A citizen of the United States, who holds by purchase or descent a claim which in its origin belonged to one who could not claim that character, does not come within the meaning of the treaty, and can claim no participation in the fund. The umpire of the mixed commission upon this principle disallowed the claim of the heirs of General Robinson.

"In the opinion of the board, the claim is not valid under the treaty of 1848, and it is accordingly disallowed."

Case of Cassius C. Young et al., heirs at law of Guilford D. Young: Opinion of Messrs. Evans, Smith, and Paine, commissioners, March 21, 1851, under the act of Congress of March 3, 1851.

In the case of *Harvey Lake v. Mexico*, No. 607, *Lake's Case*. before the commission under the convention of July 4, 1868,¹ a claim was made for various services rendered to the Mexican Republic. These services were of two kinds: (1) Those performed in raising supplies and men in the United States in 1865-66, and (2) those rendered by taking a company of men to Mexico and fighting with them in the republican army. It appeared that in 1865 General Ochoa met Lake, who was an instructor in military tactics, at San Francisco, and engaged his services. Lake gave up all other occupation and, after acting for a year in raising supplies and men, went himself to Mexico in June 1866 with a company of 25 men. He entered the republican army, in which President Juarez gave him a commission as captain, and performed valuable service. It seems that he received for all his services only \$150, the Mexican treasury at the time being empty. The case evidently appealed strongly to the commissioners' sympathies. Mr. Wadsworth, the United States commissioner, said that it seemed to him that "the only party to this controversy" (i. e., before the commission) who had "any right to complain of Lake and his adventurers and gallant comrades" was "the United States." That government could, if it chose, "punish their disobedience of its laws" or "pass it by." It had been said that the United States was "not to be regarded as waiving the violation of her laws." If this was so, said Mr. Wadsworth, he should dismiss the claim at once, since no claim against Mexico could be laid before the commission but by the United States. The case had, however, been placed by the agent of the United States both on the general and on the notice docket. The Government of Mexico had "not put in any documents or proofs in answer," but showed against the claim "only reasons founded on the case of claimant as presented by his government." The services of Captain Lake to Mexico were important. Some persons had given to him and his men

¹MS. Op. I. 138.

the credit of saving President Juarez's life at Zacatecas. Continuing, Mr. Wadsworth said:

"But I do not feel at liberty to recognize his claim for services after he accepted a commission in the Mexican army. This is dated September 26, 1866, and is signed by the President. Lake was then in Mexico. His act was voluntary, and by operation of the Mexican law, upon the act, he became a citizen of that country, and while he continued to reside there and serve in the army that relation continued. We do not think he can make a collecting agent of his government for services rendered in Mexico, while he had voluntarily transferred his allegiance to a new sovereign and remained within his jurisdiction. But does not his claim for losses and expenses incurred between the spring of 1865 and June 1866, while assisting Ochoa and Brannan, the agents of Mexico, under inducements and promises held out to him, rest on a different footing? He was not then a citizen of Mexico. * * * I am disposed to allow it. Its real justice and binding obligation upon Mexico is so plain I do not feel like rejecting the claim. I believe that government itself would recognize it if the opportunity had been afforded it by claimant. * * * The proof is absolute that the man gave up his business in the United States and devoted himself to the interest of Mexico, under the direction of Ochoa and Brannan, from the spring of 1865 till June 1866, and thereby suffered a loss and damage of \$3,000 prior to June 1866, when he departed for Mexico. Under all the circumstances I allow this loss, with interest from June 1, 1866, and award that sum in favor of the United States against the Government of Mexico. As to the balance of claim, I do not wish to prejudice it, but reject it without prejudice upon the ground that the United States can not claim for military services rendered the Government of Mexico, within her jurisdiction, by a person who has voluntarily removed himself to that country and accepted a commission in her army."

Mr. Palacio, the Mexican commissioner, said:

"In giving my opinion in this case I deliberately abstain from touching any of the questions, whether of law or legality, that have been or might have been raised, and will look only at the fact of a foreigner incurring expense and the loss of his property for the purpose of arming and bringing to another country soldiers who might fight for its independence and liberty, and going himself to expose his life for the same cause. I think that such a fact gives a right to be indemnified that can not be defeated by any circumstances nor denied or contradicted. I believe, moreover, that the Mexican Republic would have recognized and paid this claim if her attention had been called to it before. I therefore concur in the opinion of my respected colleague."

The decision in the case of Lake bears date March 16, 1871, and was one of the earliest rendered by the commission. It was cited by the commissioners in numerous cases in disallowing claims against Mexico based on military services in that country; *e. g.*, *Jas. H. Blake*, No. 904; *Charles E. Benjamin*, No. 906; *B. F. Catlin*, No. 908; *J. A. Ellert*, No. 951. The same principle was applied, though the case of Lake was not cited, in *Frederick M. Phelps v. Mexico*, No. 687.

A claim was presented for services rendered
Greene's Case. and expenditures made in 1853 for Mexico under an agreement with General Ochoa. "Some of these services were of doubtful legality, and were certainly not in accordance with the neutrality which should have been observed by a citizen of the United States with reference to the hostilities which existed in Mexico." And as it was avowed and was "no doubt true that these services were performed on behalf of the Republic of Mexico, and were to be paid for by the Mexican Government, the claimant must be considered to have been actually employed by and in the service of the Mexican Government, and *pro tanto* a Mexican citizen during the time of his services."

Thornton, umpire, May 31, 1876, *Alfred A. Green v. Mexico*, No. 776, Am. docket, convention of July 4, 1868, 6 MS. Op. 432; *S. P.*, Thornton, umpire, Sept. 24, 1875, *Lew Wallace v. Mexico*, No. 425, Am. docket, 7 MS. Op. 438.

"The claim arises out of a contract made
Sturm's Case. between claimant and General Carbajal, the object of which contract was that the claimant should give his services and assistance to General Carbajal in his endeavors to carry out the instructions of his government, which were to the effect that he should procure emigrants in the United States to be sent to Mexico, raise money and furnish munitions of war for that republic. It appears to the umpire that the contract in question was merely between General Carbajal as a private individual and the claimant; for there is no sufficient proof that the former was empowered by his government to employ anyone else to assist him in carrying out the instructions which he had received. This being the case, the Mexican Government can not be held responsible for any violation of a contract entered into by General Carbajal without its previous knowledge or consent.

"But if it be admitted that Carbajal was authorized to appoint an agent with the powers granted to the claimant, and

that the latter was in fact an agent of the Mexican Government, it is certain that the contract was entered into voluntarily by the claimant; there was no compulsion whatever—indeed, there could have been none. The claimant was entirely at liberty to refuse to entertain any such proposal. The wrong, therefore, of which he complains does not appear to the umpire to be one of those injuries which were contemplated by the convention of July 4, 1868.

“It must be also observed that, supposing that the claimant was actually the agent of the Mexican Government, it is clear that he was in the service of a foreign country. It is even doubtful whether some of the services which he rendered were not in contravention of the laws of the United States. It was part of his contract with Carbajal that he should resign his position as brigadier-general and chief of ordnance of the State of Indiana and give his whole time and attention to the interests of Mexico, placing himself for the purpose under the orders of the said Carbajal and the supreme government of the Republic of Mexico. As far, then, as these services rendered to the Mexican Government were concerned, the umpire considers that the claimant had divested himself of his nationality as a legitimate citizen of the United States and has, therefore, no standing before this commission.”

Thornton, umpire, March 8, 1876, *Herman Sturm v. Mexico*, No. 676, Am. docket, convention of July 4, 1868, MS. VII. Op. 385.

“The claims in question arise out of an authority granted by General Sanchez Ochoa to the claimant to raise a loan for Mexico in the United States, to enlist men for the service of the army, and to purchase arms and ammunition. * * *

“It is doubtful whether Ochoa was empowered by his government to enter into such a contract with a third person; but, even supposing that he possessed such power, * * * the loan which the claimant was exerting himself to raise for Mexico was avowedly intended to be used for carrying on a war in which she was engaged, and in which the United States had declared themselves neutral. The umpire is inclined to think that the claimant's participation in the raising of the loan was a violation of that neutrality which as a citizen of a neutral power he was bound to observe.

“But, even if this be not so, there can be no doubt that the enlistment, equipment, and transportation of troops to Mexico

for service in the Mexican army were violations not only of neutrality but of the laws of the United States. The umpire can not believe that this international commission is justified in countenancing a claim founded upon the contempt and infraction of the laws of one of the nations concerned."

Thornton, umpire, *Samuel Brannan v. Mexico*, No. 562, Am. docket, convention of July 4, 1868, MS. Op. V. 201, VII. 590.

3. ENGAGING IN AN UNLAWFUL EXPEDITION.

Numerous claims were presented to the mixed commission under the convention between the United States and Mexico of July 4, 1868, growing out of the seizure at La Paz, Lower California, November 16, 1855, by Mexican authorities, of the *Rebecca Adams* and the *Archibald Gracie*, two American vessels, and the improper detention and imprisonment of their passengers and crews. The essential facts in the cases were as follows:

On March 1, 1854, the garrison of the town of Ayutla, State of Guerrero, Mexico, having revolted against the rule of Santa Anna, proclaimed what was known as the "plan of Ayutla," and placed the movement under the lead of Generals Nicolas Bravo Juan Alvarez and Tomas Moreno, the latter being at that time governor of the State. On the 11th of the same month the garrison of Acapulco seconded the plan, under the lead of Col. Ignacio Comonfort. August 8, 1855, Santa Anna abandoned the City of Mexico and fled the country, and on the 13th of the same month the garrison of the city proclaimed the plan of Ayutla and placed the government provisionally in charge of Gen. Martin Carrera. On the 4th of the ensuing October General Alvarez was named as provisional president, and on the 8th of December Ignacio Comonfort was named as president in his stead. Comonfort held this post until December 1, 1857, when he was installed as the first president under the constitution of February 5, 1857, which was established by the supporters of the plan of Ayutla. On the 17th of December however Comonfort dissolved the congress and united with the Church party, which in turn deposed him, proclaimed on January 21, 1858, the plan of Tacubaya, and on the next day placed Zuloaga in the presidency. But already Benito Juarez, president of the supreme court of justice, and by virtue of that office president of the republic on the deposition

of Comonfort, on the 19th of January had set up his government at Guanajuato, maintaining the cause of the plan of Ayutla and of the constitution of 1857, which finally triumphed.

In the spring of 1855, while engaged in the contest with Santa Anna, Alvarez sent his nephew, Parra y Alvarez, to San Francisco, California, to procure a loan, munitions of war, and provisions. Arrived at that place, he conferred with Roderick Matheson, M. M. Noah, and A. de la Chapelle, citizens of the United States, but sympathizers with the revolutionary movement, and sought their assistance. At the same time he made the acquaintance of John Napoleon Zerman, who had been an officer in the French navy. But, the credit of the revolutionary movement being insufficient, Parra y Alvarez failed in his mission and returned to his home. Subsequently, a correspondence took place between Matheson, Noah, and Chapelle, and General Alvarez, in which the three first named offered to provide ships and fit out an expedition to support by force the plan of Ayutla. This offer General Alvarez by a letter of August 4, 1855, declined, but he authorized Matheson to raise a loan of money on bonds of the State of Guerrero. Meanwhile, Zerman had entered into correspondence with General Alvarez, and had offered to come with a fleet to blockade the Mexican ports on the Pacific held by the adherents of Santa Anna. August 4, 1855, General Alvarez wrote to Zerman declining this offer also. Zerman, however, afterward produced a paper, dated August 17, 1855, and purporting to be a letter written by a person signing himself Rodrigo de la Torre, secretary to the city corporation and marine department of Texaca, State of Guerrero, saying that Zerman's plan to furnish a squadron met the approval of the provisional government and authorizing him to fit it out as soon as possible. The authenticity of this paper and the authority of the alleged writer were both impeached.

But, before General Alvarez's letters of August 4, 1855, declining the proffered expeditions, reached San Francisco, and long before the alleged letter of August 17 could have been received there, Matheson and certain other individuals, friends of General Alvarez and supporters of the plan of Ayutla, determined to equip a vessel and enlist men and dispatch an expedition to Mexican waters. To this end they entered into an agreement with Zerman conferring upon him

the command of the expedition, and fixing his rank and pay, depending upon the approval of their course by Alvarez and Comonfort. On September 9, notwithstanding that they had then received Alvarez's declination of the 4th of August, they continued the execution of their enterprise by purchasing a vessel from Samuel L. Dennison, and proceeded to issue commissions to Zerman and others as officers in the Mexican service. The vessel purchased from Dennison was the bark *Archibald Gracie*, for which and for her equipment Matheson, in virtue of the authority given him to raise a loan, issued to Dennison seven \$1,000 bonds of the State of Guerrero. Arms were purchased from Camille Gros, of San Francisco, for which also bonds of the State of Guerrero were given. An advertisement was published in the newspapers announcing the departure of the bark for Mexican ports and soliciting passengers and freight. One J. J. Arrington, a merchant of San Francisco, shipped a lot of goods on board for Acapulco, and himself took passage on the bark. Dennison and Gros, each with his bonds, also embarked on her. There were also other persons who purchased tickets for Acapulco in good faith as passengers.

The bark put to sea October 11, 1855, having been regularly cleared on the preceding day. On the evening before sailing eighty-five men came on board who had been recruited by one John McCurdy, under an arrangement with Matheson and the members of his "committee," for military service. When the bark was three days out from port, the passengers and crew were summoned on deck to meet the "admiral," Zerman, and his officers, all in Mexican uniforms, and the United States flag was lowered and the Mexican hoisted in its place. The people were told by Dennison that the bark had been sold to the Mexican Government, but that this would not affect the interests and safety of the passengers.

On the 24th of October the bark put into Cape St. Lucas, Lower California, for stores. Here she found the United States whaling vessel *Rebecca Adams*, Thomas Andrews master. Zerman offered to charter the vessel for the Mexican Government, to act as a transport. The master, having no reason to doubt the validity of the transaction, accepted a charter-party at \$4,000 a month.

The two vessels sailed from St. Lucas on the 31st of October. But, instead of going to Acapulco, as they had intended, they made for La Paz. For this change of course various rea-

sons were assigned. Zerman's own excuse was that he had heard that Blancarte, the commander there, had given his adhesion to the plan of Ayutla and was anxious to lead his 400 soldiers against Blanco, an adherent of Santa Anna, who still held out at Mazatlan, and that he had conceived the idea of going to La Paz and transporting Blancarte's troops to Mazatlan and reducing Blanco to submission. Whether this excuse was true or false, it did not succeed. When the vessels arrived at La Paz, Blancarte ordered them to be seized. Their passengers and crews, besides being arrested, were, as it was alleged, stripped of everything except such clothing as was absolutely necessary to cover them, and confined for forty days in a small room, all the while being subjected to cruel treatment. On the 27th of December Blancarte sent them to Mazatlan and San Blas; and it was alleged that for this purpose they were chained and marched, with bare heads and feet, to the ships from which they had been taken; that they were crowded together on board under the most wretched conditions for twenty-four days, and often treated with great personal indignity; and that from San Blas they were marched on foot through the country to Tepic, Guadalajara, Guanajuato, and the City of Mexico, a distance of 800 miles.

When the prisoners reached the city of Mexico, some of them who could command influence or credit obtained their release, the rest were held in custody. The government of Comoufort, then in power, denied the authority of Matheson and his associates to fit out the expedition, and even refused to recognize its friendly purpose.

In the mean time the vessels, with their cargoes and all the property of those on board, had been confiscated, sold, consumed, or destroyed, without any judicial proceedings or sentence whatever.

After several weeks Mr. Gadsden, the United States minister, intervened and demanded the release of the persons who were held in custody, the discharge of the vessels, and appropriate indemnities for the injuries and losses illegally inflicted. But it was not till July 7, 1856, after the prisoners had been held for over nine months, that a judicial investigation was set on foot. Fifteen days after the trial began the district judge ordered the release of all the prisoners, and in pronouncing his sentence said:

"Considering that it is not conformable to the honor of the Mexican Republic to protract the imprisonment of Zerman,

Fleury, and Dennison, who tendered their lives, families, and resources to the service of the triumphant revolution, or of those who went on board the ship as passengers in San Francisco; considering that, according to law, whenever an accused person is found innocent, all the proceedings against him must be suspended, it is decided to desist from the prosecution of this proceeding, as the charge of piracy, which gave rise to it, has not been proved against those implicated in this cause."

This sentence was unsatisfactory to the government, which caused the case to be appealed to a superior tribunal, and removed the district judge, Villaseñor, from office. The superior court, after a delay of six months, on January 3, 1857, announced its decision to the effect that the case had not been properly investigated. From this decision the prisoners took an appeal to the supreme court of Mexico, which on November 27, 1857, two years after their original arrest, declared that they were not guilty of the charge of piracy, on which they had been tried, but ordered them to be remanded before the inferior tribunal to be tried on new charges to be formulated upon the fact that they had used the Mexican flag, forced a Mexican ship to join their expedition, and sought to have their military titles and rank recognized at La Paz. In less than two months after this judgment was pronounced, a new revolution broke out in the City of Mexico. Some of the defendants had, by the advice of the American minister, then left the country. Zerman and others of his associates took up arms for the plan of Ayutla, and, after the temporary triumph of Zuloaga, returned to the United States.

On the facts above narrated, and assuming
Opinion of Mr. Wadsworth. the genuineness of the letter of De la Torre to Zerman, Mr. Wadsworth, the United States commissioner, arrived at the following results, upon the claim preferred in behalf of Dennison:

"1. That the confiscation of the vessel and her property, without the judgment of any court, was illegal, and renders the Government of Mexico responsible to the owner for the value of both.

"2. That the crews and passengers of the vessels came to La Paz as friends of the Mexican Government, in possession of the supreme authority at the time, and not as enemies; and that they had not violated any law of Mexico when they were assailed, captured and imprisoned, and deprived of their property.

"3. That the imprisonment was in violation of the constitution and laws of Mexico, which forbade their detention without a surrender to the judicial authority and without trial—a detention lasting over nine months at the hands of the political power exclusively.

"4. That their compulsory march from San Blas to the City of Mexico was illegal, merely an act of violence, as they could only be tried in the district where their offenses had been committed; that this march was an act of military-lawlessness, committed long after the period fixed by the Mexican law when the prisoners should have been surrendered to the judicial authority competent to try them.

"By the prolonged detention of the prisoners without handing them over to the judicial authority of the district of Lower California; by their march from that district to the City of Mexico, and their continued detention there by the political power and by their trial in the courts of the district of Mexico, Comonfort violated his own 'estatuto organico' of the 23d of May 1856. The 48th article of this statute declares that any arrest which exceeds the time prescribed by law is arbitrary and involves the responsibility of the authority committing it, and of the judicial authority which fails to punish it. The 43d article requires the political authority to place the party arrested at the disposal of the judge having cognizance of his case within sixty hours. The judge in the case before us was the judge of the district of Lower California, and not of the district of Mexico. The judge himself can only detain the prisoner five days without having ascertained the *corpus delicti*, and satisfied himself by presumptive proof of guilt. In the case of these prisoners their imprisonment was prolonged and their trial postponed, in spite of the interference of the minister representing their government, over nine months. The trial was brought on at last in a court a thousand miles distant from the only court that could legally imprison, try and punish the pretended criminals. * * *

"I find, moreover, a distinct ground of responsibility on the part of the government for the cruelties and privations inflicted upon the prisoners. Such wrongs would have been unjustifiable even after sentence—they were simply intolerable before the trial—and it ought to be declared by all having authority to speak that such cruelties to prisoners entail grave responsibilities. I certainly approve the decision of the late Anglo-American commissioners awarding against the United States damages in such cases.

"In finding the value of the vessel and property on board belonging to Dennison, I shall not be governed by the price which he was to have received in bonds of the State of Guerrero. I do not think that Matheson, Noah, and Chapelle could bind the Mexican Government by that contract. They did not attempt to do it absolutely, but appealed to that government

to accept and ratify. It was not then a bargain unless Alvarez and Comonfort should approve what their friends had done in their names. Now, they had their choice to accept the vessel and supplies at \$70,000, payable in the bonds of the State of Guerrero, or to decline the offer. They were bound in declining to send back unharmed the vessels and people sent them by their friends; they could not reject the offer and treat the people as pirates, imprison, and rob them. I hold them responsible for the vessel and property belonging to Dennison for what they were worth at La Paz, the place where they were confiscated in so rough a manner. Guerrero bonds were taken at a heavy discount, and the property cast into a wild speculation. It wasn't worth anything like \$70,000; that was the prize which Dennison was to draw, and for which he ventured a much smaller sum. I find from the proof that Denver furnished Dennison \$5,000, and for that sum he was to have one-third of the amount which the latter was to receive for the property. This makes it cost \$15,000 at San Francisco. Now add \$5,000 to get it to La Paz, and that will be enough on a guess.

"Dennison, however, was robbed of his personal effects, was cruelly imprisoned and treated and put to great expense for himself and fellow-prisoners in and about the trial, etc., at the City of Mexico. Zerman and Captain Andrews proved by an affidavit given in the City of Mexico September 11, 1856, that Dennison had paid out for expenses incurred in the long prosecution \$10,000. Mr. Cootey, the owner of the *Rebecca Adams*, who went to Mexico to see after his property, says he believes Dennison had paid out that much. I will allow it, as I would be very sorry not to recognize any expenditure made in behalf of these suffering and destitute prisoners, neglected by the Comonfort government.

"For the imprisonment and ill treatment received by Dennison, I allow \$3,000. I would make it a great deal more if I did not bear in mind the number of persons entitled to indemnity, making a severe burden for a government to bear that is not very rich.

"My award then would be and is that the Government of Mexico pay to that of the United States in the currency of the latter the sum of \$30,000, with interest at the rate of 6 per cent per annum from the 1st day of July 1856 to the close of the labors of this commission; and the further sum of \$3,100, cost of printing, etc., for the use and benefit of claimant, Maria J. Dennison, and whoever else it may concern."

Opinion of Mr. Palacio. Mr. Palacio, the Mexican commissioner, treated the expedition as of a piece with the

Walker and other filibustering expeditions organized in California with designs against Mexican territory. He said that the government of General Alvarez repulsed the efforts of the organizers to secure its approval, and when it

started out it was known in San Francisco that the revolution in Mexico had ceased. On the facts as he understood them, Mr. Palacio reached the following conclusions:

"1. That the *Archibald Gracie* expedition was of a character essentially military, and that this character was assumed by all the parties who sailed on board of that vessel.

"2. That the expedition was organized and undertaken without any authority on the part of the Mexican Government.

"3. That, considered as a voluntary and officious act, arising out of sympathy or friendship toward Mexico, it was culpable in its nature and can create no rights as against the Government of Mexico.

"4. That there is still greater reason for the foregoing, from the fact that according to the evidence in the case, the *Archibald Gracie* expedition was made a disguise for underhanded and hostile purposes toward the republic to which it was going.

"5. That even supposing that the expedition was guileless; that it was the result of invitations made by Mexico and organized in accordance with arrangements made with the government of that country, it can never be the subject of a diplomatic claim.

"6. That, even allowing that the circumstances of the case did permit a diplomatic intervention on the part of the government, this could not be invoked until it had been shown that the claimants had suffered a denial of justice by the proceedings which are still pending in Mexico.

"7. That all the foregoing considerations, which are generally applicable to the expedition and all concerned in it, are specially applicable to this claimant, who was distinguished by the prominent part he took in the transaction and his proven participation therein.

"8. That such of the contents of official documents as favor the claimants are derived from officers who are interested with or accomplices of the claimants.

"9. That an impartial diplomacy, including even that of the United States, as manifested by the highest officers of this government, has shown itself to be averse to a diplomatic support of these claims.

"10. That the commission now having them under consideration can not make a favorable award concerning them without counteracting the final purpose of the treaty under which it is acting, and at the same time casting a slur upon the dignity of the two contracting nations and that of the commissioners representing them in this arbitration."

These conclusions Mr. Palacio supported by much evidence. Beginning with the clearing of the vessel, he endeavored to show that the purpose of the expedition was piratical. The clearance classed the armed men as passengers, when in reality

they were enlisted in the service of the expedition. Mr. Palacio also contended that the only cargo on board consisted of arms and ammunition. The whole equipment was warlike, and was undertaken without authority from anyone in Mexico. The letter of De la Torre to Zerman of August 17, 1856, Mr. Palacio declared to be a forgery.

Even on the supposition that the expedition was friendly to General Alvarez, Mr. Palacio contended that it was unlawful and could not be made the subject of intervention on behalf of the participants by the United States; but it was in reality understood by everybody to be a filibustering one, and the Mexican Government was warned of it by the minister of the United States.

Mr. Palacio contended that the judicial proceedings were regular.

To his opinion Mr. Palacio appended the decision of Sir Frederick Bruce in the cases of the *Constancia*, *Good Return*, *Medea*, and John D. Danels.

Decision of Sir Edward Thornton. The umpire, Sir Edward Thornton, made the following decision:

"In the case of *Maria J. Dennison v. Mexico*, No. 213, it appears that one Roderick Matheson, of San Francisco, was authorized in 1855 by General Alvarez, not in the character of the head of the Mexican Government, but as the leader of a revolution against that government, to negotiate a loan for the purpose of contributing to the success of that revolution. This loan was to be guaranteed by the State of Guerrero. The umpire does not find that any authority was given to Matheson or to those who assumed to act with him as agents for Alvarez and Comonfort, to purchase a vessel for the use of the Mexican Government, together with the necessary supplies, for he does not believe in the authenticity of the letter of Rodrigo de la Torre, dated 'Texca, August 17, 1855.' Such a letter could not have been written by anyone whose native language was Spanish.

"But whatever the contract was which Samuel L. Dennison made with Matheson, it was entered into voluntarily on his part, and it was not therefore one the fulfillment of which by the Mexican Government that of the United States was called on to enforce.

"It further appears to the umpire that Dennison was cognizant of and a party to the fitting out of the *Archibald Gracie*, and of the enlisting of men at San Francisco, for hostile purposes in violation of the laws of the United States and of international law.

"Before the *Archibald Gracie* arrived at La Paz, Lower California, the Mexican Government had been informed by cer-

tain diplomatic agents accredited to it, of whom the United States minister was one, that a piratical expedition had left San Francisco under the command of Zerman. Before arriving at La Paz, a Mexican vessel, with which the *Archibald Gracie* had fallen in, had been compelled to deviate from its course to accompany the expedition. Under these circumstances, the Mexican authorities were justified in seizing a vessel which had without any authority assumed to carry the Mexican flag and to exercise the rights of a Mexican man-of-war, forcing a Mexican vessel to deviate from its course. Nor can the United States Government call upon Mexico to indemnify Dennison for a vessel which with his knowledge was fitted out in violation of the United States law.

“The umpire is therefore of opinion that the Mexican Government can not be held responsible for any pecuniary losses suffered by Dennison in consequence of the seizure of the *Archibald Gracie*.

“But although Dennison brought upon himself these losses by acts which were in contravention of United States and international law, the umpire considers that the United States have a right to expect that one of their citizens, even when accused of crime against the laws of Mexico, should receive proper treatment at the hands of its authorities. In the present instance there was unnecessary and illegal delay in beginning and concluding the trial of Dennison, and after his arrest at La Paz he was treated with undue severity and even cruelty.

“For the lengthened imprisonment and ill treatment suffered by Dennison and the unnecessary loss of time to which he was forced to submit, the umpire considers that the sum of one thousand dollars (\$1,000) in gold will be a fair compensation; and he therefore awards that this sum, without interest, in gold coin of the United States, be paid by the Mexican Government for Maria J. Dennison, as administratrix for the aforesaid Samuel L. Dennison.”

Maria J. Dennison, admx., v. Mexico, No. 213, United States and Mexican Claims Commission, convention of July 4, 1868.

A claim preferred by Zerman was dismissed by the commissioners on the ground that he was not at the time of the transactions in question a citizen of the United States. (*John Napoleon Zerman v. Mexico*, No. 212, Am. docket, MS. Op. III. 114.) Thirty-nine other of the *Archibald Gracie* claims were dismissed by the umpire on the same ground.

One Dolan (*Thomas J. Dolan v. Mexico*, No. Zerman Expedition: 79, Am. docket) made a claim as an innocent Dolan's Claim.

passenger on the *Archibald Gracie*, alleging that he had no intention of participating in any hostile proceedings. Sir Edward Thornton decided:

“There is evidence in support of these assertions, though, as it is offered by others who were in the same position as

Dolan, it is not entitled to the fullest credit. But if Dolan was really ignorant of the character of the vessel, his ignorance proved an absence of prudence on his part for which he could blame no one but himself; for it would have been easy at the time to ascertain by inquiry at San Francisco everything connected with the expedition. At all events, it would be most unjust to make the Mexican Government responsible for the deceit which was practiced on the claimant, although the latter might on that account sue for compensation from the owner of the vessel.

"The umpire is of opinion, as in other cases, that the Mexican authorities were justified in arresting Dolan; but he also thinks that the claimant is entitled to compensation for the unnecessary and illegal delay and harsh treatment to which he was subjected; and as there is no proof that he had a guilty knowledge of the nature of the expedition of which he, perhaps innocently, formed a part, the umpire thinks that the compensation in the case should be higher than in some others, where it has been proved that the claimant had such guilty knowledge and actively contributed to the preparation of the expedition. He therefore awards that the sum of one thousand dollars (\$1,000) in gold coin of the United States, without interest, be paid by the Mexican Government for the above-mentioned claim."

The decision in Dolan's case was followed
Zerman Expedition: by Sir Edward Thornton in nineteen other
Disposition of other cases of innocent passengers. In another
Claims. such case (*James Ballentine v. Mexico*, No. 285)

he allowed a sum with interest for property of which it was shown that the claimant was wrongfully deprived. In yet another case (*John Craig v. Mexico*, No. 257) an award of \$2,000 was made for exceptionally cruel treatment, the claimant, when found in Mexico by messengers dispatched by his father, being so reduced that he had to be carried.¹ But, in

¹ Several of the passengers' claims were dismissed for want of evidence of citizenship. In one of these cases, Sir Edward Thornton said:

"In the case of *A. M. Spencer v. Mexico*, No. 231, the umpire does not consider that there is sufficient evidence that the claimant was a citizen of the United States. If it be really true that he was so, that he was one of the unfortunate passengers in the *Archibald Gracie*, and that besides the cruel treatment to which he was subjected, he lost a considerable amount of property, the case is a hard one upon those who took care of him during his failing health for several years.

"But all the evidence offered is either his own declarations or those of persons immediately interested in the claim.

"The umpire can not recognize the sufficiency of such evidence, and is therefore compelled to award that the claim be disallowed."

the cases in which it appeared that a passenger or member of the crew of the *Archibald Gracie* had knowledge of the character of the voyage, Sir Edward Thornton held that justice called for "the lowest possible amounts" of damages. Thus in the case of *John McCurdy v. Mexico*, No. 214, he said:

"The Government of the United States can not equitably ask of the Mexican Government compensation for the losses, pecuniary or of time, suffered by the claimant; for the enterprise, whilst it was illegal, was evidently of a speculative character, and those losses were due to the claimant's having knowingly taken part in it.

"In the case, however, of Mr. McCurdy, as in the cases of the other prisoners, there was unnecessary and illegal delay in proceeding with his trial, and he was exposed to unduly harsh treatment, for which he is entitled to compensation; but, considering the culpable conduct of the claimant, the umpire is of the opinion that justice only calls for the lowest possible amount, and he therefore awards that the sum of \$500 in gold coin of the United States, without interest, be paid in satisfaction for this claim."¹

The case of the *Rebecca Adams* presented different features from that of the *Archibald Gracie*. In the case of the master of the former vessel (*Thomas S. Andrews v. Mexico*, No. 216), Sir Edward Thornton rendered the following decision:

"Captain Andrews had previously chartered the vessel to Zerman at San Lucas, and in doing so, and then losing sight of the objects of the voyage and the intentions of the owner of the vessel, the umpire considers that Captain Andrews committed a grave indiscretion. But he also believes that Captain Andrews was thoroughly deceived as to the position of Zerman and was convinced that he really was an admiral in the Mexican service, and that the *Archibald Gracie* was a Mexican vessel of war; and that he did not suppose that Zerman had any hostile intentions. But as the *Rebecca Adams* accompanied the *Archibald Gracie* and had on board, besides arms and ammunition, some of the men who were transferred from the latter vessel, there was *prima facie* evidence that she formed part of the expedition, and the Mexican authorities were therefore justified in seizing and detaining her, together with the captain and crew.

"But these authorities should, in the opinion of the umpire, have investigated the circumstances of the case without delay; and have released the vessel, captain, and crew, and for this purpose the term of three months from the date of the seizure

¹ This award was followed by the umpire in the cases of *Joseph Bogy*, No. 228; *A. Brown Chapman*, No. 234, and *Robert G. Baldwin*, No. 258.

of the vessel would have been sufficient. The seizure of Captain Andrews's private property, the ill treatment which he and his crew were subsequently forced to suffer, and the unnecessary and illegal delay which occurred in the decision of their case, were entirely unjustifiable. The umpire is therefore of opinion that the claimant is entitled to the value of his private property which was seized, to the expenses incurred by him owing to the unnecessary delays which took place, and to compensation for his loss of time, and the ill treatment which he suffered.

"The umpire therefore awards \$1,500 in gold coin of the United States for the value of the claimant's private property, and \$3,000 in the same coin for his expenses, with interest upon these two items at the rate of 6 per cent per annum from the 17th of February 1856 to the date of the final award; and further, the sum of \$2,000 in the same coin without interest for the ill treatment suffered and the loss of time. The umpire would have adjudged a higher compensation on this last account but for the want of judgment and indiscretion shown by Captain Andrews in chartering his vessel to Zerman, which action of his was participated in and supported, as it appears, by the whole of the crew of the *Rebecca Adams*, and of which the occurrences, of which he and they complained, were the consequence."

In the case of Patrick H. Cootey, owner of the *Rebecca Adams* (*Patrick H. Cootey v. Mexico*, No. 215), Sir Edward Thornton held that as Cootey had no knowledge of the chartering of the vessel to Zerman, and ought not to be made to suffer for the error of the captain, and as the Mexican authorities "ought immediately to have ascertained the facts by judicial means, and to have released the vessel as soon as possible, the presence of the owner not being necessary for that purpose," the Government of Mexico "should pay the value of the vessel, with interest thereon." On this score he awarded \$50,000 in gold, with interest at 6 per cent, to commence at the end of three months after the seizure, three months having been, in his opinion, "ample for the investigation of the facts." He also awarded to Cootey, for "expenses incurred by him in proceeding to Mexico, a step to which he was forced by the unnecessary delays of the Mexican authorities," the sum of \$4,000 in gold coin, with interest at 6 per cent from January 1, 1857.

To the first officer of the *Rebecca Adams*, Sir Edward Thornton, referring to his remarks in the case of Andrews, the master, awarded \$100 for loss of personal property; \$315 for a twentieth part of the oil on board, but nothing for his share

of the prospective catch; \$1,000 for expenses, and \$2,000 "for the illegal detention and cruel treatment to which he was subjected." The whole amount of the award was \$1,415, United States gold, with interest at 6 per cent from February 17, 1856, and \$2,000 in the same coin without interest. (*Benjamin Ripley v. Mexico*, No. 217.) In the case of the second mate, an award was made of \$170.37, representing a thirty-seventh part of the oil on board, with interest at 6 per cent from February 17, 1856, and \$2,000 in the same coin without interest. (*Herman F. Wulff v. Mexico*, No. 232.)

In the case of *Francis McCreedy v. Mexico*, No. 218, Sir Edward Thornton considered and determined the award to be made in favor of an ordinary seaman on the *Rebecca Adams*. He found that McCreedy was "equitably entitled to the one one hundred and fiftieth share of the oil on board the *Rebecca Adams*, and to compensation on account of the cruel treatment and illegal delay to which he was subjected." He therefore awarded him on these grounds, respectively, \$42 in United States gold coin, with interest at 6 per cent from February 17, 1856, and \$2,000 in the same coin without interest.

The same award was made in fifteen similar cases.

Finally, Sir Edward Thornton considered
Zerman Expedition: and decided the case of *Camille Gros v. Mexico*,
Claim for Arms No. 311, in which the individual who furnished
and Ammunition. the arms and ammunition for the expedition
 put forward a claim. Sir Edward Thornton said:

"The umpire is of opinion that the expedition prepared under the auspices of Zerman was a violation of the law of the United States and of international law. It is clear that the claimant in this case was perfectly well acquainted with the character of that expedition, and assisted in its equipment. The authority to negotiate a loan at San Francisco was given to Matheson by General Alvarez when he was not at the head of the Mexican Government, but was merely a leader of a revolution against that government. The claimant entered of his own free will into the arrangement for supplying arms, munitions of war, and provisions, and received bonds in return guaranteed by the State of Guerrero.

"Under these circumstances the umpire is of opinion that the losses suffered by Camille Gros and for which he claims compensation were due to his own acts, committed in violation of the law of the United States and of international law, and he thinks that the United States ought not to support such a claim, and would not be justified in doing so.

"Considering the manner of the claimant's arrival at La Paz, there can be no doubt that the Mexican authorities were justified in ordering his arrest, as much as that of all those who were on board the *Archie Gracie*. The only point on which he would be entitled to compensation is the unnecessary and illegal length of the detention to which he was subjected and the cruel treatment which he suffered at the hands of the Mexican authorities; but, considering the illegal acts previously committed by him, the umpire thinks that such compensation should not be a high one.

"Such is the opinion of the umpire with regard to the rights of the claimant in this case if he had proved that he was a citizen of the United States at the time at which the acts were committed on account of which he claims compensation. But it appears to the umpire that he was not a citizen of the United States at the time. He had declared his intention of becoming so, and no more; but had not actually become a citizen of the United States. The umpire is therefore of opinion that Camille Gros is not one of the persons whose claim is entitled to consideration under the provisions of the convention of July 4, 1868, between the United States and Mexico, and consequently awards that the claim be dismissed."

The claimants in this case were C. H. Campbell, the owner, and A. A. Arango, the charterer and owner of the cargo, of the American brig *Mary Lowell*, which was captured on March 15, 1869, off Ragged Island, one of the Bahamas, by the Spanish man-of-war *Andaluza*. The brig was cleared from New York for Vera Cruz, in Mexico, with a cargo of arms and munitions of war. Subsequently she put in at Ragged Island, where she was reported to be in distress. Here she was watched by the *Andaluza*, in consequence of information that her cargo was intended for the insurgents in Cuba. On the day of the capture she left what was known as the "man-of-war anchorage," where she had been lying, for the purpose, as was alleged, of entering a neighboring harbor of greater security, when, as she was about to double the southeast point of Little Ragged Island, she was seized by a crew from the *Andaluza*. She was immediately taken to Havana, where, together with her cargo, she was condemned as lawful prize. Campbell claimed \$21,000 for the value of the vessel and for the damages resulting from the loss of the money to become due under the charter-party, together with interest from the date of the capture. Arango claimed \$39,719.47 in gold coin for the value of the cargo, with interest from the same date.

When the capture of the brig was first made known to the Government of the United States, it was stated that she was seized near the coast, within British jurisdictional waters, and while in charge of a colonial custom-house officer. Acting on this information, Mr. Fish, then Secretary of State, instructed the minister of the United States in London that it was presumed that Her Majesty's government would not hesitate "to hold the Spanish authorities accountable for the proceedings," and that the United States would "look to the British Government for indemnification for the losses and injuries which citizens of the United States, owners of the *Mary Lowell* and her cargo," might "sustain, in consequence of her illegal seizure."¹ To this instruction, when communicated to the British Government, Lord Clarendon, then foreign secretary, replied that as regarded the statement that the brig, at the time of her capture, was in charge of a British custom-house officer, it appeared that the person who was in charge of the vessel "had, for the time, ceased to have any connection with Her Majesty's customs, and was in fact acting master of her;" and that, as regarded the place of capture, Her Majesty's government considered that "the claim of territory must be made out by clear and unimpeached evidence, and that therefore if any doubt should exist upon the subject it would not be proper for them, on the strength of that doubt, to insist upon the *Mary Lowell* being released." Some of the evidence, he said, tended "to prove that the capture took place clearly within British waters," while other parts of it supported the conclusion that the capture "did not so take place." Her Majesty's government were unable to say that the capture was "satisfactorily made out to have taken place within the British territory, so as to entitle Great Britain to claim the restoration of the vessel."² The officers of the *Andaluzá* alleged that the capture was made six miles or upwards from the shore.

When the case came before the commission
 Claimants' Contention. it was contended in behalf of the claimants:

- (1) That the seizure of the vessel and cargo was unlawful because made within neutral jurisdiction.
- (2) That, even if the seizure was made on the high seas, it was unlawful, because Spain had conceded that there was no con-

¹ S. Ex. Doc. 108, 41 Cong. 2 sess. p. 31.

² Id., p. 43.

flict at the time amounting to a war in the international sense, such as gave the parties a right to exercise belligerent powers on the high seas. (3) That, even if the cargo consisted at the time of capture of articles which, in time of war, would be contraband, yet at the time of the capture the vessel was not prosecuting her voyage, nor was the cargo taken *in delicto*, nor was there any purpose on the part of the owner either of the vessel or of the cargo to violate any blockade established by Spain in Cuba, since no such blockade had been proclaimed or established. (4) That, in view of these facts and principles, the court at Havana had no jurisdiction of the vessel and cargo as prize of war, and that its decree of condemnation was null and void.

On behalf of the Government of Spain it
 Spanish Contention: was contended: (1) That the only question be-
 Self-defense on the tween Spain and the United States in regard
 High Seas. to the condition of affairs in Cuba was whether
 the insurrection was of any such magnitude as to justify the United States in recognizing the insurgents as belligerents; that, as was contended by the United States during the civil war, a condition of things might exist that would justify the government in exercising belligerent rights against revolted subjects, and yet would not warrant their recognition as belligerents by foreign nations. (2) That, even if there was no such war as gave technical jurisdiction to a prize court, there was a right of self-defense in nations as well as in individuals—a right which was recognized in the case of the steamer *Caroline* and in the case of the Lopez expedition in 1851; and that if the capture was made on the high seas it was lawful, because the voyage was undertaken for an unlawful purpose—viz, to aid the insurgents in Cuba. The argument for Spain rested chiefly on this second ground, of self-defense.

The arbitrators having differed in opinion,
 Decisions of Baron the umpire, Baron Blanc, on June 9, 1879, pro-
 Blanc. nounced the following decision:

“In the cases of the American citizens Charles H. Campbell and Augustin A. Arango against Spain, I may, as is claimed in behalf of the United States, assume for the purposes of the controversy submitted to me that the capture of the brig *Mary Lowell* and cargo by Spanish force on the high seas was unauthorized by international law. Yet, as the cargo, consisting of arms, ammunition, and other military supplies, was admittedly intended by its owner, Augustin A. Arango, for the bene-

fit of the insurgents against the Spanish Government, and as the brig was allowed by Charles H. Campbell, either willfully or negligently, to fall into the hands of parties actively interested in promoting the insurrection, the claimants forfeited their right to the protection of the American flag, and are estopped from asserting any of the privileges of lawful intercourse in times of peace and any title to individual benefit of indemnity as against the acts of the Spanish authorities done in self-defense.

"The claims are therefore dismissed."

After this decision was pronounced a motion was made to the umpire by the advocate for the United States for a rehearing, on the ground that the decision as to the right of self-defense was erroneous and destructive of the freedom of the seas; that the right of self-defense claimed by Spain could not extend beyond her own jurisdiction, and that the umpire had erred in holding that the brig "was allowed by Charles H. Campbell, either willfully or negligently, to fall into the hands of parties actively interested in promoting the insurrection." In denying this motion the umpire elaborated his decision as follows:

"The cases of *C. H. Campbell v. Spain* and *A. A. Arango v. Spain* again come before the American and Spanish Commission on a motion for a rehearing. Besides the fact that the motion is not presented to the umpire through the authorized channels, he considers it a matter of very serious doubt whether he possesses the power to reopen a case after his decision is made and filed. While there is great plausibility in the theory that with the filing of his decision his function ends, it certainly can not be disputed that the power, even if the umpire possesses it, should be exercised with caution, and only when evidence and reasons are offered by the moving party which were not before the umpire when he rendered his decision. The umpire has very carefully looked for, and failed to find, such evidence and reasons in the brief for a rehearing filed in the acts of the commission. It may be due to the parties, however, that he should now state his views upon the whole case more fully than he has heretofore done, in order that no misapprehension as to the real character of his decision may exist.

"As matter of fact, it has been established that the arms and ammunition shipped on the *Mary Lowell* were admittedly intended for delivery, even by illegal means, to the Cuban insurgents. It has been established in regard to the *Mary Lowell* that, even if it be doubtful on the proofs that her ostensible destination for Vera Cruz had been simulated from the departure from New York, she was abandoned at the Bahamas by her captain and crew, they alleging unwillingness to participate

in a descent upon the Cuban coast; that she was thereupon left by her proprietor under the command of one of the members of a body of men, organized as a military company, which had come from Jacksonville with C. H. Campbell on another ship belonging to C. H. Campbell himself; that the allegation that the *Mary Lowell* was afterward placed in the custody of a British official is inconsistent with the positive declarations of the British Government; that the aforesaid company was manifestly engaged in the initiation, at least, of an attempt to make a descent upon the Cuban coast in aid of the insurrection; and that before the capture of the *Mary Lowell* by the Spanish forces the vessel and cargo had passed into the possession and under the control of the insurgents, whatever may be the weight properly attributable to the assertion that the claimants had lost and the insurgents had acquired ownership of the property.

"As matter of law, the umpire is of opinion that prior to the capture of the *Mary Lowell*, and independently of the circumstances of the capture itself, the vessel and cargo were being used by the act or through the negligence of their respective owners in an unlawful enterprise and placed outside the conditions of lawful intercourse in time of peace; that this illegality was of such a character as to carry with it forfeiture of the protection of the United States flag and as to subject the property to such eventual action as might be deemed proper by the United States and by Spain according to the mutual rights and duties of the two governments; that such abnormal situation of the owners of the ship and cargo toward Spain, and indeed toward the United States themselves, could not be covered by the alleged infraction of international law involved in the subsequent capture of the *Mary Lowell* and cargo by the Spanish forces; and that on those principles of equity which the umpire does not feel at liberty to disregard he is bound to decide that the owners of the ship and cargo are, as such, estopped in their present claim to indemnity for the consequences of their unlawful venture. It is, then, irrelevant under the circumstances of this case to state how far, if at all, the acts of the Spanish forces, done in self-defense, were unauthorized by international law and such as to create a claim on the part of the United States against Spain in behalf of the offended sovereignty of their flag. It is accordingly unnecessary for the determination of the personal rights of the claimants before this commission to ascertain the facts on which the regularity of the capture, as to the rights of the United States, depends, namely: Has the *Mary Lowell* set herself right as to the allegation of Spain that she was, at the moment of the capture, without a captain and without the necessary papers to justify her flag; that she was pursuing an unjustified course, etc.?

"The umpire must be understood as applying the rule of estoppel only against the private claims of C. H. Campbell and A. A. Arango, as claimants of an indemnity for their own indi-

vidual account, in which private claims the question, *Was the capture of the Mary Lowell and cargo unlawful?* is subordinate to the other question, viz, *Were the Mary Lowell and cargo engaged in a lawful enterprise?* The umpire can not be legitimately called upon to treat this as a case of the United States against Spain having for its direct object a suitable reparation for the offended dignity of their flag. In such a case the regularity of the capture would constitute the principal question to be considered, the personal situation of the owners of the property becoming subordinate; but no case of the *United States v. Spain* has been or could, in the opinion of the umpire, properly be presented to this tribunal.

"The umpire therefore finds nothing to justify a reversal of his decision. While leaving entirely untouched the capture of the *Mary Lowell* in its relations to international law and in its consequences upon such rights as the United States and Spain may respectively possess in the premises, he must adhere to the dismissal of these claims, *C. H. Campbell* and *A. A. Arango v. Spain*, and deny the applications for a rehearing."

Baron Blanc, umpire; case of *C. H. Campbell*, No. 94, and *A. A. Arango*, No. 95, Span. Com. (1871), December 9, 1879.

Cases of Wyeth and
Speaker. An indemnity was demanded from Spain by the representatives of two persons, citizens of the United States, who were summarily examined and executed in Cuba by military authority as "pirates," on proof "of being taken with arms in their hands, and of having landed outside of a port in order to make war against Spain." They were taken prisoners, with arms in their hands, after a conflict between the party of which they were members and the Spanish troops. Counsel for the claimants contended that the deceased did not voluntarily participate in the hostile expedition, but were forced into it, under threats of death, after the vessel (a schooner called the *Grape-shot*) on which it was said that they innocently embarked as passengers, had left the United States.

Counsel for the claimants, in their opening argument, also took the following position:

"As in the one case [the *Virginus*], so in the other, the question of the guilt or innocence of the victims does not enter into the international discussion. * * * In all Christian and civilized states a public trial in which the evidence is produced against and in favor of the supposed criminal, in which he is allowed the assistance of such solicitors, advocates, and agents as he may deem proper to employ, precedes the judgment and execution. Such a trial—a trial 'by order and authority of law only, and according to the regular course of proceedings in such cases'—a trial in the presence of the

proper counsel of the accused, a trial when no evidence shall be exhibited save that at the taking of which such counsel may have, or may have had, the right to be present, is expressly guaranteed by the seventh article of the treaty of 1795, to every citizen of the United States charged with an offense cognizable by a Spanish tribunal."

In reply, the advocate for Spain referred to the proclamation of the President of the United States of August 11, 1849 (9 Stats. at L. 1003), in relation to an apprehended expedition from the United States to invade Cuba, in which all citizens of the United States who should connect themselves with that enterprise were warned that they would "forfeit their claim to the protection of their country," and must not expect the "interference" of their government "in any form in their behalf," "no matter to what extremity" they might "be reduced in consequence of their conduct;" and to the declaration of Mr. Webster, in regard to the participants in the ensuing Lopez expedition, that they had "no legal claim" to the protection of the United States (6 Webster's Works, 513, 515). Persons, said the advocate for Spain, who entered Cuba with arms in their hands were subject to military law and under military jurisdiction, and the treaty of 1795 had no application to them. He also referred to the case of Capt. Nathan Hale, executed as a spy in 1776 on orders given personally by Lord Howe, without any other proceeding than his own oral examination of the prisoner, and to a case in which Gen. B. F. Butler ordered the execution of a man who, it was alleged, had torn down the American flag.

Counsel for the claimant, in their closing argument, contended that if the deceased were prisoners of war, in military custody of the Spanish Government, that government was bound, under the law of nations, to treat them according to the usages which had obtained currency among civilized states, and which had for their object the mitigation of the miseries of war.¹ It was not pretended, said counsel, that the deceased had forfeited their lives as spies by reason of any crime against the laws of war; and even if they were engaged in an expedition hostile to Spain, that government could not justify the execution of them as prisoners of war. If they were not prisoners of war they were entitled to the guaranties to the treaty of 1795.

¹ Mr. Webster, Secretary of State, to Mr. Thompeon, minister to Mexico, April 15, 1842, case of the Santa Fé Expedition, 6 Webster's Works, 427, 437; Lieber's "Instructions for the government of the armies of the United States in the field," Scott's Digest of Military Law, 1873, p. 441, *et seq.*

The advocate for Spain answered that considerations of humanity did not touch the case; but if they did, it might be said that the responsibility for the horrors of the war then desolating Cuba rested upon the adventurers who for so many years had used the territory of the United States as a base of operations against that island. The real question was whether men taken in arms could claim to be treated, not as enemies under the laws of war, but as persons simply accused of felony, and punishable only after due trial and sentence. In the civil war in the United States there were some who contended that American citizens moving on the capital and threatening the existence of the government could not lawfully be shot in battle, or taken prisoners, because the Constitution of the United States provides that no person shall be deprived of life, liberty, or property without due process of law. According to the argument for the claimants, if ten thousand American citizens had invaded Cuba, each one individually would have been entitled to the protection of the treaty of 1795. Nor were the circumstances of the present execution in any degree barbarous.¹ In the Franco-German war the commanders of the invading army placed beyond the protection of the laws of war many combatants, including some who had generally been held entitled to be considered as lawful belligerents.

The arbitrators differing in opinion, the case was referred to the umpire, who held that it appeared "from the papers on record" that the claimants "left the United States with an expedition intended to invade the Island of Cuba;" that they "landed in the Island of Cuba with the said expedition," and that therefore they had "no right to recover damages from the Government of Spain."

M. Bartholdi, umpire, cases of Wyeth, No. 57, and Speakman, No. 74, Span. Com. (1871), July 10, 1876.

4. GIVING AID AND COMFORT TO THE ENEMY.

The American schooner *Fanny*, of Baltimore, arrived off Sisal, State of Yucatan, in 1843, with a load of coal, which she proceeded to deliver to a Mexican national war steamer forming one of a squadron then blockading the ports of that State. Having

¹ Halleck's International Law, chap. 16, sec. 8; Rebellion Record, vol. 6, p. 48, order of General Rosecrans denouncing a "war of extermination" against certain partisan bands.

discharged part of her cargo, she anchored near the land, under the protection of the blockading squadron, but was boarded at night by a crew from the Yucatan gunboats and carried into the port of Campeachy as a prize. The court at Campeachy decided against the captors and the vessel was restored. The apparent owner preferred a claim for her detention to the commissioners under the act of Congress of March 3, 1849, who said:

"The board can see no good grounds for charging any responsibility to the Mexican Government for the seizure or detention of the vessel. She was taken there voluntarily by her master and exposed to the danger of capture by a State in open and successful war with the Mexican Government, and she was captured in the act of supplying one of the parties with the means of carrying on the war. The wrong was not perpetrated by the public authorities of Mexico, nor by their consent or approval. Besides, the evidence in the case before the board shows that other persons, and not the claimant, were the legal owners of the vessel.

"The board is therefore of opinion that said claim is not valid against Mexico under the treaty of 2 February 1848."

Memorial of John Patterson: Opinion of Messrs. Evans, Smith, and Paine, commissioners, November 25, 1860. A similar decision was made by the commissioners in the case of the brig *Ada Eliza*, Andrew Fenton, owner, captured off Lerma while engaged in supplying the same squadron with coal. The commissioners said: "At the time of this occurrence, May 1843, Texas and Mexico were at war and Campeachy was in a state of revolution against Mexico. It does not appear by whom the vessel was taken, whether by Colonel Moore [of the Texas navy] or by the forces of Campeachy. It was not done by Mexico nor by anybody for whom Mexico was responsible. The object of seizing the vessel was to deprive the Mexican war steamers of the fuel designed for their use. The coal, being Mexican property, was liable to be seized by any power at war with Mexico."

It was contended by Spain that the claimant, who appeared as an American citizen, had contributed money to aid the insurgents in Cuba, and that, consequently, the embargo of his plantation in that island was justified. In proof of this charge Spain offered in evidence the original books of the "Central Republican Junta of Cuba and Porto Rico." In these books there were several entries, of which the following is an example: "November 14, 1868, Ramon de Rivas y Lamar, \$1,400."

The umpire said that if contributions were made by the claimant to the insurgents in Cuba, he had committed a violation of international law, and was estopped from asserting

any claim before the commission for indemnity for acts done by Spain in self-defense. He had no doubt that the books were "the original books of the junta, and that the contributions were made to aid the revolution in Cuba; but," continued the umpire, "the books are not satisfactory evidence that the contributions were made by the claimant, and therefore the umpire is of the opinion that the seizure was not justified."

Count Lewenhaupt, umpire; case of *Ramon de Rivas y Lamar*, No. 73. Span. Com. (1871), February 22, 1883. A similar ruling was made by Count Lewenhaupt in the case of *Felix Corin y Pisto*, No. 9.

The memorialists were citizens and residents of France, engaged at New Orleans in the sale of brandies by their agents, William E. Lev-
 Case of *de Forge et Fils*.
 erich & Co. From the record it appeared that they shipped by a vessel called the *Baldwin* 25 packages of brandy, and that the vessel arrived at the port of New Orleans March 11, 1861. The ordinance of secession of the State of Louisiana was adopted January 26, 1861, and the Confederate government was organized at Montgomery, Alabama, on the 22d day of February. Upon the capture of New Orleans in April 1862 a part of the brandy was in the custom-house, and came into the possession of the United States authorities. Other portions had been taken from the custom-house while the city was in the possession of the Confederates, and the duties on the brandy so taken were paid to the Confederate government. Of the part remaining in the custom-house a quantity was taken by Dr. McCormack, medical director of the United States, and for the brandy so taken the memorialists claimed \$22,000.

It was contended by counsel for the United States that the payment of duties to the Confederate government by the agents of the claimants was an act of aid and comfort to the Confederate authorities, and that the claim was barred under the first article of the convention.

This position was not sustained by the commission, and the claim was allowed in the sum of \$10,468.22.

Sazerac de Forge et Fils v. United States, No. 458, Boutwell's Report, 132: Commission under the convention between the United States and France of January 16, 1880.

"The honorable agent of the respondent
 Claims of *Grace Bros. & Co.* and *W. R. Grace & Co.* government has filed a motion setting forth that the memorialists, having given voluntary aid and comfort to the Government of Peru during the war between that country and Chile, have no right

to present their claims before this commission pursuant to the express provisions of Article I. of the convention of Santiago, of August 7, 1892.

"In support of the motion, the respondent government has produced duly authenticated extracts from the account current of the house of W. R. Grace & Co. with the Government of Peru, and several communications exchanged between the heads of the claimant firms and the said government and its agents, from which it appears that the said firms during the war between Chile and Peru were the official purveyors of the Peruvian Government; that they furnished it and charged to its account the coal for the ship *Andrew Johnson*, on January 15, 1881; that they furnished and charged on account the supplies for the Peruvian navy (December 31, 1880, and January 15, 1881); that they provided and charged on account the electric wires and batteries intended for the reserve of the Peruvian army (October 31, 1880, and December 18, 1881); that they guaranteed Mr. Charles E. Pettie the sum he asked for the remodeling of Remington rifles, old style, belonging to the Peruvian Government (January 17, 1881); that they advanced to Mr. Bogardus, agent of Peru in the United States, and charged on account, the sum of \$10,994 for the purchase of arms in the latter country (February 17, 1881); that they advanced sums of money to the Peruvian consul-general in San Francisco to defray the expenses of the embargo of certain Chilean vessels which had arrived there laden with nitrate (June 25, 1880, and December 28, 1881).

"The account current and the correspondence aforesaid corroborate these facts and are to be found collated in the pamphlet entitled *Documentary Evidence on Behalf of Respondent Government*. The agent of Chile maintains that all these facts, in connection with the items inserted in the account current and other documents, constitute aid and comfort voluntarily given by the memorialists to the enemies of Chile, which deprives them of access to this commission.

"The memorialists deny these allegations and recapitulate their arguments in the document entitled *Statement and Brief of Claimants in Answer to the Motion of the Respondent Government to Dismiss the Claim*, in the manner following:

"1st. That the payments made by W. R. Grace & Co. to Peru were made out of funds in their hands belonging to the Peruvian Government. The fact that that government was at

war with Chile did not release the claimants from their obligation to pay their debt to Peru, either directly or on the order of the government of that country.

"2d. That the funds in the hands of W. R. Grace & Co. arose from commercial transactions between it and the Government of Peru prior to the breaking out of the war between Peru and Chile. Such state of war could not alter the commercial relation between the parties.

"3d. That all of the articles complained of were furnished by claimants to Peru in compliance with a contract entered into between them and the Government of Peru prior to the breaking out of hostilities between Chile and Peru, and their contractual obligation to perform that contract continued notwithstanding such war.

"4th. That the articles complained of and mentioned in the schedules and the documents of respondent were not contraband of war.

"5th. That the claimants being neutral citizens of the United States, a friendly country to both Chile and Peru, had a right to carry on their commercial business with the government or citizens of either of the belligerents without molestation.

"6th. That even though the articles were contraband, the only penalty was the peril of seizure if captured *in transitu* by the Chilean Government. That the penalty did not go beyond the contraband goods and attach in any way to the person of the neutrals or to their goods not contraband.

"7th. That the evidence shows that claimants were not only willing but actually did sell the same articles to the Republic of Chile during the war, after the occupation of Lima.

"8th. That General Lynch, being military commander of the Chilean forces of occupation in Callao, charged the house of Grace Bros. & Co. with having given aid and comfort to the Peruvians, and threatened to confiscate certain of their property as being enemies of Chile, but upon an investigation of the charge not only revoked his threat, but returned the property to them, and afterward paid them for the property which he seized and used in military operations. That by the conduct of the commander of its armies the Government of Chile is estopped from setting up a breach of neutrality on the part of the claimants.

"9th. That the account current on which the agent of the respondent government relies to establish the aid and comfort

to the enemies of Chile was made out long after the capture of Lima by Chile, and when the war had definitely ended.

"In view of these antecedents we must ascertain what voluntary aid and comfort means, and whether the memorialists have really given such aid and comfort voluntarily to the enemies of Chile.

"The principle of aid and comfort in the matter of claims is a modern creation in international law; it rests upon the fact that access to courts of arbitration is a purely conventional privilege; that it is the contracting parties who should decide the character of persons who can appear before these courts, and what class of claims may be presented thereto.

"According to the terms of Article I. of the convention of Santiago, among others, no parities may appear who have given voluntary aid and comfort to the enemy of the respondent state. The question here is not an imputed crime, harmful to certain claimants, but a conventional stipulation which limits the field of action of the commission, founded on the very just principle that it would not be proper for the state that has suffered through the acts of persons who have given aid and comfort to its enemy to be bound to grant to these the advantages it has accorded to those who have preserved a strict neutrality. Upon establishing this limitation, the contracting parties have not had in view any penalty for acts violative of international practices; they only and simply refuse to accord a privilege to those whose voluntary acts have tended to favor their enemies.

"The difficulty is, then, to formulate a rule that shall determine when aid and comfort has been given, and in what measure neutrals, who, as a general rule, have the right to maintain commercial relations with the belligerents, are to be excluded from the benefits aimed at by the treaty from which this commission derives its authority, because of the fact of having continued their habitual commercial transactions with the enemy and even those growing out of contracts. In other words, to what restrictions is the trade of a neutral subject who later on may find himself in the necessity of appearing before a commission of arbitration established under conditions similar to those the convention of Santiago provides, if he does not wish to see himself deprived of the privileges of such convention in consequence of a motion such as that made by the agent of the respondent government?

"The precedents that may serve for the proper solution of this point are not numerous. On the 3d of March 1863 a law of the United States was enacted entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts of the United States.' Section 3 thereof provides that 'Any person claiming to have been the owner of such abandoned or captured property may * * * prefer his claim to the Court of Claims, and on proof * * * that he has never given any aid or comfort to the present rebellion.'

"Another official act, which is an international agreement, is the treaty concluded between France and the United States on the 15th of January 1881, which contains, in its first article, some dispositions absolutely the same as those of the convention of Santiago of August 7, 1892.

"In the interpretation of the law of the 3d of March 1863 and of the convention of January 15, 1881, the juriconsults and the arbitrators who have been called upon to decide the question of aid and comfort given the enemy have frequently started from different bases, and, at times very strict, excluding from the legal or conventional benefits claims of persons who have given the enemy really slight, unconscious, and accidental aid and comfort. There is, therefore, since modern publicists have not occupied themselves in determining this question, room to indicate under what circumstances the aid and comfort furnished by a neutral to one of the belligerents will deprive him of the prospective redress for acts committed by the civil or military authorities of the other belligerent to which otherwise he would be entitled.

"In the absence of precise rules in this matter, it is necessary to attempt to establish the limits within which commercial transactions may constitute the *exceptio pacti* contemplated by Article I. of the convention of Santiago.

"In all cases where the aid to the enemy has been furnished in flagrant violation of international laws or the rules established by the belligerent in interest (*blocus par ex.*) it is undeniable that there has been aid and comfort. In the second place, in all cases in which the acts committed would have involved the crime of high treason, if they had been committed by the subjects of a nation in behalf of the enemies thereof, we would have to admit that aid and comfort in the sense established by Article I. of the convention of Santiago has existed.

"The same rule should be applied to cases wherein the alleged acts refer to the furnishing of articles which should be considered as contraband of war and subject, therefore, to confiscation had they been seized and been the subject of trial at the proper time.

"Outside of these limits, which determine the cases in which access to this commission may be refused, it is undeniable that the commerce of neutrals is not subject to any restriction other than that which may be imposed thereon by the usages of nations. The neutral who may have furnished one of the belligerents articles that may be considered as contraband, has given aid and comfort thereto, since the furnishing and transporting to the enemy of articles which by their nature may serve directly or indirectly in the war is considered as illegal. The neutral, in fine, who has committed an act the natural consequences of which would be to increase the strength of one of the belligerents to the prejudice of the other, has given aid and comfort, because, if, instead of acting in his neutral character, the acts committed by him had been in behalf of the enemy of his own country, he would have made himself liable for the crime of high treason.

"Aid and comfort, according to the terms of Article I. of the before-cited convention, must be voluntary.

"In order that voluntary aid and comfort may exist, it is not necessary that the acts should have been intentionally committed in behalf of one belligerent and against the other. There may be a voluntary act without a hostile intention, as a hostile act may also be done involuntarily. So, in the case before us, the agent of the Government of Chile has incorrectly accused the claimants of the act of having furnished voluntarily ten launches to the Peruvian Government. This furnishing was done by order of that government, and the claimant houses, though not desiring to do it, were forced into that loan, and the fact that they did not protest before their diplomatic representative for this violation of their neutral character can not be invoked against them. They submitted to the conditions of the stronger. It is the same as if the magistrates of a city, threatened with death, should reveal the place where the national funds were secreted; or a countryman who, under the same circumstances, should have given aid and comfort to the enemy by showing him the topography of the country. We believe further that the planter who has accepted the price of forage furnished the enemy has not given it voluntary aid and

comfort because if he had declined the money he could not thereby have prevented the enemy on the march from taking what he needed for the supply of the troops or the train of his army. In other words, the willingness to give aid and comfort to the enemy without assuming a hostile character towards the other party, can be considered as established in all cases in which he who commits those acts in his sound senses can and must know that such acts involve an increase of the strength of one of the belligerents to the detriment of the other.

"In their reply the claimants have maintained that the acts charged against them should be excused by reason of the contracts which existed previous to the commencement of the war. Those contracts, in their judgment, had restricted their liberty, obliging them to carry out during the whole period of the hostilities what they had engaged to do before the commencement thereof. Under the point of view of the voluntary aid and comfort contemplated by the terms of Article I. of the convention of Santiago, that excuse is inadmissible. The state of war is a case of superior force which suspends, modifies, or alters all contracts, returning to the contracting parties the liberty they had compromised in time of peace. If, after the commencement of hostilities, the contracting party persists in giving aid and comfort to one of the belligerents he can not invoke, as regards the consequences of his acts, the restriction of his free action through contracts existing previous to the commencement of the hostilities. This principle can and must be admitted if the analogy of the cases of contraband and high treason are admitted. As a fact, a neutral who, in time of peace, should promise to furnish a foreign state a quantity of arms, ammunition, field telegraphs, for example, or provisions, he could not prevent the confiscation thereof, should they be seized, on the ground that they were articles that he had agreed to furnish to one of the belligerents pursuant to contracts made previous to the outbreak of hostilities. Precisely the same thing occurs in the case of high treason. No previous contract would protect one who, to the prejudice of the interests of his country, furnishes the enemy money for the purchase of arms or to increase his financial resources.

"These principles established, we will enter upon the examination of the grounds of the motion of the respondent government and the arguments of the memorialists, viewed in the light of these principles.

"We have shown that voluntary aid and comfort exist in cases where the articles furnished would constitute and would be seized as contraband of war if they were captured on the sea, and in cases in which the resources supplied would involve the crime of high treason had they been furnished to the enemy of a nation by a citizen thereof. Within these propositions the fact that what constitutes contraband of war is frequently vague, variably laid down by the publicists, and often the subject of agreements may give rise to controversy.

"On this subject no treaty between the United States and Chile changes the general principles established by science relative to contraband of war. It is necessary, then, to accept, so as to determine the principle governing this point, the opinions of the most impartial jurists representing the most liberal modern ideas. Rivier, for example, in his *Lehrbuch Über das Völkerrecht*, section 68, gives the following definition of contraband of war: 'Articles of contraband are those which serve directly for the war—that is to say, arms of all kinds, materials and ammunition for firearms, explosive material, army supplies, articles of equipment, clothing, and uniforms. Next follow articles which serve indirectly for war, such as iron in bulk, lumber for construction, the rigging, sails, and materials which after preparation may be used in the war, also pitch, tar, and horses. While the first of these articles may be always confiscated, the latter will only be when the circumstances *shall be of such a nature as to show the intention to increase the strength of the adversary*.

"'Articles of food and money are not to-day considered as articles of contraband. The exception must be admitted that articles of food must be considered as contraband of war when they are furnished directly to a hostile fleet. It is the same with coal furnished a fleet. Dispatches carried to an enemy, the conveyance of men, war vessels, and transports are also contraband.'

"This definition would by itself be sufficient to determine whether the houses of Grace & Co. have been guilty of acts which, considered in the light of contraband of war, constitute an *exceptio pacti* pursuant to the provisions of Article I. of the convention of Santiago; without going into a simultaneous consideration of whether the acts charged would have also constituted the crime of high treason if they had been committed by the citizens of a state in behalf of the enemies thereof. Recon-

sidering some of the allegations made by the memorialists and denied by the respondent government, it appears to us undeniable that, according to the declarations of John W. Grace, partner in the house (pages 18 to 22 of the claimants' depositions), the house of Grace Bros. & Co. 'were purveyors of naval supplies for the Peruvian squadron, and that the articles that it sold embraced all kinds of articles necessary to a ship, from a needle to an anchor, all sorts of supplies, food, rope, sails, pitch, anchors, chains, and other articles.'

"In accordance with the principles expressed by Rivier, pursuant to those recognized by modern science, and in conformity with the terms of the formal and textural declaration of one of the heads of the claimants' houses, the latter have furnished anchors, pitch, tar, sails, all articles of contraband. Would a citizen furnishing the enemy of his country such articles be punishable or not?

"The house of W. R. Grace & Co. has furnished:

- "December 31, 1880. Provisions and naval supplies to the squadron in December 1880 \$35, 796. 88
- "January 15, 1881. Provisions and naval supplies for the squadron during the first fortnight of January 1881, as per annexed receipt..... 14, 806. 36'

"According to Rivier and all modern writers, provisions should be considered as articles of contraband whenever administered directly to a hostile fleet, which has been done in this case. The voluntary supplies given by a citizen to the enemy of his country would constitute a *corpus delicti* in a trial for high treason. We have no doubt whatever that the said houses have given the Government of Peru, to the detriment of that of Chile, articles intended to directly assist in the prosecution of military operations, as may be proven by the following items:

- "October 31, 1880. For electric wire and batteries intended for the use of the reserve corps of the army, as per invoice..... \$6, 690. 81
- "December 18, 1881. To amount of the following invoices for electric wire and batteries embarked by order and at the expense of the supreme government, less product of the sale of said articles returned to New York, as per statement of sale herewith 2, 752. 47'

"See with regard to cables intended for military operations, Calvo, *Droit International*, sections 2721 and 2722, and Martens,

Volkerrecht II. sec. 132; and also the report of Mr. Renault in the *Annuaire de l'Institut de Droit International*, Vol. I. 1879-1880, p. 370.

"Would not the furnishing of such articles by a neutral be considered as contraband of war? And if it were done in behalf of the enemy of his country, would not the citizen so doing suffer all the force of the law?"

"As regards the charge in the account current mentioned above:

"March 18, 1881. To salary to the mechanic Charles E. Pettie, under contract for remodeling Remington rifles, old style..... \$450.00'

"Mr. Edward Eyre, one of the heads of the houses of W. R. Grace & Co. and Grace Brothers & Co., has not wavered in acknowledging (p. 43 of claimants' depositions) that there was no money in the country (Peru) other than the paper money issued by the dictator, and that they (the said houses) were requested by the Government of Peru to guarantee to this man (Pettie) that he would receive the \$450, and that they (Grace) paid him with a draft on New York. The mechanic objected to doing the work and accept Peruvian money. Would not a Chilean citizen who should guarantee the payment of such work, done in behalf of the Peruvian Government during the war with the Government of Chile, render himself liable to be tried by the courts of his country?"

"Let us also note that W. R. Grace & Co. spontaneously loaned the consul-general of Peru the funds necessary to attach the Chilean cargoes of nitrate while the proceeds of the sale of those cargoes constituted for the Government of Chile a valuable resource for the continuation of the war.

"Note the items of the account current:

"December 28, 1881. To payment to the consul-general in San Francisco to continue his efforts to embargo the nitrate laden in Tarapacá by the Chileans \$300

"June 25, 1880. Payment to the consul-general at San Francisco for instituting prosecution and attachment of the nitrate embarked at Tarapacá by the Chilean authorities 500'

"Finally let us cite the following charge:

"February 17, 1881. Payment of the bills of the special commissioner for the purchase of arms in the United States—Mr. G. Bogardus.. \$10,994.02'

"And in connection with this item the letter written by W. R. Grace & Co. to the minister of war of Peru, in which he tells him with respect to this advance for the purchase of arms: 'In this case, Mr. Minister, as in all the others, we came forward in all willingness with our services and money.'

"We believe that the voluntary aid and comfort are proven in a clear and conclusive manner, and that the efforts of the claimants, when they affirm (Recapitulations 1 and 2 of the statement and brief of claimants in answer to the motion of the respondent government) that the payments were made out of funds belonging to the Government of Peru cut no figure, since from their own spontaneous declaration and the confessions set forth on pages 56 and 57 of the depositions for the claimants, it appears that the house of W. R. Grace & Co. advanced funds of its own to Peru to carry out its obligations, in the hope of reimbursing itself later on from the proceeds of the sales of nitrate. And it even appears that the voluntary advances overbalanced the sum proceeding from said sales, a considerable balance resulting in favor of W. R. Grace & Co.

"From the facts established it can not be doubted that the houses of W. R. Grace & Co. and Grace Bros. & Co. have given voluntary aid and comfort to the enemies of Chile, and therefore it is held that the motion of the agent of the respondent government be granted, and that claims Nos. 16, 19, 20, 21, 22, and 29 be dismissed for want of jurisdiction."

Grace Bros. & Co. v. Chile, No. 29; opinion of Messrs. Claparède and Gana, commissioners, United States and Chilean Claims Commission, convention of August 7, 1892. See also Shield's Report, 84 et seq.

Mr. Goode delivered the following dissenting opinion:

Mr. Goode's Dissenting Opinion:

"The agent of the Republic of Chile has submitted a motion to dismiss these cases for the reason that Grace Brothers & Co. and William R. Grace & Co. are justly chargeable with having given aid and comfort to the enemies of Chile during the years 1880, 1881, and at other times. In support of this motion he has produced certain documentary evidence, consisting of extracts from the general account current of W. R. Grace & Co. with the Government of Peru, presented to said government in 1886, and copies of correspondence between the parties in relation to some of the items charged in said account.

"In opposition to said motion the agent of the United States has filed the depositions of Robert T. Clayton, Edward Eyre, Alberto Falcon, O. G. H. E. Kehrhahn, John B. Mulloy, and Henry J. Schenck.

"The first item in the general account current relied upon by the Republic of Chile is the following: 'January 15, to balance due by the supreme government on the price of the cargo of coal on the ship *Andrew Johnson*, as per vouchers annexed.'

"The testimony of John W. Grace, Henry J. Schenck, and Edward Eyre proves that this cargo of coal was offered for sale in open market and bought by the Government of Peru as the highest bidder; that it was sold by the claimants in the ordinary course of business upon a commission, and that they had no other interest in the transaction whatever.

"The next two items are the following: 'December 31, 1880. To provisions and naval supplies furnished the squadron in 1880.—January 15, 1881. To provisions and naval supplies furnished the squadron during the first fortnight of January 1881, as per vouchers annexed.'

"The testimony shows that the provisions and naval supplies referred to were such as were furnished by the claimants to all their customers alike in their general business as ship chandlers.

"Mr. Edward Eyre, a witness produced on behalf of the claimants, testifies as follows:

"Q. State the character of goods that the houses of Grace Brothers & Co. dealt in, in Peru, during that war.

"A. The house at that time dealt almost exclusively in naval stores; that is to say, the principal business of the house was to supply provisions, naval stores, and coal to the shipping that came to Callao, notably to the American Navy, and occasionally to the English navy, and very frequently to other navies, besides the merchant vessels, and for supplying under contract such supplies as were used by the Peruvian navy.

"Q. When did the houses cease to supply the Peruvian navy with these articles under contract?

"A. On the 15th of January 1881; that was the date of the last important battle between the Peruvians and the Chileans.

"Q. The Chileans then had possession?

"A. On the 16th they had virtually possession; they didn't actually come into the place; there were no forces to oppose them, and the Peruvian navy had ceased to exist.

"Q. State who, after that time, supplied the Chilean navy with supplies?

"A. For the first few days after the occupation the Chileans supplied themselves with their own transports, but as soon as they had sent their transports away our house supplied them under a contract given to us by General Lynch, a contract very similar to the one we had with the Peruvian navy.

"Q. Were the goods supplied to the Peruvian and Chilean governments alike in character under these contracts?

"A. Yes; except that there was a difference in the rations supplied to the Chilean navy; it was a very much larger ration than we supplied to the Peruvian navy; in other words, the Chileans eat more.

"Q. How long did you continue to supply the Chilean navy?

"A. We continued to supply the Chilean navy as long as they kept any vessels in Callao; and, in fact, I think the contract that we had with them is still supposed to be in force; I have never had any advice of its having been cancelled.

"Q. Was the business of the house of the same character during the war, so far as its trade was concerned, that it was previously?

"A. Exactly."

"The next item reads as follows: 'October 31, 1880. To balance of the invoices for insulated wire, electric batteries for the reserve corps of the army.'

"The testimony shows that the wire and batteries were shipped by W. R. Grace & Co. to the Government of Peru by its orders and at its expense; that they were paid for with the money of Peru in the hands of the claimants; and that claimants did not know at the time of the transaction, and have never known, what use was intended to be made of them.

"As to this item, Mr. Edward Eyre testified as follows:

"Q. I would like to ask you there if, in the sale and delivery of the wires and batteries referred to in that item, you had any knowledge at the time to what use they were to be put, or whether you know now to what use they were put?

"A. We had no knowledge at the time they were ordered to what use they were to be put. We were ordered to deliver them when the invoices came to the chief of the reserve corps, and we supposed they were for establishing telegraphic communication between the central government of Lima and the different points where the reserve corps were stationed. We supposed that; we didn't know what the goods were ordered for.

"Q. Were these goods used for any other purpose by the Government in Peru?

"A. I don't think so. The goods were consigned to Grace Brothers & Co., Callao, having been shipped on an order from the government by W. R. Grace & Co., of New York.'

"The next item reads as follows: 'March 18, 1881. To salaries to the mechanic Charles E. Pettie, under contract to remodel Remington minie rifles.'

"In regard to this item the testimony shows that Pettie, a mechanic and American citizen, had been employed by the Peruvian Government to repair some old rifles; that at that time there was no money in the country except paper issued by the dictator, and that the claimants were asked to guarantee that this man would receive \$450, which was paid to him by a draft on New York, and out of the funds of the Peruvian Government.

"As to this item, if the claimants are justly chargeable with having given aid and comfort to anybody, an American citizen, and not the Government of Peru, was the beneficiary.

"Another item in the general account current is the following: 'July 30, 1880. To value of three launches loaned the supreme government and lost in the blockade of Callao, as per record herewith.'

"It appears from the testimony that ten launches, including the three in question, were forcibly seized by the Government of Peru and used for defensive purposes. As to the seizure of these launches, Mr. Eyre testifies as follows:

"The next item is for the value of three launches. The Government of Peru decided that it was advisable—somewhere in 1880—to make use of all the lighters that were in the bay of Callao for a defense around the discharging dock, or Darsena, as it is called. The chief naval authority in the port notified all the owners of lighters, including the Pacific Steam Navigation Company, the Discharging Dock Company, Grace Brothers &

Co., and others, that they would require the lighters, and proceeded to take them. I wish to explain here that the lighters were taken by the authorities, and were not voluntarily tendered or offered by any of the owners. When the Chilean authorities took possession of the port, and we went to find our lighters, we found that three of them had disappeared or been lost. And when the government—Peruvian Government—was re-established, I personally presented a petition asking for payment of the lighters that had been lost, and after some trouble in proving the loss and value of the lighters succeeded in getting a decree recognizing the obligation on the government's part.'

"In this statement he is fully sustained by the testimony of Kehrhahn, Schenck, Falcon, John W. Grace, and Mulloy.

"I have thus noticed the most important items in the general account current between the claimants and the Government of Peru. It would be impossible to refer to all of them without extending this paper beyond reasonable limits.

"After a careful examination of all the testimony introduced on both sides, I think the facts may be fairly stated as follows: That long anterior to the war, and as far back as the year 1868, the claimants had furnished the Peruvian Government with naval supplies and provisions; that in the year 1877 they entered into a contract with Peru under which they continued to furnish the same articles; that after the declaration of war in April 1879, and until the capture of Lima in January 1881, the claimants continued to carry out their contract with Peru; that after the Chilean fleet had taken possession of the port of Callao and the Peruvian navy had ceased to exist, the claimants entered into a similar contract with Chile, by which they furnished similar stores and provisions to the Chilean navy; that the claimants, as general merchants and ship-chandlers, were engaged in legitimate trade and commerce with Peru and Chile, and with no purpose of extending aid and comfort to either belligerent; that the claimants had a mercantile house in Peru and in the city of New York; that they had a contract with Peru for the sale of its nitrate in the United States and Canada, and for furnishing naval stores and supplies; that in keeping the account current the claimants charged themselves with the proceeds of the sale of the nitrate and credited themselves with the prices of the articles furnished at the request and by order of Peru. In other words, that the various items of which complaint is made were paid for not with the money of the claimants, but with the money of Peru in the hands of the claimants and subject to the order of Peru. That the claimants observed a strict neutrality between the belligerents is abundantly shown by the testimony. Mr. Kehrhahn says:

"A. I knew the members of this firm very well indeed, like everyone else in the country would know one of the most prominent firms of that country, W. R. Grace & Co. and Grace Brothers & Co., being about the most prominent houses in Peru, so that I could not help knowing the members of that firm, coming in contact with them as often as I did, and as far as I could judge myself, and as I heard from everybody else whose judgment might be thoroughly relied upon in my opinion expressed themselves to the effect that W. R. Grace & Co. and Grace Brothers & Co. in this affair were entirely and strictly neutral. In fact, I don't see how it could be otherwise, because before the war was scarcely finished, W. R.

Grace & Co. established a branch house in Valparaiso. As they must have had that end in view for some time before the war perhaps even commenced, I certainly think it would not have suited their purpose to in any way antagonize the Chilean Government.'

"A. I was very well acquainted with their business house in Lima, as well as the one in Callao, and, as I before remarked, I have known them ever since 1868 to be purveyors to the Peruvian Government and Peruvian navy, supplying them with all kinds of naval stores, coal, provisions, etc., like any firm being in the same line of business would do.'

"A. I know of no interruption in their business relations with the Peruvian Government; that means to say that I think the same business was carried on by them during the war as what was carried on by them before and after the war.'

"A. My own personal acquaintance of these gentlemen and their often repeated statements to me as well as to others as to their strict neutrality, and the general public opinion on the subject, would make me believe that I am right in my assertion in stating that they were strictly neutral; and, not having any positive evidence, or nothing having come under my personal notice that they, by any act whatever, broke the neutrality that they always did observe and that the public and people in general gave them the credit of so doing, makes me still more adhere to my opinion that they were strictly neutral.'

"Mr. Clayton says:

"Q. From your knowledge of the conduct of the members of the firms of W. R. Grace & Co. and Grace Brothers & Co., during that war, and from your associations with them, also from your knowledge of the character of the business carried on by them at their store, what would you say as to their neutrality during the war between the governments of Peru and Chile?

"A. I should say they were perfectly neutral, as far as I knew.

"Q. Mr. Clayton, is there anything else in connection with this question of neutrality of the firms you have mentioned that I have not asked you about that you know? If so, you will please state it? I don't know what you may know about this matter.

"A. The conversations we had were always neutral; it was supposed to be an American house; I have never seen anything else any time but that was neutral all through, to my knowledge.

"Q. The actions of the parties as you observed them, both in their personal conduct and in their business relations, were those of neutral persons?

"A. Yes, sir; entirely.

"Q. And in business relations neutral?

"A. Yes, sir.'

"Mr. Falcon says:

"Q. Had you a knowledge of the character of the business carried on by W. R. Grace & Co. and Grace Brothers & Co. in Peru during the war?

"A. I was not acquainted with them personally in Peru while I was there; I heard their name, but I know this, that the dictator himself, and all the officers of the government were as much afraid of foreigners as of Chileans—they were suspicious with the foreigners because they knew that they had no interests at stake as the Peruvians had—they had no reason to be sentimental about it.'

"Mr. John W. Grace, among other things, testifies as follows:

"Q. When you reached Peru, had the Chilean forces advanced as far as Lima?

"A. No, sir.

"Q. You may state whether you remained there until the Chileans did take possession of those places.

"A. I was there when the Chileans took possession of Lima.

"Q. How well were you acquainted with any of the Chilean officers who were stationed there at the time, if any?

"A. I became almost at once very intimately acquainted with General Lynch, with Admiral Latorre, with Captain Simpson, Lieutenants Wilson and Chenaux, and so many others that I couldn't relate all their names by any means.

"Q. Now, you may relate fully, if you will, what were your relations and associations with these Chilean officers, and what their treatment was toward you and your business houses there.

"A. I was never treated so well by any people in my life as I was by them. When I went to Peru I went for the purpose of relieving my brother, M. P. Grace, who lived there, as I told you, and I took possession of a quinta, or a house at a place called La Punta, which was a health resort where he resided. We had to abandon that place and live in Lima when the blockade was established, because we were right on a point out on the sea there and under the guns of the Chilean men-of-war, quite near the Peruvian batteries.

"Q. I wish you would state fully of what this treatment on their part consisted.

"A. Well, the particular treatment for which I was always very grateful was that one of my children—my eldest child now—got badly attacked with a malarial fever, and I called on General Lynch and told him that as the country was under a military occupation and disturbed in a great many places, that it was impossible for me to take this child to the mountains or to the seaside at this place, La Punta, which were the only places which the doctors thought would save her life, and I asked him if it was possible, under these circumstances, if I could take her to live at this point, which was at that time abandoned by everybody. He told me that I could take the child there, and that I could go down myself and my family, and live more safely than ever I did under the Peruvian Government, and that he would send a troop of soldiers there to remain on guard around my house, and send them there specially to take care of me, and that he would be answerable for my safety, and he did march a company of men from Lurigaicho, a very long march, to the point for that special purpose the very next day, and the very next day I also arrived with my family, including this child, and found the men there as he had promised.

"Q. During all this time what were the social relations between your family and the family of General Lynch and other officers of the Chilean forces?

"A. They were quite intimate relations. I felt so grateful to General Lynch about this particular, as the child recovered, that I took especial interest in inviting himself and his officers to my house, and they came there constantly, dined with us, took tea with us—were on the most intimate acquaintance with us. The religious services, on account of the disturb-

ance, were suspended where we lived, and by Captain, afterwards Admiral, Latorre and General Lynch himself we were invited to divine service on board the Chilean ships, and my wife and children, daughters and sons, attended there frequently, and attended the entertainments that were given on board these ships frequently; and they attended every entertainment without exception, some of them that were given at our house, and we had the honor of giving the first entertainment in our house in which we induced Peruvians and Chileans to meet.

"Q. Now you may state further, if you know the facts personally, whether during that time any of the Chilean officers or authorities showed any disposition to regard you or the members of your firm, or your business, as having been anything but neutral during the war, and at that time especially.

"A. I couldn't state any stronger evidence to the contrary than what I just told you; they never did accuse us of anything of the kind—in fact, General Lynch went so far as tell me that he had a perfect system of spies between the fleet and the shore all this time, and that he knew perfectly well what was going on on shore, and he told me that he knew what we were all doing, and told me that the admiral used to have fresh flowers and communications from the shore every morning on board his ship.

"Q. Did he ever, in any of these conversations, refer to any instance, as to yourself or any member of your firm, in which you had been under surveillance for the purpose of testing whether you were neutral persons or not?

"A. Nothing, either from himself or any of his officers, or from anybody during my long residence in Chile afterwards, did I ever hear the slightest reference or suspicions—in fact, I had very good proof from the extraordinarily kind treatment received in Chile to the contrary.'

"Certain communications from the claimants addressed to the Peruvian minister of state are adduced for the purpose of sustaining the charge of aid and comfort. These communications are couched in polite and complimentary terms, such as are usually employed in diplomatic intercourse, and were evidently written for the purpose of making a pleasant impression upon the Peruvian minister and securing his favorable action upon the subject under discussion; but they are not sufficient to establish the fact that the claimants have given aid and comfort to the enemies of Chile.

"In the case of the United States v. Lumsden *et al.* (1st Bond's Reports, page 5), in which the defendants were tried for the attempted violation of the neutrality laws of the United States, the court said:

"No proposition can be clearer than that some definite act or acts of which the mind can take cognizance must be proved to sustain the charges against these defendants. Mere words, *written* or spoken, though indicative of the strongest desire and the most determined purpose to do the forbidden act, will not constitute the offense.'

"No case can be found in which the mere words or expressions of sympathy for one belligerent have been held by any court to constitute a breach of neutrality towards the other belligerent. What is the law applicable to the facts, as disclosed by the testimony in this case? Article I. of the convention under which the commission has been organized provides that:

"All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Chile, arising out of acts committed against the persons or property of citizens of the United States not in the service of the enemies of Chile, or voluntarily giving aid and comfort to the same, by the civil or military authorities of Chile, * * * shall be referred to three commissioners, etc.'

"What is the meaning of the words 'aid and comfort,' as here employed? It is to be presumed that they were used by the treaty-making power with reference to the well-established principles of international law. Unless there be a breach of neutrality there can be no giving of aid and comfort to a belligerent. If the claimants, citizens of the United States, have done any act that amounts to a breach of neutrality towards Chile in her war with Peru, they have given aid and comfort to the enemies of Chile, but not otherwise. In other words, the claimants can not be charged with giving aid and comfort unless they have violated the neutrality laws in their dealings with Peru. Have they done so? I think not. If the claimants in the regular course of trade had sold to Peru arms and munitions of war, the transaction would have been entirely legitimate. In the case of the *Santissima Trinidad* (7 Wheaton, 340) Mr. Justice Story, in delivering the opinion of the Supreme Court of the United States, says:

"There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels, as well as munitions of war to foreign ports for sale. It is a commercial venture which no nation is bound to prohibit, and which exposes the persons engaged in it to the penalty of confiscation.'

"In Wheaton's *International Law*, Boyd's 3d edition, page 595, the same doctrine is stated as follows:

"A neutral government is bound not to assist a belligerent in any way. On the other hand, the subjects of the neutral are entitled to continue their ordinary trade, and when that trade consists in exporting arms, or ships of war, there arises a conflict between the rights of a belligerent and the rights of neutral subjects. A government may not in any case sell munitions of war to a belligerent, but its subjects may, provided they sell indifferently to both parties in the war, and provided the transaction is a purely commercial one, and not done with the intent of assisting in the war, *animo adjuvandi*, but simply for purposes of gain. The right which war gives to a belligerent is that of seizing such goods as are contraband, when on their way from the neutral state to his adversary.'

"Conceding, therefore, for the sake of the argument, that some of the articles sold by the claimants to Peru were contraband of war, I submit that they had the right to sell them, subject only to the right of seizure *in transitu* by the Chilean Government. (See Kent's Commentaries, part 1st, vol. 1, and 11th volume of Opinions of Attorneys-General, page 451.)

"But in my opinion the documentary evidence relied upon by the respondent is insufficient to show that any of the goods sold by the claimants to Peru were contraband. They are not found in the list of prohibited articles enumerated in the treaties between the United States and Chile, Peru, or any of the South American republics. The manifest object of those treaties was to promote and encourage free and unrestricted commerce. They only prohibited the transportation and sale of

such articles as are actually used in war. The articles mentioned in the documentary evidence referred to were not of that character, and if they had been, the only penalty would have been confiscation in the event of their seizure by Chile while *in transitu* between the United States and Peru.

"The learned counsel for the Republic of Chile in support of their contention have cited decisions of the Court of Claims and the Supreme Court of the United States. In my opinion, those decisions have no application whatever to the question now under consideration. They involve the construction of the nonintercourse act of Congress, approved July 13, 1861. They were based upon a law of Congress and not upon the law of nations; they involved the question of loyalty and not the question of neutrality. There is a very broad distinction between the two. It is altogether illogical to say that the claimants have given aid and comfort to Peru because they may have done something for which as citizens of the United States they might have been convicted of treason in the late war between the United States and the Confederate States. The phrase 'aid and comfort' is comparatively new in international law, and no well-defined meaning has been given to it by international law writers. It was first employed, I believe, in the treaty between France and the United States establishing a commission for the settlement of French and American claims. That commission decided that the Le Mores, two French citizens, were not chargeable with giving aid and comfort to the enemies of the United States, although the evidence proved that they had delivered 609 bales of gray cloth to the Confederate authorities under a contract with the Quartermaster's Department to supply the cloth for the army of the Confederate States. This is a very important decision, rendered by an international tribunal under a convention containing the same provision in regard to aid and comfort and should be accepted as strongly persuasive authority in these cases.

"In view of the facts and circumstances, I feel convinced that the dismissal of these cases will operate as a great hardship upon the claimants. They have done nothing that good faith did not require in the fulfillment of their contract with Peru, made before the commencement of hostilities with Chile; they have done nothing in violation of the laws of nations which prescribe the duties of neutrals toward belligerents; they have made no discrimination whatever in their dealings with Chile and Peru, and have treated both belligerents alike. If Chile thought proper to declare war against Peru she had the right to do so, but she had no right to interdict legitimate trade between Peru and a neutral American citizen; she had no right to stop the wheels of commerce and thereby inflict loss upon an unoffending neutral. The rights of neutrals should be respected as well as those of belligerents.

"If the views of my honorable colleagues are correct, a neutral can only deal with a belligerent at his peril. A declaration of war by one nation against another involves not only the destinies of the two belligerents, but the rights and interests of the rest of mankind. No trade can be carried on with one belligerent without giving aid and comfort to enemies of the other. According to my understanding, such is not a fair construction of the phrase 'aid and comfort' used in the first article of the treaty; and I feel constrained to dissent from the decision which has been rendered."

5. TRADING WITH THE ENEMY.

Edmund I. Forestall, in his own right and as Case of the "*Felix*," partner in and representative of the late firm of Gordon, Forestall & Co.; James Johnston, administrator of James P. Wallace; and Joseph M. Cuculla, administrator of Simon Cuculla, presented claims to Messrs. Evans, Smith, and Paine, commissioners under the act of Congress of March 3, 1849, growing out of the seizure of the schooner *Felix* by the Mexican man-of-war *Tampico*, and the subsequent condemnation of the vessel and cargo at Alvarado, in 1825. The claims submitted by Forestall and Johnston were presented to the mixed commission under the convention between the United States and Mexico of April 11, 1839, but were returned by the umpire undecided. All the claimants were, at the time of the origin and at that of the presentation of their claims, citizens of the United States. The *Felix* was the property of Edmund I. Forestall.

The *Felix* sailed from New Orleans August 7, 1825, for Soto La Marina and Tampico, Mexico, having on board a cargo consigned to different persons in those places. She came to anchor in the outer roads of the harbor of Soto La Marina on the 7th of September, and was soon boarded by an officer of the Mexican man-of-war *Tampico*, then lying at anchor in the same place, who, finding the *Felix* 'suspicious,' ordered the captain, with all the vessel's papers, on board the *Tampico*. A summary investigation there took place, resulting in the seizure of the vessel and the sending her to Alvarado, where she arrived on the 18th of September. Next day, September 19, proceedings were taken before the junta of the marine for that department, a tribunal claiming and exercising jurisdiction over the matter, which proceedings terminated in the condemnation of the vessel, and, with trifling exceptions, of the cargo also. On the 9th of November, the cargo having in the mean time been landed and appraised, the 'assessor,' or legal adviser, of the junta, gave an opinion to the effect that the condemnation pronounced on the 19th of September might be confirmed. On the same day the junta adopted the opinion of the assessor; and ultimately the cargo, with the exceptions mentioned, was sold, and the proceeds were distributed according to the laws of Mexico. The vessel, having been appraised, was appropriated to the use of the Mexican Government. The property excepted from condemnation consisted of a worm and still, 10

cases of bottles, a billiard table, and a box of books. These articles were deposited in the custom-house at Alvarado for their owners.

Forestall claimed, individually, for the vessel and freight and the expenses of defending her; and, as the representative of Gordon, Forestall & Co., for the ten cases of bottles and the worm and still. Johnston, administrator of Wallace, claimed for 40 barrels of brandy, alleged to be of American manufacture, part of the cargo which was condemned; and Cuculla, administrator of Cuculla, for the residue of the cargo, which residue, with the exception of the billiard table and the box of books, was also condemned.

The Mexican members of the mixed commission resisted the claims of Forestall and Johnston on the ground that the *Felix* was lawfully seized and condemned for having on board property of Spanish subjects, or of Spanish growth or origin, which she had brought from Havana, a Spanish port, between which and the Mexican Republic all intercourse was then interdicted by the existence of war between the two countries.

The American members contended that, even if this charge were true, nothing but the property in question was liable to confiscation; that the vessel, being neutral, might lawfully carry enemies' property; that the seizure was not a capture *jure belli*; that neither the vessel nor any property on board was liable to condemnation by any municipal law of Mexico; that the proceedings, both on board the *Tampico* and before the junta of marine, were grossly irregular, and that the condemnation was pronounced by a tribunal having no jurisdiction of the subject-matter.

On these facts, the commissioners under the
Opinion. act of 1849 said:

"It becomes important in the first place to consider the true character of the voyage and the nature of the trade in which the *Felix* was engaged at the time of her seizure. Her last port of departure from the United States was New Orleans; but the commencement of the voyage was at Havana. Some portion of her cargo was unquestionably shipped at New Orleans and was American property; but much the larger portion of it had been, immediately before, brought in the same vessel from Havana. The evidence of this is found in a statement subscribed and sworn to by the captain of the *Felix* at the summary investigation which took place on board the *Tampico*, hereinbefore mentioned. The American commissioners do not appear to have regarded this statement as of any

importance in the case, or rather they considered it an aggravation of the injuries committed by the commander of the *Tampico* that such a deposition was obtained. They say that 'the self-constituted tribunal,' composed of officers of the *Tampico*, 'proceeded to examine the captain of the *Felix* on oath, administered to him by the commander of the *Tampico*, and to make and record a deposition as if made by him. Having secured the captain's deposition in their own shape, the next step was to secure the booty.'

"The board finds nothing in the proofs and documents before it to authorize an inference that the deposition of the captain was not freely given, and taken and recorded in the precise form he chose to give it. After his arrival at Alvarado he made a protest before the American consul at that place, reciting the injuries of which he complained, and naming particular acts of constraint and violence to which he and the crew had been subjected. He makes no complaint in it of having been required to give any deposition, or of having been compelled to sign any paper, or of any perversion or garbling of the statement which he had made, circumstances which it is highly improbable he would have neglected to mention if there had been any just ground of complaint on that account. Besides, the statement of the captain is corroborated, in many particulars essential to be considered, by papers and documents found on board the vessel, to which reference will hereafter be made. The account which the captain gives of the voyage of the *Felix* is as follows:

"That the schooner under his command is called the *Felix*, her burden 99 and three-quarters tons, from New Orleans, where she originated; that from thence she sailed for Charleston and Havana on 31st of January of the present year; that she had been engaged in three voyages to Havana until the month of July of the said year; that she undertook this voyage for New Orleans, sailing from thence (Havana) on the 17th of the same July, with a cargo of wine in cases and barrels, rum in pipes, wax, gin, coffee, and sugar, consigned to various merchants, among others to Mr. Simon Cuculla; that he anchored in that port on the 29th of the same month; that he discharged the greater part of that cargo, leaving on board the same wine and wax which he shipped at Havana; that he afterwards shipped the goods which appear in the manifest, which he made in that custom-house and which are exhibited in this act. * * * Being asked if he knows and to state what is the cargo, whether he has in his vessel Spanish property brought from Havana to New Orleans, disembarked and reshipped from thence in said vessel, and if he knows who are the owners, he said that in Havana his consignees, Mr. Castillo and Mr. Black, shipped goods by him for various persons in that city, bound to New Orleans, in which port he discharged the greater part of the goods which he brought and reshipped part of the wax and part of the goods, and retook on board 205 barrels of white wine, these last three articles being the same which he shipped in Havana, and brought on board for Soto La Marina, and Tampico, as appears by the bills of lading, which he has delivered; that all the rest which appears in the said bills of lading are goods reshipped in New Orleans—American property.'

"These last statements of the captain are in answer to the question whether he had 'Spanish property' on board and to whom it belonged, and his reply, that he had on board 295 barrels of wine, and a part of the wax and a part of the goods which he had taken on board at Havana, and that the rest of his cargo, taken in at New Orleans, was American property, leaves a very strong presumption that the wine, wax, and goods were in fact Spanish property. There is other proof in the case leading to the same conclusion. The captain of the *Felix*, being interrogated as to whether he brought 'any other papers or letters in his vessel, he said that what he brought he has exhibited, and they are on deposit in this vessel, the *Tampico*.' There were, however, subsequently discovered, as certified in the record of the proceedings of the summary examination, 'among the multitude of letters which the captain, Mr. James Ross, brought in his vessel, two documents concerning her cargo, which declare the embarkation of the barrels of wine and the wax, shipped at Havana, Spanish property, and they were accordingly added to the *expediente*,' or record of the proceedings. These documents are:

"1st. An invoice of 295 barrels of white wine shipped on board the *Felix* at Havana, consigned to Mr. Simon Cuculla, New Orleans, for account and risk of Don Alarico M. Zaballa, of Soto La Marina, and Antonio Blandin, to remit to said Zaballa; and the invoice sets forth the purchase of the wine in Madeira, 1st of July 1825, and the costs and expenses, and that the shipment was made by Blandin on account of Zaballa and himself, who were owners, and was insured in New York by a policy dated 15th of May 1825, for \$3,270.

"2nd. A letter of advice from Blandin, in Havana, to Zaballa, in Soto La Marina, dated 12th July 1825, confirming former letters and saying, 'I inform you I have shipped on board the American schooner *Felix*, Captain James Ross, 295 barrels very superior dry wine, bound to New Orleans, consigned to Simon Cuculla, to be remitted to you. This wine, which is very good, has cost me high; but it is at six months' credit; and each barrel contains four and a half *ambas*. I hope it will reach you soon, and that you will like it. I enclose you the invoice, amounting to \$3,865.81, and in case you wish it to be divided equally between us, as I have supposed, I will charge you \$1,923.91 for your share.'

"The wine, as appears by the bill of lading, was shipped at Havana on the same 12th of July by Antonio Blandin to Cuculla in New Orleans, as though it was his property and on his account and risk, and was accompanied also by a letter of advice requesting Cuculla to credit the amount, \$2,865.06, half to Blandin's account.

"No doubt whatever can be entertained that the wine was actually the property of Blandin, a Spanish merchant at Havana, and Zaballa, a citizen of Mexico, residing at Soto La Marina, and that Cuculla was merely the agent of the parties

through whom this intercourse between Spanish and Mexican ports might be carried on, apparently for the purpose of affording to it the protection of the American flag. There is also, among the documents filed by the claimant, an original letter in the Spanish language from Blandin to Cuculla, which has not been translated, dated at Havana, October 5, 1825, apprising him that information had just been received that the *Felix* had been excluded from the harbor of Soto La Marina, and had not been able to discharge any of her cargo previous to that event, and advising him that it would be necessary to make abandonment of the 295 barrels of wine to the underwriters, and adding: 'I take it for granted that you would order the remaining barrels to be insured from all risk, and until they shall be landed in the port of Soto La Marina.' They could not be landed, so that the underwriters must infallibly be responsible. This letter is wholly inconsistent with the idea that the wine in question was the property of Cuculla, as is represented in the memorial of his administrator, but harmonizes entirely with the other proof in the case, showing that it was really the property and at the risk of Zaballa and Blandin.

"There is also another original letter among the papers from Blandin to Cuculla, dated November 18, 1826, which was not translated, acknowledging the receipt of a letter from Cuculla of 23rd October and forwarding a new certificate from the custom-house (Havana) of the foreign growth or origin of the 295 barrels of wine shipped in the *Felix*. A certificate is found among the documents connected with these claims, which is probably the document referred to in the letter of Blandin just noticed. The translation of it, furnished by the claimant, is as follows:

"I, Don Bernardo Elamo y Melo, honorary member of the army and acting Controller of the General Collection of Royal Revenue in this place, by his Majesty, certify that on the 12th day of July last year, Mr. Antonio Blandin registered, bound to New Orleans, in the American schooner *Felix*, Captain James Ross, two hundred and ninety-five barrels of dry wine, S. C., mark for Simon Cuculla, which were imported into this port by the American barque *Orleans* from Gibraltar, and in testimony thereof I give the present in virtue of a decree of the Collector General issued at the request of the said Blandin. Havana Oct. 4, 1826. Signed—Bernardo Elamo, attested by the American Consul.'

"It also appears by the invoice signed by Cuculla that the wine was shipped by him at New Orleans and consigned to Zaballa as 'white Marseilles wine.' It has already appeared from the proofs in the case, submitted by the claimant himself, that the wine in question was Madeira wine, purchased in Madeira on the 1st day of the same month in which it was shipped from Havana; and the certificate and invoice describing it as 'imported from Gibraltar,' and as Marseilles wine, are both false and fraudulent, and, with the other circumstances

already alluded to, leave no doubt of its origin or ownership. Both were unquestionably Spanish.

"Among the cargo on board, and which was also condemned, were 77 boxes of beeswax, which the administrator of Cuculla now claims the value of; of which 27 boxes, as appears by the invoices, were consigned to Francisco Verde, and 50 boxes to Mr. R——. There were also 46 other boxes on board, shipped by Cuculla and appearing in the manifest of the cargo, of which no invoice is found among the proofs, and it does not appear to whom they were consigned. The deposition of the captain has already been quoted, to the effect that the wax on board was a part of that which he brought from Havana. Coming from that port, there is the strongest presumption that it was of Spanish origin; no proof to the contrary is exhibited. There is scarcely a less strong presumption that it was also Spanish property. The fact that it was shipped by Cuculla as his own, after the clear proof in respect to the wine which was shipped in the same way and at the same time, has no weight in the opinion of the board to impair that presumption. It is strengthened by other documents found in the case; and among them is a notarial protest made by Francisco Verde, to whom the 27 boxes were consigned, before the vice-consul of the United States at Tampico, on the 20th of September 1825, of which the following is an extract: 'Personally appeared Francisco Verde, of Tampico, merchant, and exhibited a bill of lading of a quantity of wax, shipped at New Orleans on the 13th day of August last past by Simon Cuculla, of New Orleans, merchant, on board the American schooner *Felix*, whereof James Ross was master, bound from New Orleans to Soto La Marina and Tampico, and consigned to the said Francisco Verde, viz: (F. C.) No. 1 a 20 L (F. C.) 21 a 27, twenty-seven cases white Philadelphia wax.'

"A similar protest was made at the same time by Joaquin Ganazcochea, attorney in fact of Manuel Ramon Canonge, exhibiting a bill of lading of the 50 cases of wax, also described as 'white Philadelphia wax.' These bills of lading must have been forwarded by Cuculla, and he could not have been ignorant that the wax was in fact brought from Havana in the *Felix*, and that there was no pretense whatever that it was of American origin, as his description of it would imply. There were also found on board the vessel several letters addressed by merchants in Havana to Marina La Soto and Tampico, which were annexed to the *expediente* or record of the proceedings, some of which are translated and are contained in the copy filed in this case by the claimant. Although none of the letters relate to the wax found on board the *Felix*, they evidently show that an illicit trade to a great extent had been carried on through Cuculla by these parties in Havana with their correspondents in Mexico. An extract from one of them, dated Havana July 7, 1825, from Ramon del Hoyo to José de

la Lama is in the following words: 'It is well that Don Diego remains in Marina in order to consign to him the wax of Castillo and Arce, if it goes there; but that of this house, although I say another thing to the company, with this date will go to New Orleans, Philadelphia, or New York, since when I wrote it I did not recollect what in the fifth paragraph of yours you tell me; but it is very regular, even to the last point, since it has already been sent to Cuculla and nothing has since happened.' Another of the letters also refers to Cuculla's agency in receiving and forwarding wax, and of effecting insurance on sundry parcels sent by other vessels at or near the same time.

"From this accumulated mass of testimony but one satisfactory conclusion can be drawn, and that is that the wax as well as the wine, though shipped by Cuculla as his own property, was in fact Spanish property and shipped on Spanish account. The same result, although the proof is not so strong, attends the other property shipped by Cuculla, and for which his administrator now presents a claim. This consists of several bales and trunks of foreign manufactured articles of merchandize, silks, ribbons, German, English, and French fabrics of cotton and linen, etc.

"It has already been seen that the captain deposed that he took on board a part of the goods brought from Havana. There were no other goods of this kind on board, except those shipped by Cuculla. The invoice of them is made by him in the same way as the invoices of the wine and wax were made. Finding him to have been a willing instrument in carrying on, under the protection of the American flag, an unlawful commerce by false papers and fraudulent representations, the board are constrained to regard all his transactions in connection with this voyage as partaking of the same character, unless, as in regard to the billiard table, very clear and explicit proof to the contrary is exhibited. The following note appears in the translated copy of the *expediente* furnished by the claimants: 'Copies of several unimportant letters found on board the *Felix* here follow,—they are not translated.' Whether the board would regard them as unimportant, or whether they would throw any light upon the subjects investigated, we have no means of ascertaining.

"Being satisfied by these proofs that the larger part of the cargo of the *Felix* was in fact Spanish property at the time of the seizure and condemnation of it, it remains to inquire what effect this fact legitimately produces upon the claims severally presented in the memorials under consideration. * * *

"This is not merely the case of a neutral ship found with enemies' goods on board. It is the case of a neutral ship, with enemies' goods on board, destined for the ports of the capturing party—a neutral ship attempting to carry on a commerce which by the laws of nations and the practice of all civilized states, is wholly illegal and prohibited. Authorities to this point can hardly be necessary; a few only will be cited. In the case of

Hoop, 1 Rob. Admiralty Reports, page 298, Sir William Scott, in giving judgment, says:

“In my opinion there exists such a general rule in the jurisprudence of this country, by which all trading with the public enemy, unless by permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country. It is laid down by Bynkershoek as an universal principle of law.’

“He then quotes several passages from that author, and proceeds:

“It appears from these passages to have been the law of Holland. Valin, lib. 3, tit. 6, art. 3, states it to have been the law of France, whether the trade was attempted to be carried on in national or neutral vessels. It will appear from a case which I shall have occasion to mention, the *Fortune*, to have been the law of Spain; and it may, without rashness, I think be assumed to have been a general principle of law in most of the countries of Europe.’ ‘By the law and constitution of this country the sovereign alone has the power of deciding war and peace, and he, therefore, who has alone the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and commerce merely, possibly on the ground of private advantage, but not very reconcilable with the general interest of the state. It is for the state alone, on more enlarged views of policy and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted and under what regulations. In my opinion no principle ought to be held more sacred than that this intercourse can not subsist on any other footing than that of direct permission of the state.”

“The same principle is operated in *Potts v. Bell* (8 Term Rep. 548), and has been repeatedly recognized and enforced by the courts of the United States. Some of the cases have gone to a great length as to what constitutes trading with the enemy; and it has been held that a citizen of the United States could not, during war, withdraw his property from the enemies’ country, though it was acquired abroad before the war. The act of withdrawal is a trading with the enemy. (1 Gall. C. C. R. 467; *The St. Lawrence*, 1 Gall. 467; *The Rugen*, 1 Wheat. 62; *The Eliza*, 2 Gall. 4; *The Alexander*, 1 Gall. 532; 1 Peters, 586, 8 Cranch, 282.)

“The United States has, on more than one occasion, enacted very stringent laws interdicting intercourse with foreign nations, even before a state of war existed. By the 3rd section of an act of 18th April 1806, which prohibited the importation of certain merchandize from Great Britain, it was provided that if any of said prohibited articles ‘should, after a certain day be put on board any vessel, ship, boat, raft or carriage, with intent to import the same into the United States with the

knowledge of the owner or master of such ship,' etc., such ship, etc., 'should forfeit treble the value of such articles. (3 Stats. at L. 379-380.) The same provision is contained in the 6th section of an act passed March 2, 1809, commonly called the nonintercourse act. (3 Stats. at L. 529, 530.) These acts were never supposed to impair any neutral rights, nor to give to neutral nations any just grounds of complaint if their vessels should be seized and confiscated for the violation of them. But they no more effectually interdicted commerce between the United States and Great Britain or France than a state of war interdicts it between belligerent nations.

"Nations have the right, undoubtedly, to prescribe the penalties which neutrals incur who shall be found attempting to prostrate their policy by carrying on a commerce which by principles of universal law is prohibited. The offense of which the neutral vessel is guilty in such cases is that of trading with the enemy, being concerned in an unlawful voyage, whereby she forfeits her neutral character, and not merely for having enemies' property on board, not destined for introduction into the neutral country, which is a lawful voyage and subjects the neutral to no liability.

"It being competent for Mexico, without any violation of the law of nations, to render liable to confiscation any vessel, whether neutral or otherwise, found engaged in carrying on trade between her citizens and those of her enemy, it becomes important to inquire whether the *Felix* and her cargo was condemned for this cause, and, if so, whether condemnation was pronounced by a regular court of competent jurisdiction. Upon these points the American and Mexican members of the joint commission differed in opinion. In regard to the first question there does not seem to be much room for hesitation or doubt. The American commissioners say: 'It is either a case of capture or piracy. The captain himself, the court-martial, and the assessor treat it as a cause of capture.'

"If a case of capture, it is capture *jure belli*—capture for a violation of the belligerent rights of Mexico. It was not a seizure for merely having goods on board, which by any municipal regulation of Mexico were prohibited from importation into the country. In the *expediente* filed among the proofs there is the report of the commander of the *Tampico*, setting forth his proceedings, in which it is stated that, having made an examination of the papers and documents found on board the *Felix*, 'it resulted that she had on board sundry Spanish goods, brought from Harana, intended for New Orleans, and thence for Soto La Marina and Tampico.' So, also, in the record of the proceedings of the junta of the marine it clearly appears that the condemnation was pronounced from the same cause. Speaking of the documents found on board the vessel, they say:

"From their scrupulous and attentive examination, as well as of private letters of correspondents found on board of the captured vessel, it results with all clearness that the aforesaid 295 bales of wine comprehend

in the invoice, p. 2 (com. with the date of 12 July last), directed from the port of Havana and for account and risk of Don Zaballa in Soto La Marina, his mark being S. C. It also results that the 27 cases of wax remitted by José Pereyera, in the said city of Havana, to Don Francisco Verde, in the old town of Tampico, through Simon Cuculla, resident of New Orleans, and that they are marked with the letters E. C., according to the invoices, pages 7 and 8, come directed from the said city of Havana, without there being the least room for doubt in this particular. The like happens with respect to the other 50 cases of wax which the said Pereyera sent from the same city of Havana on the 5th of July last to the aforesaid Simon Cuculla, in order that the latter, for account and risk of Don José Lopez Alrella, may ship them to Soto La Marina to Don M. K. Colonge, in such a manner that, being satisfied and well persuaded, all the gentlemen who compose the present *junta*, that all the aforesaid produce, and which were found on board the said American schooner *Felir*, are not only prohibited, but that they undoubtedly draw their origin from an enemy's country,' 'it was unanimously agreed that they should declare and in effect they did declare it to be good prize, both the said American schooner *Felir* and the wine and wax mentioned in this act with the aforesaid marks. They also extended said condemnation of good prize to the 46 cases of wax which were found on board the said vessel and such other produce of Spanish soil, proceeding from any port of that nation, or from those prohibited, confirming their sentence in the articles of the ordinance of — and in the provisions of art. 3 of the decree of Oct. 8, 1823, and that of the 17 of March 1821.'

"The following extract from the opinion of the assessor hereinbefore referred to of November 1825 shows also upon what ground he deemed the decree might be confirmed:

"In pursuance of these proceedings, entered into upon the capture by the gunboat *Tampico* off Soto La Marina of the American schooner *Felir* proceeding from Havana after stopping at New Orleans, I am of opinion that the first declaration of good prize may be confirmed, which declaration was pronounced on the 19th of September last, * * * there being only excepted one billiard table, one still, and 10 crates of empty bottles; * * * also the case of books, * * * inasmuch as these were not contraband articles, there being no proof that they were brought from Havana in the same vessel nor that they are Spanish property, produce, or manufacture; in which quality and prohibition are comprized the other goods which are condemned, in the penalty of good prize, agreeably to our revenue laws and the declaration of war between Spain and her colonies.'

"In another part of the opinion he speaks of 'the legal causes of the capture are well certified, as also is the national quality of some of the articles, and the sailing of the vessel from a port within the Spanish jurisdiction,' as leading to the conclusion that the decree of condemnation should be confirmed.

"There seems to be no room for doubt as to the grounds upon which the condemnation was decreed. The vessel was condemned for being concerned in carrying on a trade between the enemy's countries, and the cargo for being Spanish or of

Spanish growth or origin, proceeding in the same vessel from one of the ports of Spain.

"Was the decree pronounced by a court of competent jurisdiction?"

"This question has been presented before another tribunal and was determined in the affirmative. Among the proofs in the case is the copy of an opinion delivered by the supreme court of Louisiana in a suit brought by Cuculla against the Louisiana Insurance Company upon a policy of insurance on the same goods which were shipped by him in the *Felix*, and for which the present claim of his administrator is made. The policy contained a clause of warranty to the assurers free from any charge, damages, or loss which may arise in consequence of engaging or having been engaged in illicit or prohibited trade at any time whatever, and the defendants resisted the claim upon the ground that the loss happened for some of the causes named in the warranty. The defendants further contended that the decree of the court in Mexico condemning the property was *conclusive* in relation to all matters on which it acted, and the court was of this opinion also. It was answered by the plaintiff that, 'however the general rule might be, the sentence of the court offered in evidence was not *conclusive*, because it was pronounced by a tribunal of incompetent authority.' This raised the question which we are now considering, and in regard to it the court said:

"The first question which meets us on inquiry into the correctness of this position is, whether the court has the power to examine into the competency of the tribunal by whose sentence the condemnation was pronounced."

"The court entertained no doubt that it possessed such power; and thereupon proceeded to examine at considerable length the grounds of objection which had been made to the competency of Mexican court. The following is an extract from this opinion:

"In addition to this, the testimony of lawyers in the city of Mexico has been taken. One of them, a distinguished member of the profession, holding a high situation in the government, swears that the court which condemned the goods was a lawful tribunal and that its proceedings were regular and its jurisdiction undoubted.' Again: 'It has been proved by the evidence of lawyers residing in the city of Mexico that the tribunal was competent and its proceedings regular. The testimony was much commented on, but nothing we have heard in argument has destroyed or shaken its credit. It appears to have come from persons of respectability. It was taken by depositions, and these depositions were opened, as the indorsements on them show, some time before the trial. If the plaintiff believed they were improperly obtained, or that the witnesses erred through ignorance, or from corrupt motives, it could not have been difficult to disprove them.'

"The proof referred to by the court is not before this board. It was not for the interest of the claimants to produce it; but

the documents which they have produced and thus given credit to show incontestably its existence and purport, and the board does not feel restrained by the rules of evidence observed in courts of common-law jurisdiction from considering the fact as proved here which it thus appears was proved to the satisfaction of the court in Louisiana. And independent of this consideration, it might well be required by the claimants to establish by affirmative evidence the proof of the position upon which they rely, and to show that the tribunal by which the sentence of condemnation was pronounced was not of competent authority for that purpose. No such proof is found in the case, and none was offered before the court in Louisiana.

"It being thus established that the sentence of condemnation was pronounced by a tribunal of competent authority, and that its proceedings were regular, it now remains to inquire whether by the laws of Mexico the vessel and cargo, or any part of it, for the causes alleged, was liable to confiscation.

"In courts of law, the decision of the tribunal in Mexico upon this question would probably be held as conclusive. It was so regarded by the court in Louisiana in the case just adverted to; and in many other cases cited in the opinion pronounced by that court the same principle has prevailed. But it is quite obvious that this board is not and can not be bound by any such principle, however well it may be established as binding upon courts of law. The parties before the two tribunals are different. In trials at law the foreign government, whose proceedings through its courts are brought in question, is not a party; and the acts of its tribunals are only collaterally subjects of investigation. But the questions which are presented to this board touch directly and immediately the legality and validity of the acts of Mexico through any and all of the departments of its government. A nation may commit wrongs upon the citizens of other nations as well through the instrumentality of her courts as through any other of her civil or her military departments. It is well known that in many cases of reclamation made by the United States upon France, where indemnity was obtained, the property captured had been regularly condemned by tribunals of competent authority abroad; but it was never supposed that as against France the legality of the proceeding could not be inquired into, or that the sentence of her courts was conclusive.

"While, therefore, this board does not consider that the sentence pronounced by the court in Mexico, condemning the *Felix* and her cargo, is conclusive that by the laws of Mexico they were liable to condemnation, it nevertheless does consider that it furnishes a strong degree of presumption that such was the case, sufficient to throw upon the claimant the burden of establishing the contrary. The vessel was found carrying on a direct trade with the enemies of Mexico, was taken *in delicto* with enemies' property on board; whether upon the high seas or

within the territorial jurisdiction of Mexico does not very clearly appear. She had, however, approached near enough to land her passengers. The commander of the *Tampico* asserts that when first discovered she was sailing under Mexican colors; a fact, if true, which shows quite plainly a consciousness of being in illicit trade.

"If it were fully and clearly established that the vessel was taken on the high seas, and without the jurisdiction of Mexico, inasmuch as the Spanish goods on board were not contraband of war, it might possibly result that the vessel would not for that cause be liable to seizure. But it is beyond doubt that the enemy goods on board were destined to be landed in Mexican ports; that the offense committed by the vessel was an offense known to the laws of nations—trading between enemies; and, by well-established principles, neutral property so concerned forfeits its neutral character.

"By the general law of prize, property engaged in an illegal intercourse with the enemy is deemed enemy property. It is of no consequence whether it belongs to an ally or a citizen; the illegal traffic stamps it with the hostile character, and attaches to it all the penal consequences of enemy ownership. In conformity with this rule it has been solemnly adjudged by the same course of decisions which has established the illegality of the intercourse that the property engaged therein must be condemned as prize to the captors and not to the crown.' (8 Cranch, 334, *The Sally*.) 'All trade with the enemy, unless with the permission of the sovereign, is interdicted, and subjects the property engaged in it to the penalty of confiscation.' (1 Gallison, C. C. R. 295, *The Rapid*.) 'If a vessel be sent from the United States, after knowledge of the war, to the enemies' country, to withdraw property of a citizen of the United States acquired before the war, the vessel and cargo are subject to capture and condemnation *jure belli*.' (1 Gallison, C. C. R. 295.) 'A vessel sailing to an enemy port after knowledge of the war, and captured bringing thence a cargo consisting chiefly of enemy goods, is liable to confiscation as prize of war.' (*The St. Lawrence*, 8 Cranch, 434.)

"The concluding sentence in the opinion of the court in the case last cited is:

"The *St. Lawrence* was certainly guilty of trading with the enemy, and, being taken on the way from one of his ports to the United States, she is liable to be confiscated on that ground, as a prize of war, to whomsoever she might belong' (p. 444). 'In cases of trading with the enemy the property is considered *quasi* as enemy's property and condemned to captors.' (1 Gallison, C. C. R. p. 545, *The Joseph*.)

"The offense of trading with the enemy in time of war is a grave offense, highly injurious to the country, and is commented on with much severity by courts and writers upon public law. Every nation must have a right to interdict it, as well when carried on by neutral vessels as by its own. The dangers are as great in the one case as in the other. Judge

Johnson, in giving the opinion in the case of *Rose v. Himeley*, 4 Cranch, 289, says:

“The right to subdue an enemy carried with it the right to make use of the necessary means for that purpose, and the individual who does an act inconsistent with the rights of a belligerent exposes himself to the liability of being treated as an enemy. The belligerent nation can exercise the same acts of violence against him that she can against an individual of her enemy. Nor can his sovereign protect an individual who has committed an aggression upon belligerent rights without becoming a party to the contest.’

“Again he says:

“Let it not be supposed that the opinion which I am giving devotes the commerce of our country to lawless depredation. My observations are applied to a case in which an evident aggression had been committed by entering two at least of the interdicted ports of St. Domingo. The individual who will knowingly violate the rights of war, or laws of trade of another nation, is well apprised that he forfeits all claim to the protection of his country, or the interference of its courts. The peace of the nation and the interest of the fair trader imperiously require that the smuggler or the violator of neutrality should be left to his fate’ (pp. 290, 291).

“These observations apply with great force to the cases now before us. The *Felix* was found carrying on commercial intercourse between Mexico and Spain, the two nations being then at war; she had on board Spanish property taken on board in a Spanish port, destined to be conveyed in the same vessel to a Mexican port. The large bulk of her cargo was of this description. The circumstance that she stopped at New Orleans, and there discharged some articles and took on board others of American origin and ownership, does not change the character of the voyage in which she was engaged. It must have been very well known to her owner that a state of war existed between Mexico and Spain, that all commercial intercourse between the two nations was prohibited. It must have been equally well known to him that the vessel was concerned in this trade. He lived at New Orleans and shipped himself the brandy belonging to Wallace, on this voyage. In a letter from him to Mr. John S. Wallace, dated April 4, 1827, respecting the brandy he says, ‘The shipment was made on board one of the regular traders, the schooner *Felix*.’ If this was the regular employment of this vessel, the owner could not be ignorant of the hazards which he exposed himself to. In the same letter he says, ‘she was captured for having Spanish property on board as was asserted,’ and he does not deny that the fact was as asserted, nor that the vessel was liable to seizure and confiscation for that cause. In a subsequent letter of 26th July 1827, to the same person, he speaks of the seizure of the vessel as a ‘catastrophe’ which was consequent upon the shipment of ‘these goods,’ and not as an outrage or wrong inflicted with-

out justification. Indeed, the general tenor of the letter would seem to admit that the act of Mexico assuming the property on board to be Spanish property or of Spanish origin, was rightful. It appears by the same letter that insurance had been effected on the vessel; but that in the opinion of his legal advisers there was no just expectation of being able to recover for the loss, because the vessel was engaged in an illicit trade.

"The Supreme Court of the United States has held in ———, 5 Wheat. 385, 389, that 'where the original owner of captured property seeks restitution in court upon the ground of a violation of our neutrality by the captors, the *onus probandi* lies upon him; and if there be reasonable doubt respecting the facts, the court will decline to exercise its jurisdiction.' The board is of opinion that under the peculiar circumstances of this case it is no hardship to apply this rule to these claimants. No proof is exhibited to show that by the laws of Mexico the vessel was not liable to confiscation. The court which pronounced sentence referred to 'the articles of the ordinance of cruising' and the 'provisions of articles 3 of the decree of October 8th, 1823, and that of 17 March 1824,' as conferring authority to do so. These ordinances and laws are not before us. The claimants have had ample opportunity to prove what the laws of Mexico are upon these subjects; and not having done so, and a court of competent jurisdiction, proceeding regularly, having declared that by these laws the vessel and cargo for the causes assigned are good prize, this board is of opinion that it is sufficiently established that the confiscation of the vessel was in conformity with the laws of Mexico.

"It results therefore that the claim of E. J. Forestall for the value of the vessel, freight, expenses, etc., is not a valid claim against Mexico, and the board is of opinion and decides that the same be not allowed.

"It also results that the claim of Jos. H. Cuculla, administrator of Simon Cuculla, is not valid; first, because the property for which he claims was the property of persons residing in Havana and in Mexico, and was not the property of citizens of the United States; and second, because if it had been the property of Cuculla it was of Spanish origin and proceeded from a Spanish port bound for Mexico in violation of her belligerent rights.

"The claim of Forestall as copartner, and representing the late firm of Gordon, Forestall & Co., for ten crates of bottles and one still, and of Cuculla's administrator for one billiard table, which were articles of American origin and ownership, is not valid because it appears that the same were not condemned by the Mexican authorities, but were expressly excepted from the decree of confiscation, and were deposited in the custom-house for the benefit of the owners; and there is no proof that they were not received and disposed of by the owners; and the board accordingly decided that the said several claims be rejected.

"The claim of James Johnston, administrator of James P. Wallace, for 40 barrels of brandy, stands upon a different ground, and it is distinguishable from all the other claims in the case. It is clearly proved by testimony in the case that the brandy was of American origin, manufactured in Cincinnati, in the State of Ohio, and was the property of an American citizen. Of these facts no doubt exists. It was condemned as of Spanish origin, coming from Havana. Of this there is no proof, or pretense of proof, beyond the circumstance that it was found on board with the other property, which was of that description. The Mexican commissioners appear to have been satisfied that it was not liable to confiscation, but resisted the claim on the ground that the proof of its origin and ownership should have been made to the prize court which pronounced the decree.

"This board is of the opinion that the objection is not well founded. It does not appear that any opportunity was afforded for making such proof, and, indeed, it could hardly be required that the owner should follow his property from Cincinnati, where he resided, to Mexico for such purpose. It was shipped and documented as American, and the captain of the *Felix*, in his deposition, after reciting what came from Havana, declared that all the residue on board was American property shipped from New Orleans. The 40 barrels of brandy were therefore unjustly condemned, and this board is of opinion and decides that the claim of James Johnston, administrator, for the value of the same, is a valid claim."

Another claim similar to the foregoing was
Case of the "Isaac
McKim." presented to the commissioners under the act of

1849 by William Frear, owner of the schooner *Isaac McKim*, Joseph M. Cuculla, administrator of Simon Cuculla, owner of the cargo, and John J. Palmer, receiver of the American Insurance Company of New York, for the seizure and confiscation of the schooner in question and her cargo in 1825. The commissioners said:

"The evidence before the board proves that the schooner sailed from Havana on the 20th August 1825, and on the 9th of September anchored off the bar of Soto La Marina. Immediately after she anchored she was boarded by an officer from the Mexican national vessel *Tampico*, who took possession of her as a prize upon the charge that she had sailed for a Mexican port with a cargo of Spanish goods. Proceedings were instituted before a prize court, which resulted in the confiscation of the vessel and cargo, both of which were sold and the proceeds distributed in conformity with the laws of Mexico.

"At the time when the *Isaac McKim* was seized a state of war existed between Mexico and Spain. All trade between the Spanish and Mexican ports was interdicted, and a neutral

flag could not be used to cover or protect such a trade. A vessel sailing from Havana, a Spanish port, with Spanish property destined for a port in Mexico, was liable to seizure and confiscation in such Mexican port, whether such vessel belonged to a belligerent or to a neutral nation. This question is examined and the authorities cited in the opinion of the board in the case of the schooner *Felix* heretofore decided.

"The evidence in this case leaves no room to doubt that the *Isaac McKim* was freighted with a cargo of Spanish goods, and that she sailed from Havana direct for Soto La Marina. It was the case of a neutral ship with enemies' goods on board, destined for a port of the capturing party. The allegation that she was compelled to anchor off the bar of Soto La Marina 'by stress of weather and want of water and supplies' was a mere pretext to cover an attempt to carry on an illegal trade."

Claimants were American citizens, partners in a mercantile house at Tampico. A large and valuable lot of goods belonging to their firm, together with goods of other merchants, was destroyed January 17, 1866, at Tantoyaquita, State of Tamaulipas, by Mexican troops under the command of Col. Pedro Mendez, in the service of the republic. At the time war was flagrant between France and the republic. It seems that these and other merchants went up to Tampico, on the advice of an officer of the French army, who assured them of sufficient protection by the French authorities while the goods were in transit. The merchants set out under the military protection of the French, who subsequently left the trains and goods with only 40 soldiers to protect them. Thereupon Colonel Mendez, with 500 Liberal troops, attacked the guard, and dispersed and burnt the goods, except what he carried away. It was decided that the owners of the goods had no claim against the Republic of Mexico. For- eigners residing in Mexico during the war with France, and inside the lines of the French, had not, it was held, a legal right to force a trade in the Mexican territory with the aid and under the escort of the French military. Such a trade was illicit and hostile, and all engaged in it were enemies of the opposing belligerents, who might lawfully break it up by force of arms, destroying the property and carrying it away as booty taken in the field.

Wadsworth, commissioner, delivering the opinion of the commission. December 20, 1871, *Torre & Labourdette v. Mexico*, No. 749, convention of July 4, 1868.

In the case of *Lorenzo Castro v. Mexico*, No. 124, MS. Op. II. 195, the claimant, a naturalized citizen of the United States, who resided in

Texas and adhered to the Confederacy, went in 1864 to Monterey, in Mexico, where he entered into business. During the French intervention he sided with the partisans of Maximilian, and when the French abandoned Monterey was prominent as the organizer of a foreign legion, ostensibly for police purposes, but for refusing to serve in which certain American citizens were imprisoned. On the approach of the Mexican forces under General Escobedo, claimant went off with the French to the City of Mexico, having closed his business and stored his goods with the United States consul. The commissioners, strange to say, made an award for property which General Escobedo took and for the use by him of claimant's store for quartering troops. They refused, however, to allow anything for some wines, seized by the Mexican troops, which were being conducted through the country, under an escort of the invading army, on the ground that as it was "not lawful to attempt to introduce goods into the country under the military escort of the enemy, or to trade with the enemy or to and from his lines, without executive license," the wines were lawful booty.

In the case of *Joseph Scott v. Mexico*, No. 148, the commissioners refused to make an award in favor of claimant on account of property seized and confiscated while under French escort. "The claimant's proofs," said Mr. Zamacona, "establish two facts: First, that he was engaged in a traffic between two points occupied by the French, which was prohibited by the laws of Mexico; second, that he was traveling under a military escort of the French. Although he states that he was compelled to do so, it is most probable that he joined the convoy for protection. A party violating the law, and who exposes himself to the hazards of a military march through a country the possession of which is disputed by belligerents, should not complain of the consequences. This claim is referable to such causes, and in my opinion should be dismissed." "The trade in which claimant was engaged had," said Mr. Wadsworth, "been forbidden by the proclamation of President Juarez, and where a party was attempting to carry it on, without executive permission or license from the commander of the belligerent force, he was liable to seizure and confiscation. If the trade had received encouragement from the forces engaged in the strife it does not appear. There is no reason, therefore, to interfere in behalf of this claim, and it is dismissed."

Claimant, a physician, a resident of El
Johnson's Case. Fuerte, actuated by motives of humanity, started on a voyage to Alamos to take to the imperial commandant of the latter place a letter from certain individuals who requested the release of their father, a prisoner in the commandant's hands. The political authority of El Fuerte, hearing of the circumstance, had claimant arrested and sent to the Republican general, Martinez. The latter fined Johnson \$5,000 for a violation of the laws of war in bearing communications to the enemy. A thousand dollars were paid, the rest was never collected. The commissioners awarded \$1,870, including the \$1,000 and some of claimant's

property, which was seized at the same time, with interest at 6 per cent.

Charles C. Johnson v. Mexico, No. 82, May 17, 1871, convention of July 4, 1868, MS. Op. I. 325.

"Even if it be true that the goods of the *Jaroslawsky's Case*. claimant were seized by Mexican troops, the umpire considers that the Mexican authorities had, by the general laws of war, as well as by the Mexican law of August 16, 1863, the right to confiscate them. If the claimant thought that the seizure was illegal it was for him to present his claim to the Mexican Government, as he certainly might have done in accordance with the law of November 19, 1867. In view, therefore, of the insufficiency of the evidence that the claimant's goods were seized by a force belonging to the Mexican army, and of the illegality of the transportation of the goods from a town occupied by the imperialist forces to that portion of Mexico which was under the control of the Mexican forces, the umpire is of the opinion that the claim must be disallowed."

Thornton, umpire, May 25, 1874, *Jacob Jaroslawsky v. Mexico*, No. 896, convention of July 4, 1868, MS. Op. VI. 65.

"In the case of 'Theodore Schleining and *Schleining's Case*. Erhard Pentenreider v. Mexico,' No. 864, the claim arises out of the seizure of merchandise belonging to the claimants by troops belonging to the forces under the command of General Cotina and Pedro Hinojosa. These goods were dispatched by the claimants in June 1865 from Matamoras to Piedras Negras to be subsequently forwarded to San Antonio, Texas; but Matamoras was at the time occupied by the imperialists' forces, and all intercourse with it was prohibited by the Mexican Government. The forces of that government were therefore justified in seizing and confiscating articles coming from that post unless their owners or carriers were furnished with a special license, which does not appear to have been the case in this instance."

Thornton, umpire, June 29, 1876, *Theodore Schleining and Erhard Pentenreider v. Mexico*, No. 864, convention of July 4, 1868, MS. Op. VI. 477.

Mary Biencourt, a native citizen of the *Biencourt's Case*. United States but the wife of a native-born Frenchman, made a claim for the value of a quantity of goods which were seized and confiscated by General Escobedo in 1866. The goods had been purchased by

Pedro Biencourt, the husband, in France, whither he had gone from Monterey, the place of his residence, to obtain them. They were imported at Matamoras, then in the possession of the imperialists, and were on their way to Monterey, under a military escort of the imperialists, when they were captured. Mary Biencourt claimed, as the wife of Pedro Biencourt, but in the charter of a citizen of the United States, for the value of half of all the goods. The commissioners differed as to her citizenship, Mr. Wadsworth, the United States commissioner, maintaining that as she had never resided, at any time after her marriage, in France or any of its dependencies, she was still an American citizen. He concurred, however, in the dismissal of the claim on the ground that "the claimant and her husband while domiciled within the territory and military lines of the Republic of Mexico, without license, engaged in unlawful intercourse and illicit trade with the enemy." Mr. Wadsworth cited *The Rapid*, 8 Oranch, 155; Phillimore Int. Law, III. 108; *The Hoop*, 1 Rob. 198.

Mary Biencourt v. Mexico, No. 355, convention of July 4, 1868; S. P., *Moke v. Mexico*, No. 342, MS. Op. I. 165.

6. ACCEPTANCE OF AN OFFICE OR AGENCY.

"In the case of *Robert Eakin v. The United States*, No. 118, the proofs showed that the claimant had, in 1857, in the State of Mississippi, exercised acts of citizenship of the United States by holding an office, which under the laws of Mississippi could only lawfully be held by a citizen of the United States; and that he had, in 1862, the State of Mississippi being then in rebellion against the United States, held a like office, which by the then laws of Mississippi could only be held by a citizen of the Confederate States.

"The counsel for the United States contended that the claimant was, by each of these acts, debarred from a standing as a British subject.

"The claim was disallowed without a separate and distinct decision of this question; but the undersigned is advised that a majority, at least, of the commission were of opinion that such holding of office under the rebel government was of itself a violation of neutrality, and debarred the claimant from a standing before the commission."

Am. and Br. Claims Commission, Treaty of May 8, 1871, Hale's report, 15.

Whitty's Case: Question of Amnesty. "This was a claim for the destruction and appropriation of rum and molasses by the United States authorities, in the year 1864,

in and near the town of Alexandria, Louisiana. It is not, however, proposed in this report to review the evidence on this part of the claim, but to confine it to the question of neutrality.

"Claimant's counsel admitted that the evidence showed that the memorialist had, in June 1861, joined a volunteer company in the service of the Confederate States, and that he went with said company to New Orleans, and thence to the State of Virginia. That at the time he went to Virginia it was not known in the Confederate States that Her Majesty had issued the proclamation of the 13th of May 1861, which enjoined her subjects to remain neutral during the then existing war; and that shortly after his arrival in Virginia, hearing of said proclamation, and being disabled by sickness, he applied for and got his discharge from the service, and returned to his home, which he reached about September or October 1861.

"The defense filed two documents, certified to by the United States Secretary of War, which were alleged to be true copies of portions of the Confederate records of the State of Louisiana, captured by the United States Army, and in the possession of the United States War Department.

"The first of these papers purported to be a true copy of a bond, given by the claimant in February 1864 to the State of Louisiana, which recites his appointment as purchasing agent of the State for the Quartermaster's Department; the second purported to be a true copy of a letter written by the claimant to the governor of Louisiana on the 5th of March 1864, relative to some purchases of sugar and molasses he was making for the State.

"One of the witnesses for the defense, previous to the filing of said bond and letter, had sworn in evidence that Whitty had told him that he was acting as purchasing agent for the State of Louisiana. The claimant was examined on this point, and swore that he had received a commission to act as such agent, but had never acted under it.

"The prosecution, however, after the filing of the said copies of the bond and letter, never demanded that the originals of the same should be produced, and did not offer to take any further evidence in rebuttal, but claimant's counsel in his brief relied on the following facts:

"1. That the facts as to the seizure, etc., of the memorialist's property had been fully proven.

"2. That although one of the United States' witnesses had declared that the claimant was discharged on account of sickness, and although Whitty may have used that excuse for obtaining said discharge, yet he had sworn that he had left the Confederate service because he was charged to do so by Her Majesty's proclamation, and by such action he had maintained his right to the protection of his government.

"3. That on the 8th of December 1863, after Whitty had left the Confederate army and before the seizure of his property, the President of the United States had publicly proclaimed a pardon to all who had participated in the rebellion upon taking the oath of allegiance to the United States; and that the claimant being a resident alien, it was not expected of him to take said oath, but that he was nevertheless entitled to all the advantages said proclamation extended to the citizens of the United States.

"4. That on the 4th of July 1868 the President of the United States, by a further proclamation, pardoned everybody (with certain exceptions not including the claimant) who had participated in the rebellion, and restored to them all their rights of property, except as to slaves.

"5. That this pardon was not confined to citizens, but extended to resident aliens, and that the Supreme Court had so decided.

"6. That said pardon was not confined to cases of property seized under the abandoned and captured property act, and that although the question of amnesty and pardon under the proclamation of July 1868 arose in a suit for property taken under that act, the Supreme Court did not confine the action of said proclamation to such property.

"7. That if Whitty had been guilty of a crime by his alleged breach of neutrality, said crime was committed against the United States, and the pardon of the President denies to the Government of the United States the right to plead it in bar to this or any other claims pending before the courts of the country, or before any commission having a right to hear and determine claims upon legal principles.

"8. That Congress had no right to establish the 'Southern Claims Commission' *only for loyal citizens, and excluding aliens.*

"9. That private property does not change title after seizure, and that it can not be taken without Congressional enactment, and without being condemned as directed by law. That no law existed for the seizure of the property in question.

"10. That it had not been proven that Whitty acted as purchasing agent for the State of Louisiana, and that the copies of the bond and letter filed by the defense were not in evidence, as there was no proof of the originals of these documents, and that they should be rejected, as the United States Court of Claims had done in a case where similar documents had been sought to be introduced in evidence.

"The United States agent, in his brief, contended:

"1. That the evidence proved beyond a doubt not only that the claimant was in the rebel army in 1861, but that he remained there till unfitted by ill health for active service, which was his sole reason for leaving said army; that it also proved that he was in the service of one of the rebel States under a semimilitary appointment, his duties being to buy and forward supplies for the troops of Louisiana, then making war upon the United States.

"2. That not having been neutral during the war, he had no standing before the commission.

"3. That a neutral is bound to conduct himself as a neutral, even in the absence of an express notification to that effect from his sovereign.

"4. That the proclamation of the President referred to restored to all persons their rights of property, but excepted 'any property of which any person may have been legally divested under the laws of the United States,' as well as any property in 'slaves.'

"5. That the Supreme Court had decided that the amnesty proclamation of 1868 only dispensed with proof of loyalty in the Court of Claims under the captured and abandoned property act, and on the express ground that seizure of property under that act did not divest the title of the owners.

"6. That as to supplies taken within the rebel States for the use of the army, Congress alone had power to make compensation for the same, and that it had established such a court in the Southern Claims Commission for these very claims of citizens of the United States, expressly limiting the allowance of claims to those of citizens who had 'remained loyal adherents' to the United States.

"7. That Whitty, if a citizen, could have no standing before said commission by reason of his acts in support of the rebellion, and that it was plain that as a British subject guilty of the same acts he can not be entitled to a better standing than a citizen in like condition.

"8. That the claim, independently of the question of neutrality, had not been proven.

"The commissioners rendered the following decision, the British commissioner not signing the same:

"The claimant having been actively engaged in the late rebellion against the United States, has no standing before this commission for the prosecution of a claim like this, and the claim is therefore disallowed.

"L. CORTI.

"JAS. S. FRAZER."

William Whitty v. The United States, No. 310, Am. and Br. Claims Com., treaty of May 8, 1871, Howard's Report, 65, 540, 545, 551.

7. TAKING PART IN POLITICS.

"McAllen took part with one of the conflicting parties [in Mexico] and thus violated the neutrality which as a foreigner he ought to have observed."

Thornton, umpire, March 27, 1875, *Heirs of John Young v. Mexico*, No. 591, Am. docket, MS. Op. IV. 618.

"But there is another more important point, which compels the umpire to consider that the claimant is not entitled to expect his government to assist him in obtaining compensation. There is a mass of evidence on the side of the defense showing that the claimant identified himself with Mexican politics and factions. The umpire does not allude to the circumstance of claimant's having interceded on behalf of the imprisoned women and children, or of his having accepted the office of syndic to which he was elected; but it is declared by a number of witnesses, and is not disproved by evidence on the part of the claimant, that he constantly attended political meetings; that it was notorious that he openly adhered to the party of the so-called reactionists, which he assisted with money and arms, and during the time of the French intervention he favored and assisted the cause of the imperialists. It is even declared by some of the witnesses that they were punished by the claimant for their opinions in favor of the liberal government, and were sent by him to serve in the force collected by the Manganos leaders of the reactionist party, their cattle having been robbed from them during their forced absence. The umpire believes from the evidence that there is good ground for the assertion that the claimant did not preserve that neutral character

which was to be expected of him as a foreigner, and failing which his government was not bound to support him. For the above reasons the umpire is of opinion that the Mexican Government can not be held responsible for the losses suffered by the claimant, nor can he expect his claim to be recognized by the commission."

Thornton, umpire, July 28, 1875, *William C. Tripler v. Mexico*, No. 144, MS. Op. IV. 221, VII. 375. Tripler claimed (1) for losses and damages on account of his expulsion from his home by the military authorities in 1858, and (2) for unlawful arrest and imprisonment by the civil authorities. The same principle was laid down in *Francois Iturrria v. Mexico*, No. 554, MS. Op. VII. 587. In the case of a friar, *Gabriel Gonzales v. The United States*, No. 111, a claim for the occupation of his house and the free use of its contents by the United States forces in Mexico in 1847 and 1848 was dismissed by the commissioners on the ground that he had taken part against the United States forces, and that it was lawful to quarter troops on an enemy.

8. ENGAGING IN THE SLAVE TRADE.

Case of the "Law-
rence." "The umpire appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February 1853 for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of the owners of the brig *Lawrence*, Captain York, against the British Government, and having carefully examined and considered the papers and evidence produced on the hearing of the said claim, and having conferred with the said commissioners thereon, hereby reports that the brig *Lawrence*, York, master, under American colors and having an American register and papers, bound from Havana to Cabenda, in Africa, with a cargo of rum, etc., having sprung a leak and put into Gallenas, on the coast of Africa, 10th September 1848, and being unable to stop the leak there, it was determined to proceed to Sierra Leone, where they could beach the vessel and repair her. She arrived at Freetown on the 22nd September and on the 25th she was seized and libeled in the vice-admiralty court for being found in a British port equipped for the slave trade, condemned, and the vessel and cargo decreed forfeited to the crown.

"The cargo shipped at Havana on board the *Lawrence* consisted of 60 pipes of rum, 116 half pipes of rum, 30 barrels of

flour, 4 boxes of beads, 48 boxes of cigars, 1 box woolen caps, 10 barrels of beans, 39 barrels of corn meal, 5 barrels of pork, 5 barrels of beef, 46 buckets, 2 packages tinware, which by charter party were to be delivered at Cabenda, in Africa, for a freight of \$3,250. It is not denied that the papers were in order as an American vessel. The crew, excepting one man, were Spanish and could not speak English, nor could Captain York speak Spanish. There were two supercargoes, one Spanish and one French, on board. Looking at the voyage as a trading operation, it appears simply absurd. The whole value of the cargo would not exceed £600, on which £700 freight was to be paid. But looking at the vessel as to be a slaver whenever the opportunity should offer so to employ her, the cargo and the fittings would appear well arranged for the business and in conformity with the fittings of several vessels under the American flag that had been overhauled by cruisers and suffered to pass on account of the flag, but were soon afterward captured with slaves on board under Spanish or Portuguese colors.

"The African slave trade at the time of this condemnation, being prohibited by all civilized nations, was contrary to the law of nations, and being prohibited by the laws of the United States, the owners of the *Lawrence* could not claim the protection of their own government, and therefore, in my judgment, can have no claim before this commission."

Bates, umpire, January 4, 1855, commission under the convention between the United States and Great Britain of February 8, 1853, MSS. Dept. of State.

9. QUESTION OF BELLIGERENT HABITANCY.

"A question has been made at the board as to the citizenship or character attached to George Patterson, the owner of the ship and part of the cargo, and it seems to be the opinion of two gentlemen that his being at Guadaloupe under the circumstances and in the manner proved in these papers, rendered his property prize to the captor, and is a bar to his receiving any compensation from the British Government for the loss sustained by the capture.

"The memorial states that the claimants were citizens of the United States at the time of capture and not inhabitants of any country at war with His Britannic Majesty.

Case of the "Betsy,"
Furlong, master:
Opinion of Mr.
Gore.

"The King's agent replies, 'That the only facts alleged in the memorial, and the only facts supported by the affidavits, are the facts of the Messrs. Patterson being citizens of the United States, and not inhabitants of any country at enmity with Great Britain; that the facts of the citizenship of these gentlemen, and of their general residence in America, were fully admitted before the lords, and that the condemnation of their property was, in the judgment of their lordships, the legal result of all the circumstances, including and admitting those very circumstances which are undertaken to be proved in the memorial.'

"The citizenship and inhabitancy of George Patterson may be considered as a question of law, resulting from facts, or simply as a matter of fact. If the former, it is worthy of remark that the supreme court in this kingdom, pronouncing on the law of nations, in a case wherein it was very material, did admit his character and citizenship to be as stated by the memorialist. If as a matter of fact simply, both parties agree and consent that at the time of capture he was a citizen of the United States of America, and not a subject or inhabitant of any country at enmity with Great Britain.

"They who are alone interested in affirming or denying this, acknowledge its truth in the most explicit manner. From the course of the business before us there is no reason to believe this to have been a sudden and unadvised concession on the part of the crown—for it is well known that the memorial was more than three weeks in the hands of the King's agent before the answer was made, and the reason offered by him for the delay was that he might consult His Majesty's advocate-general and receive his instructions as to the answer, and that the advocate-general might consult His Majesty's ministers before a reply was offered. We may safely trust, also, that nothing material to His Majesty's interest will be suffered to escape without being brought into view, for the objection raised to the board's entertaining a case that had been decided before the lords commissioners, as between captor and claimant, is introduced into the reply after it was well understood by the board to be the sense of the King's ministers that such decision was no bar to our examining the case as between claimant and crown. Considering this point, then, thus explicitly agreed upon by both parties, and after such mature deliberation by the party alone interested to deny it, I should

feel perfectly satisfied in concluding that George Patterson was not exposed to letters of marque and reprisal as a subject or inhabitant of France, without any examination of the occasion of his being at Guadaloupe. However, two gentlemen consider the law of nations so absolute and clear on this subject, and so decidedly to characterize a man circumstanced as George Patterson an enemy to Great Britain, and a subject or inhabitant of France, that, notwithstanding the consent of parties and the decision of the court of appeals, they are constrained to consider him not as a citizen, but in the quality of an enemy, and for this cause his property liable to confiscation. It is therefore incumbent on those who think differently to examine the question with great care, on the principles of the law of nations. I shall first state the facts relative to Mr. Patterson as they appear from the papers, then consider what things the right of war authorizes a belligerent to seize, etc.; what according to the law of nations constitutes a subject or inhabitant, in the sense those words are used in letters of marque and reprisal; and lastly, I will examine the quotation from Grotius which led the gentlemen to form an opinion that this person was an enemy.

“Mr. George Patterson was a citizen and inhabitant of the United States on the 19th December 1793, when he sailed from Baltimore for Guadaloupe with a vessel and cargo belonging to himself and brother. On his arrival there the government of the island took from him his cargo by force, and paid him for it at such times and places as were agreeable to the general who commanded there. When the vessel sailed from Guadaloupe he had not received all the moneys due for his cargo. He afterward quitted the island and returned to the United States, where he has ever since remained.

“There is no pretense that during his stay at Guadaloupe he did any act that evinced a disposition to renounce his character of citizen of the United States, or acquire that of a citizen of France, or that he performed any of the duties or received any of the benefits or commercial privileges of a subject of France. Indeed, the papers in the case manifest his continued disposition to return to Baltimore, and the necessity of his stay in the island. I will now state the law of nations as laid down by eminent writers, showing what or whose things are liable to seizure under letters of reprisal, and generally the rights and duties of neutrals. ‘Nothing is acquired by the

right of war but what is the property of the enemy.' (Lee on Captures.)

"It is not the place where a thing is which determines the nature of that thing, but the quality of the person to whom it belongs.' (Vattel, 3 B. 75 S.)

"Whatever is the property of the enemy may be acquired by capture at sea; but the property of a friend can not be taken, provided he observes his neutrality.' (Answer to the Pruss. Memorial.)

"Enemies continue such, wherever they happen to be. The place of abode is of no account here; it is the political ties which determine the quality.' (Vattel, 3, 71.)

"The war is against all who are subjects, not against those who are not subjects—neutrals may do everything with belligerents that they could do when there was peace between the belligerents, except what serves to cherish and foment the war.' (Bynkershoek Q. I. P. 1 book, 9 Chap.)

"A neutral nation continues with the two parties at war in the several relations nature has placed between nations. It is in everything not directly relating to war, to give them all the assistance in its power, and of which they may stand in need.' (Vattel, 3 B. 118 Sec.)

"If treaties do not interfere, it is lawful for neutrals to carry on commerce with the enemy, to buy, sell, hire, carry, and so on.' (Lee on Captures, 194.)

"The war does not extend beyond those who carry it on, and the very principle on which reprisals are grounded is that all the subjects of a nation are members of the state, and in this capacity answerable for the faults and debts of the state.' (2 Vattel, C. 18, secs. 344-5-6; 1 Black. 258; Valin ordonnances de la marine, 3 B. Ch. 10; Grotius de I. B. & P. 3 B. C. 2, sect. 2.)

"Inmates, strangers, and other temporary inhabitants are not members of the commonwealth, because they propose only to stay for a certain space, but not to settle their persons and fortunes on the public bottom.' (Puffendorf, 7 book, 2C., sec. 20.)

"According to Zouch, who presided in the courts of admiralty in Great Britain, 'whenever a man by the character of citizenship derived from birth, or by acquiring a domicile elsewhere, can be exempted from reprisals, he has a right to assume that which will exempt him, for reprisals, though permitted, are never favored.' He also quotes Grotius to prove that reprisals attach on all who are subjects by a permanent title,

whether natives or others—not on those who are passing through a country or are there on account of small delay. (Zouch de Jure Gentium, 2 part, 7 sect.)

“Valin, under the title before referred to, quotes Barbeyrac, on the subject of reprisals in the following words: ‘Il n’est permis d’user de représailles qu’à l’égard des sujets, proprements dits, et de leurs biens: car, pour ce qui est des étrangers qui ne font que passer, ou qui viennent seulement pour demeurer quelque temps dans le pays (sur quoi voir Grotius, Jacobus a Canibus et Martinus Laudensis, Tract. de reprisaliis) ils n’ont pas une assez grande liaison avec l’État dont ils ne sont membres qu’à temps, et d’une manière fort imparfaite, pour que l’on puisse se dédommager sur eux du tort que l’on a reçu de quelque citoyen perpétuel, ou des refus que le Souverain a fait de rendre justice.’ (2 vol. pp. 415, 416.)

“Conformably to this doctrine we find that letters of marque and reprisal are always issued against the power that did the injury, the subjects, and persons inhabiting the territory of that power. This is the case in all wars and in all countries. The orders of council for issuing such letters in this kingdom are so worded, and the act of Parliament which directs the trial and distribution of property captured adopts the same language in describing the persons from whom effects and goods may be taken. The subjects or citizens are the members of the civil society bound to it by duties, subject to its authority, and participating in its advantages. ‘The inhabitants, as distinguished from citizens, are strangers who are permitted to *settle* and *stay* there. The *perpetual inhabitants* are those who have received the right of perpetual residence.’ (1 Vattel, C. 19.)

“‘The citizen or subject of a state who absents himself for a time without any intention to abandon the society of which he is a member, does not lose his privilege by his absence. He preserves his rights and remains bound by the same obligations. Being received in a foreign country in virtue of the natural society, the communication and commerce which nations are obliged to cultivate with each other, he ought to be considered as a member of his own nation and treated as such.’ (Vattel, Book II., C. 8, sec. 107.)

“‘On appelle domicile l’habitation fixée dans quelque lieu, dans le dessein d’y demeurer toujours. Ainsi celui qui séjourne un tems quelconque, dans quelque lieu pour quelque affaire, n’y

a pas pour cela son domicile. Mais comme, en vertu de la liberté naturelle, il est permis à chacun de changer de volonté, on peut changer de domicile. On appelle domicile naturel, celui que quelqu'un a par sa naissance dans le lieu où son père est domicilié, et on appelle domicile choisi ou adopté celui que quelqu'un s'est fait par sa propre volonté. C'est pourquoi chacun est censé retenir son domicile naturel, tant qu'il n'en prend aucun par sa propre volonté, ou qu'il n'abandonne pas celui-là.' (Wolfius, 2 vol. 1103.)

"Un étranger qui passe ou qui séjourne dans le territoire d'autrui, ne change pas pour cela de domicile, il demeure citoyen de sa nation.' (Ibid. 1137.)

"Grotius (3d Book, 4 chap. 6 sec.) has been quoted to prove that the residence of Mr. George Patterson in Guadaloupe constituted him an enemy, and exposed his effects to be seized under letters of marque and reprisals against the property of the subjects of France, or persons inhabiting the territories of France. The author is speaking of a license to do evil to the person of an enemy, and says: '*Cette licence s'étend bien loin. Car premièrement, elle ne regarde pas ceux qui portent actuellement les armes ou qui sont sujets de l'auteur de la guerre, mais encore tous ceux qui se trouvent sur les terres de l'ennemi.*' In the same section this author proceeds thus: 'En effet on a à craindre quelque chose de la part même des étrangers, qui se trouvent alors dans le pays de l'ennemi; cela suffit pour que le droit dont il s'agit ait lieu aussi contr'eux dans une guerre générale et non interrompue. En quoi il y a de la différence entre la guerre et le droit de représailles, qui, comme nous l'avons vu, est une espèce d'impôt que les sujets doivent payer pour les dettes de l'État.'

"The same author in the second chapter of this book, on the subject of reprisals, says: 'Selon le droit des gens, tous les sujets du Souverain de qui l'on a reçu du tort, qui sont tels à titre durable, soit naturels du pays, ou venus d'ailleurs, sont exposés au droit de représailles, mais non pas ceux qui ne font que passer ou séjourner peu de temps—car le droit de représailles a été établi, comme une espèce de charge qui est imposée, pour payer les dettes du public: or ceux qui ne sont soumis aux lois du pays que pour un temps sont exempts de ces sortes de charge.' Barbeyrac, in a note on the subject of who are enemies, according to Grotius, in the section next to that first quoted, says: 'Fen M. Cocceius, dans une dissertation que j'ai

déjà citée, de *jure belli in Amicos*, rejette cette distinction, et il veut que les étrangers mêmes à qui l'on n'a pas donné un peu de temps pour se retirer soient regardés comme étant du parti de l'ennemi et par là exposés à de justes actes d'hostilité. Il distingue ensuite lui-même, pour suppléer à ce prétendu défaut, entre les étrangers qui demeurent dans le pays et ceux qui ne font que passer, ou qui, s'ils y séjournent quelque temps, y sont contraints par une maladie ou par la nécessité de leurs affaires. Mais cela même fait voir que M. Cocceius ici, comme en une infinité d'autres endroits, a critiqué notre auteur sans l'entendre. Dans le paragraphe suivant, Grotius distingue manifestement des étrangers dont il vient de parler ceux qui sont sujets de l'ennemi à titre durable, par quoi il on entend sans doute, comme l'explique le savant Gronovius, ceux qui sont domiciliés dans le pays. Notre auteur s'explique lui-même ci-dessus, chap. 2 de ce livre, en parlant des représailles qu'il accorde même contre ces sortes d'étrangers; au lieu qu'il ne les permet pas contre ceux qui ne font que passer, ou qui ne sont dans le pays que pour un peu de temps.'

"To show that the law has not become less liberal than in the days of Grotius, I will quote the following from 3d Book, 4 C., 76 sect. of Vattel: 'Estates in land, as they all in some measure belong to the nation, are part of its domain, of its territory, and under its government, and the proprietor, being always a subject of the country, as possessor of a parcel of land, goods of this nature do not cease to be the enemy's goods (*res hostiles*) though possessed by a neutral stranger.' Nevertheless, war being now carried on with so much moderation and indulgence, safeguards are allowed to houses and lands possessed by foreigners in an enemy's country. The question is not what rights the enemies of France would have had over the person of Mr. Patterson if they had captured Guadaloupe while he was there, nor what right over the property which he possessed in that island, tho' I am very clear in opinion that under the circumstances in which he was there he could not be considered as a subject or inhabitant, or his effects liable to confiscation. The question before the board is whether letters of marque and reprisal which the King of Great Britain has issued against the property of France, the subjects of, or persons inhabiting within any of the territories of France, will authorize a capture on the high seas of the effects of a man situated as Mr. George Patterson was in Guadaloupe.

"And to me it is evident that, according to the opinion of Grotius, his goods and effects were not liable, for Grotius says such can be taken only where the person is a subject by a durable title, or, in the language of Gronovius, domiciliated in the country, not where the person only passes through the territory of the enemy, or is there for a short time, or constrained to be there by sickness or the necessity of his affairs, and only owes a temporary allegiance to the laws of the enemy.

"Mr. Patterson went to Guadaloupe in the exercise of his just rights, and perfectly consistent with every duty which he owed to Great Britain in his neutral character. He remained there but for a short time, and while he did, he was constrained to remain for the purpose of soliciting from the government payment for the property it had seized by violence, and for which it delayed to make him compensation. There is reason to believe that he returned to the United States as soon as he obtained the amount due him (from) the commander at Guadaloupe.

"At least this is certain, that at the time of capture he was constrained to be in the territories of France by the necessity of his affairs, for it appears that on the 18th March, when the *Betsey* sailed from Basseterre, he had not obtained payment; he was therefore under a necessity of remaining there then, and could not embark in this vessel. On the 20th March the vessel was captured; the capture was irregular and illegal as to him, unless his remaining in Guadaloupe two days to solicit payment for property taken from him by force constituted him a subject of France and an inhabitant within its territories, for the letters of marque and reprisal are issued against the property of such persons only. If this doctrine is true, those who are captured by the belligerents and carried into their territories can not remain two days to solicit their causes without becoming subjects to the belligerent who captured, and enemies to his enemy, for they are certainly within the words of Grotius, viz, *tous ceux qui se trouvent sur les terres de l'ennemi*, and the constraint to stay is not less on him whose property is seized in port after having rightfully gone there than on the person whose vessel is captured on the high seas and carried into port. It would be strange if the law of nations, which is founded on reason, equity, and justice, should support a doctrine which would authorize belligerents to make subjects of neutrals by violence on their persons and property, and doubly cruel on such neutrals if the seizure of their property by one,

and an attempt to gain it, should expose them to the letters of marque and reprisal of the other.

“The authorities which have been cited show a law from which no consequences so absurd and unjust can be deduced, and expressly declare that a man must become settled or domiciliated—that is, have a fixed habitation in a place, before he or his property can be justly exposed to letters of reprisals as an inhabitant of such place. But it has been said that there is a difference between general and special reprisals, and it seems to be an opinion that, although by the law of nations a man situated like George Patterson would not be exposed to the latter; yet he would be to the former.

“Reprisals can be made only by permission of the supreme power of the state and for injuries originating in the acts of the state itself, or in the acts of individuals, and justice refused by the supreme power in the last resort, and the state thus becoming the author and supporter of the injury. If reprisals are special, and without open war, they are granted on the principle of the individual being a member of the nation, and entitled to the supreme power and authority of the state to obtain compensation for an injury received from a sovereign state.

“It is the act of one nation using its authority against the goods and persons of another for an object limited in its nature. In the case of a capture made under special reprisals, the court of the captor will decide the validity of the prize and everything relative to it, in like manner as in a case under general reprisals the individual will be permitted to receive from the prize complete compensation for the loss he sustained from the injury done him by the foreign state. General reprisals are authorized because the state has received a more extended injury in its national character and interests, and for which redress has been denied. The nation injured seeks compensation by seizing the property of the government doing the injury, or the persons or property of its subjects, because they are members of the nation. The right to take and acquire property in an open war, and by general reprisals, is founded on the denial of justice, and a right to appropriate to itself as much of the property of the nation doing the injury as shall be a complete compensation for the loss it has sustained by the injurious act of the other. In the one case letters of reprisal are granted by the supreme authority to one or more individuals because they have received an injury, and

against a nation and all its subjects because these subjects are component parts of the nation inflicting the injury. In the other, letters of reprisal are granted to all because the body politic of which they are members has received an injury.

"The difference is not in the persons *against whom* letters of marque and reprisal are directed. The difference consists only in the persons *to whom* the letters are granted.

"The question here, then, is the same, whether reprisals be general or special. It is whether the person is within the description *against whom* they issue.

"In both cases the objects against which letters of marque and reprisal issue are alike. They are directed against a nation, its subjects, and their property. A man is not more or less the subject of a state, be the reprisals issued against it general or special.

"If, then, the principle on which these acts of hostility proceed, and which, according to Grotius, constitute an imperfect war, the authority under which they are executed, the persons and property against which they may justly operate, are precisely the same in both cases, there is no reason to make a distinction as to Mr. George Patterson, because the letters of reprisal are general.

"It is said, and Grotius is quoted to support the distinction, that Mr. George Patterson is liable to reprisals for having gone to Guadaloupe after the commencement of the war, although he would not have been had he resided there when the war broke out and only remained a short time after. Grotius, describing enemies in the same 6th sec., 4 chap., 3 Book, before cited, says: 'Et hoc quidem quod dixi in peregrinis, qui commisso cognitoque bello intra fines hostiles veniunt, dubitationem non habet.' I think a construction that admits of no modification of these words inconsistent with the principles laid down by this author, and contradicted by his words on the subject of reprisal, which is the only question to be considered here. The terms used by Grotius, in my judgment, must be construed to intend persons who go into an enemy's country to settle there. I am led to this by the following reflections: Grotius makes a difference between those who go into a country in time of open war, and those who were settled there before the war, to whom a reasonable time is given to depart. If they do not depart within such time, they are to be considered as enemies, because the presumption then is that 'they

settle their persons and fortunes on the public bottom.' Yet this presumption, according to Grotius, and the still more rigid Cocceius, may be overthrown by evidence that such persons were constrained to remain there by sickness, or their affairs. Those persons were lawfully there before and at the breaking out of the war. It would therefore be unjust to implicate them in the acts of a government to whom they were not subject by a permanent title. Those who go to an enemy's country for the mere purpose of commerce during a war, are exercising an act equally lawful in regard to both parties, and if constrained to remain there by sickness, or their affairs, the reason is as strong for their being still considered as citizens of the country from which they came. Where a case is within the reason of the law, it shall be deemed within its provisions. Further, the reason given in a note for this rule under the terms *commissio cognitoque bello*, is in these words: 'Videntur enim se immiscuisse et causam illam probasse.' Now, a person who goes merely for the purpose of selling one article and buying another does not mingle himself with one party or thereby approve its cause. He certainly does not come within the reason of the rule; but a person who goes into a country *flagrante bello* and *domicilates* or *settles* himself and takes a *fixed habitation* there, from thenceforth becomes an enemy, for by so doing he takes a side in the war and approves the cause of one party.

"That this is a just construction is also to be collected from the most eminent writers on this subject since the days of Grotius, all of whom, so far as they have come within my knowledge, and some of whom have been quoted, state the doctrine as I conceive it to be, and none of them make any remark on these words as contradicting the law so expressed by them, and many refer to this writer for its support and confirmation.

"Those who differ from me, and yet consider that these words are to be taken literally and without any modification by reference to principles and the subject treated of, will recollect that when Grotius wrote, and for a long time after, the rights of neutrals were little understood and less regarded.

"In 1599 the United Provinces issued a placart forbidding all trade with their enemies, the Spaniards, and declaring those enemies who should trade with them.

"In 1666 the same power, being at war with some Asiatic prince, made a like declaration. In 1689 a convention was

entered into and concluded at London, between England and Holland, to prohibit all commerce of neutral powers with their enemy and to confiscate all vessels and merchandise to whomsoever belonging that should be found sailing into or out of the ports of France. The French ordinances passed in that century declare that merchandises, the growth or manufacture of the enemies of France on board neutral vessels, shall be good prize. These declarations, which were evidences not of the right, but of the power of belligerents, bespeak at once the weakness of neutrals and the imperfect recognition of their rights. It would be affronting to common sense to undertake to prove that such would not be considered as consistent with the law of nations at this day. Yet we may look in the practice and learning of that time for an explanation of any loose expressions that may serve to give a color to principles which are abhorrent to the intelligence and morality of the present age and from this consideration adopt, with caution, the literal sense of general and indeterminate expressions, even of this great master of the law of nations, until we have examined whether the rules they prescribe are consistent with reason, justice, and equity, which are its foundations. A perfect freedom of trade with belligerents to those not engaged in the war, in everything not directly relating to war, is considered as an axiom at the present day; and if in any instances its admission is denied by the practice of the powers at war, a sense of justice universally received and acknowledged imposes an obligation on those who oppose it to avow their assent to the principle and to endeavor to have their conduct ascribed to some other cause, which they attempt to render consistent with the dictates of justice or to exercise by the necessity of self preservation. That neutrals may rightfully traffic, except in contraband, and go to the ports and territories of belligerents, except they are besieged or blockaded, without impairing their neutrality, is now as fully acknowledged as that a neutral may be in the territory of an enemy at the commencement of a war, without, from that cause alone, being exposed to the reprisals granted against the subjects of that government with whom he happened to reside.

“A detention by sickness, or the necessity of their affairs, being as compulsive in one case as the other, and as much within the reason and justice of the law, is, in my belief, as universally acknowledged in the practice of belligerents towards them. Indeed, a right to go to a country for the pur-

poses of traffic and an obligation instantly to depart or be considered an enemy to those who are at war with that country, however prevented by sickness or the necessity of affairs, would be so obviously repugnant to common sense and common justice as not to be admitted anywhere.

“I have stated the reasons which influence my opinion and which have produced in my mind a full conviction that this claim is within the letter as well as within the intention of the article which constitutes the board.

“The course which the gentlemen who act on behalf of the crown have been pleased to pursue in their answers to the various memorials presented by the agent for the complainants, imposed the necessity of a careful examination of the duties and authorities of the board; for although these answers, taken in their full extent, raise objections which render the provisions of the article illusory—a consequence not to be admitted in the most trifling contract, if by any ways it can be avoided; still more inadmissible in a solemn bargain between two wise and respectable nations—yet, as the objection has been so constantly persisted in after the sense of the British Government was known not to countenance it, there would seem to be such strong grounds for its support as to compel an acquiescence, though its admission went to an entire destruction of the fairest hopes and the most express intentions of removing all differences, and satisfying all just complaints which prevented a good understanding, so necessary to the tranquillity and happiness of the two countries, and so truly desired by all the wise and good in both.

“These circumstances are related to apologize for a discussion so lengthy and minute on a subject which I trust to many will appear clear and free from doubt. For however important the consequences flowing from the admission of this objection, if fairly warranted by the words of the instrument, we are bound to abide by it.

“It has therefore undergone in my mind a very careful investigation, and after being examined with all the candor and attention I am capable of, I am obliged to declare that it has not the smallest support from the reason and nature of the thing, from the avowed intention of the parties, nor from the letter of the article, but that it is inconsistent with the declared views of both nations, and directly repugnant to the stipulations of the treaty. And I am of opinion that this capture

was illegal and irregular, and that the complainants are entitled to full and complete compensation from the British Government for the loss and damage sustained by reason of such capture."

Gore, commissioner, case of the *Betsey*—Furlong, master—Article VII. treaty between the United States and Great Britain of November 19, 1794.

"Upon the merits of this case a question
Case of the "*Betsey*," has occurred which requires to be examined.

Furlong, master:

Opinion of Mr.

Pinkney.

"Two of the commissioners have held that on the facts disclosed in the case, George Patterson, the owner of the brig, and part owner of the cargo, was, during and by reason of his stay in Guadaloupe (an enemy's territory), liable to be treated as an enemy to Great Britain by those acting under its authority; and, of course, that *his* property, sent out from Guadaloupe and seized by a British cruiser while he remained in that island, was by the law of nations rightfully subject to condemnation as prize.

"The facts are these:

"William and George Patterson (the claimants) were citizens of the United States and partners in trade, resident and carrying on business at Baltimore. The brigantine *Betsey* was the sole property of George Patterson. She sailed from Baltimore for the West Indies on the 19th December 1793 with a cargo of flour, butter, and specie, belonging jointly to the said partners. George Patterson sailed in her as owner and supercargo. The vessel proceeded to Guadaloupe (her port of destination), where she arrived the 8th of January following, and there delivered her cargo to the said George Patterson. The cargo (at least the provision part of it) was taken from him by the administration of the island by force, with a proviso of payment of its value. He loaded on board the said brig a return cargo, the produce of the island, and destined her therewith to Baltimore, remaining himself at the said island, and she accordingly sailed from Guadaloupe *on the 18th of March*, bound on her said intended voyage, in the prosecution whereof she was, on the 20th of the same month (two days after her departure from the island), met with and taken as prize by the British private sloop of war *Agenorina*. It appears by the evidence found on board the brig that George Patterson had no intention of settling at Guadaloupe, that his stay was meant to be for a short time (only until the *Betsey*

should return with another cargo), that his views were to obtain from the administration of the island payment for cargoes which they had taken from him and his partner, and, while he stayed, to manage the affairs of the concern, and conduct the lawful trade in which it was engaged to the best advantage. No act is proved to have been done or contemplated by him inconsistent with his neutral character and duties.

"The allegation that when he went to Guadaloupe *it was in a state of blockade* (an assumed fact upon which the condemnation at Bermudas appears to have been founded) is admitted to be false. The suggestion that during his stay in the island *it was notoriously expected to be blockaded* is unsupported by the shadow of evidence, and if it were proved, it would be idle and inconsequential. It can not be necessary to argue that the *expectation of a blockade* does not render provisions contraband, or in any shape interfere with the freedom of neutral commerce. We are all agreed that there can not be a constructive blockade to the prejudice of the trade with neutrals; and after this concession, it would be absurd to waste time in showing that the mere expectation of a blockade (when none exists in fact or can be made out constructively) is not entitled to have that effect.

"His sending to America for another cargo of flour, *after the administration of the island had taken the 'Betsey's' cargo by force*, was not the act of an enemy to Great Britain, but strictly lawful for him to do as a neutral. Is he to be called an enemy to Great Britain because he did not petulantly resent the infringement of his rights by a colonial government of France? And is he to be subjected to plunder, without retribution, by British cruisers, because a Guadaloupe administration having seized his property under a promise of adequate compensation, he has thought proper to submit to this wrong, and even to hazard a repetition of it?

"If he chose to act thus in the expectation of that profit which is the object of trade, what right has Great Britain to complain? The administration took *his* property, not *theirs*, and if he discovered it to be more prudent to be silent on the subject, to wait for the promised payment, and even to import another cargo similar to the former while he was so waiting, under a risk of similar violation, he has neither done nor intended anything injurious to Great Britain, provided the cargo imported or to be imported was such as the law of

nations did not prohibit. If the reverse of this doctrine were true, I do not know that the citizens of the United States could, since the year 1795, be at liberty to bring provisions to Great Britain without becoming enemies to France. For during that year the government of this country went far beyond the administration of Guadaloupe in seizing and appropriating the provision cargoes of American citizens. In a word, the views with which George Patterson went to and remained at Guadaloupe were fair and warrantable. The trade he was prosecuting was not forbidden. His conduct while in the island was in all respects such as the law of nations allows and prescribes to neutrals; his stay there was intended to be, and in fact was, temporary; he did not become an inhabitant of the island, but was a mere sojourner in it for special limited purposes, lawful in their nature. Still, however, it is said that his residence there, such as it was, made him *under all the circumstances* the enemy of Great Britain.

"In order that I may be distinctly comprehended in what I have to urge against the above opinion, I will begin with stating that I understand the law of nations, as applicable to this question, to be as follows:

"Neutral strangers who settle or, in other words, take up a *fixed residence* for permanent purposes, however lawful they may be, in the territory of a belligerent nation, *flagrante bello*, and thereby become united to, and *sub modo* citizens or subjects of it, are liable to be treated as enemies by the opposite belligerent; but neutral strangers who merely pass or *sojourn* in the territory of a belligerent nation for the management of their affairs, or in the quality of travelers, or for any other lawful temporary object, not hostile to the opposite belligerent, are not so liable to be treated.

"From Vattel abundant sanction is derived to this distinction. (Vattel, B. 1, ch. XIX.) In secs. 212 and 213 of this chapter the author treats of the *citizens* and *natives* of a country, and of its *inhabitants*, as distinguished from citizens, who are in some sort blended with the society into which they have entered, and these, again, he afterward distinguishes from temporary sojourners, in the predicament of Mr. Patterson.

"SEC. 213. 'The *inhabitants*, as distinguished from *citizens*, are strangers who are permitted to *settle and stay* in a country. Bound by their *residence* to the society, they are subject to the laws of the state while they reside there, and *they are obliged to defend it*, because,' etc.

"The actual *inhabitants*, then, here meant by Vattel, are such as are in some degree incorporated with the nation and are liable to the duties [of] *citizenship*, although not enjoying all its advantages. Such inhabitants have doubtless the qualities of enemies, in respect of a nation at war with that in which they reside, because they have voluntarily united themselves to the enemies of that nation, subjected themselves to their control, bound themselves to defend their interest during their stay, adopted their prejudices and their enmities, and, in short, acquired in their country a citizenship complete as to *duties* though not so as to *privileges*. Thus the same author says, in sec. 215 of the above chapter, speaking of a man who has left his own country: 'If he has *fixed his abode* in a foreign country, he is become a member of another society, at least as a perpetual *inhabitant*, etc.'

"But how is it with *sojourners*, whom Vattel distinguishes from *inhabitants*?

"Vattel, B. 2, ch. 8, sec. 99: 'We have already treated (B. 1, ch. XIX. already quoted) of the inhabitants or of the men who reside in a country where they are not citizens. We shall only treat of the strangers who *pass or sojourn in a country for the management of their affairs*, or in the quality of mere travelers.'

"SEC. 101 (speaking of such sojourners). 'But even in the countries where every stranger freely enters, the sovereign is supposed to allow him access only upon the tacit condition that he be subject to the laws; I mean *the general laws made to maintain good order, and which have no relation to the title of citizen or subject of the state*.'

"SEC. 105 (same subject). 'From a sense of gratitude for the protection granted him, and the other advantages he enjoys, the stranger ought not to confine himself to the respect due to the laws of the country; he ought to assist it upon occasion and to contribute to its defense *as much as his being a citizen of another state may permit him*. But nothing hinders his defending it against *pirates and robbers*, against the *ravages of an inundation*, or the devastations of fire.'

"The author in this place evidently supposes that (although in the case of an *inhabitant or fixed resident* every duty of a citizen is on such *inhabitant* while he continues so) there is no obligation upon a *sojourner* or temporary resident to assist in defending the country in a solemn war, and of course that there is no obligation upon him inimical to the nation with

which that country is in a state of hostility. But in sec. 106 he is still more explicit.

"SEC. 106. 'Indeed he can not be subject to the taxes which have only *a relation to the citizens*, but he ought to contribute his share to all the others. *Being exempted from serving in the militia and from the tribute destined for the support of the rights of the nation*, he will pay the duties imposed on provisions, merchandise, etc., and in a word, everything *which has only a relation to his residence in the country and the affairs which brought him thither.*' Thus, then, it is obvious that a neutral who *sojourns* in one of the countries at war for the purpose of managing his affairs and does not become *a settler* in or *inhabitant* of the country can not by reason of such sojourning be considered as having subjected himself to any obligation injurious to the opposite belligerent, as having associated himself with its enemy, or as having lost the purity of his original neutral character. It appears that, notwithstanding such sojourning, he continues under the pressure of all his former duties as a neutral and acquires none that are inconsistent with them.

"To call such a man an *enemy* is to do violence to common sense.

"SEC. 107 (same subject). 'The citizen or subject of a state *who absents himself for a time, without any intention to abandon the society of which he is a member*, does not lose his privilege by his absence; he preserves his rights *and remains bound by the same obligations*. Being received in a foreign country in virtue of the natural society, etc., *he ought to be considered there as a member of his own nation and treated as such.*'

"The nation, then, with whom a neutral sojourns is, by the law of nations, to consider and treat him *as a member of his own country*. It can not compel him to assist it in its hostile efforts against its enemy, or even in its defense against that enemy. He continues, notwithstanding his residence, to every purpose of the war, offensive or defensive, as much a neutral as if he was still in his own country; and yet it is imagined that the opposite power at war may, *merely on the ground of his residence*, which does not alter his character and is in no respect unlawful, consider and treat him as an enemy. Why is it, then, that neutral goods found in an enemy's territory are not liable to confiscation *if the quality of the place* where a neutral shall himself be found attaches itself thus powerfully

to him? If this doctrine against which I am now contending were true, the converse of it would be also true. If *place*, and not *character*, is to fix a man friend or enemy, an enemy would cease to be so as soon as he quitted the territory of his nation. Surely the character of enemy may be thrown off by the same means by which it may be acquired, where parallel means are practicable. But enemies continue such, says Vattel (B. 3, ch. 5, sect. 71), wheresoever they may happen to be. 'The *place of abode* is of no account. It is the political ties which determine the quality.'

"Here, then, is the true criterion by which friend or enemy is to be ascertained. The *political ties*, not the *locus quo*, designate the quality. Has the party duties upon him in favor of one of the belligerents against the other, which, if called into action, would be hostile in their effects? If he *has*, no matter in what part of the world he shall be found, he is an enemy. If he *has not*, you can not treat him as an enemy without trampling on the laws of nations, although you should find him in the heart of the country with which you are at war.¹

"I have already shown that a sojourner in a country with temporary views, or one who has not in fact *settled* in it, has no such *political ties* to that country as to make him an enemy to those with whom it may be in a state of hostility; that his duties do not point to the annoyance of any nation, and that the obligations which bind him are as perfectly neutral as those he brought along with him.

"The foregoing observations are confirmed by Burlamaqui's principles of political law, pa. 281, sec. 6. 'As to strangers, those who *settle* in the enemy's country, after a war is begun, of which they had previous notice, may justly be looked upon as enemies.'

"Page 299: 'It is also certain that in order to appropriate a thing by the right of war, it must belong to the enemy; for things belonging to people who are neither his subjects, *nor animated with the same spirit as he against us*, can not be taken by the right of war, even though, etc.'

"By *settlers* in a country, it will not be imagined that those are meant who sojourn in it with temporary views, and who come without any intention of abandoning their own country, or becoming *inhabitants* of another. In the description of

¹ "This is upon a supposition that he does not act hostile in its nature, as in the case of Mr. Patterson."

'those who are animated with the same spirit against us' it will not be supposed that those are included who, with a complete neutral character and with every neutral obligation upon them, go for a time into the belligerent country on a lawful errand, having no relation to hostility, and while there take no improper part in the national quarrel, but confine themselves to the object which brought them thither, who bind themselves by no ties to the nation, in whose territory they are, at variance with those which marked and constituted their neutrality, and who continue as free from any duties, adversary to either of the contending powers, as if they had remained at home. It is plain that Burlamaqui's meaning is the same with that of Vattel. By *settlers*, he intends those whom Vattel calls *inhabitants*, who may fairly be presumed to be *animated with the spirit* of the nation with whom they have permanently mingled, to whose interests they have joined their own, and under whose subjection they have placed themselves. Such may be said to make common cause with the nation and to adopt its quarrel. Thus far the doctrine may justly be carried; but when a neutral trader goes into an enemy's territory for a few weeks to conduct a legal trade, to call in precarious debts, or to do any other act connected with a commerce which no law condemns, when, during his stay, he does nothing to make common cause with the enemy, or to evidence his intention of espousing its quarrel, it is so manifestly unreasonable to call him an enemy upon such a foundation that no argument can lend even a color to it.

"Lee on Captures, pa. 65, gives us his opinion on this subject precisely in the words of Burlamaqui, and accounts no strangers as enemies but such as *settle* in the enemy's country.

"The following is copied from a manuscript note of Lord Camden's opinion in two of the St. Eustatius Cases (*Harmonie* and *Jacobus Joannes*) heard on the 10th of February 1785, put into my hands by a respectable gentleman in the profession.

"If a man went into a foreign country, upon a visit, to travel for his health, to settle a particular business, or the like—of such persons *so temporarily residing*, he thought it would be hard to seize upon their goods; that a residence attended with these circumstances ought not to be considered as a permanent residence.

"In applying the evidence and the law to the resident foreigners in St. Eustatius, he said: 'In every point of view they

ought to be deemed *resident subjects*. Their persons, their lives, their industry, were employed for the benefit of the state under whose protection they lived; and if war broke out, they continuing, they paid their proportion of taxes, imposts, and the like equally with natural-born subjects, and no doubt come within that description.'

"The note concludes with stating, 'That the goods in both ships, viz, the *Harmonie* and *Jacobus Joannes* were condemned, except those belonging to Erutz, upon the ground of *permanent residence or inhabitancy* of the owners in an enemy's territory.'

"The ground upon which the property of Ernst was excepted from the condemnation, is stated in the note to be '*that he was an occasional resident at Amsterdam.*'

"It is evident from this opinion of Lord Camden that he did not consider a temporary sojourner in an enemy's country as the proper object of hostility, but that he rested his decision wholly on the fact of *permanent inhabitancy—a fixed and settled residence*. Such was the doctrine in this country formerly, and if it has been changed it will not be easy to prove that the change is justified by the laws of nations. Even the form of the commission of reprisals issued by this country during its present and former wars concurs to establish the distinction with which I set out. It gives authority to seize property belonging to France or to any persons, being *subjects* of France, or *inhabiting* within any of the territories of France. Such, also, is the language of the different prize acts. We have seen in Vattel the true nature of an *inhabitant*, and it can not be pretended that a temporary sojourner does, even in common parlance, come within the meaning of that term.

"The only authority which has been mentioned at the board, as opposed to the principles I have endeavored to establish, is a passage in Grotius, B. 3, ch. 4, sec. 6.

"For an answer at large to this authority I shall content myself with referring to the written opinion of Mr. Gore. I am induced to this because, in the written opinion of one of the British commissioners lately filed, that authority, though originally relied upon to prove that any person *found* or being in an enemy's territory was absolutely liable to be treated as an enemy, is used for a different and a less extensive purpose, meeting my approbation.

"Upon the whole I take it to be clear that, upon the footing

of residence, George Patterson's property was not liable to condemnation.

"It would not be proper, however, to dismiss the question without noticing the particular manner in which one of the commissioners in his written opinion sustains the condemnation of George Patterson's property. The argument stands thus: All persons who are within the enemy's territory are *prima facie* to be considered as enemies and liable to hostilities. (Grotius.) George Patterson, being at Guadaloupe at the time of the capture, of course came within this rule, and to extricate himself from it it was incumbent on him to show 'That he was there acting in a manner perfectly consistent with the strict duty of a neutral. The burthen of proof was upon him.' It is then supposed and attempted to be shown that he has failed in this proof. Even if it be admitted that the above rule is a sound one, and I am not disposed to question it, the application of it is certainly exceptionable. To extricate himself from the operation of such a rule, it would only be incumbent on Mr. Patterson to prove himself an *American citizen*. The fact being established (as it was by all the evidences found on board the brig) the neutrality of his character stood free from the presumption against it, arising solely from the place in which he happened to be. The burthen of the proof would then be transferred from him to the captors.

"By showing that he was a citizen of the United States he showed that he was no enemy to Great Britain, and if the captors desired to defeat the effect of that evidence, it was indispensable for them to go further than barely to prove *that he was in an enemy's country*, which in *itself* was not at all inconsistent with the neutral quality attached to his citizenship of a friendly nation. Until they showed that he had done some act by which he had forfeited the friendly character which all the ship's papers proved him to possess, that friendly character was entitled to protect him. They did not prove such an act by merely showing that he had gone to Guadaloupe a few days or weeks before the capture on a commercial errand, and had at the time of the capture remained there *two days* after the sailing of the vessel of which he was supercargo, since all this it was perfectly lawful for him as a neutral to do. They did not prove such an act in any way. Neither his *actual stay* in the island from the time of the brig's departure to the time of the capture (two days) nor the stay he *intended* to make, as

declared by one of his letters (until the brig should return with another cargo), can be said to come up to the idea of a *permanent residence*, let such stay be coupled with what lawful acts it may, so as upon the footing of *inhabitanacy* to make him an enemy to Great Britain. It can not be pretended that while at Guadaloupe he did any act not permitted to a neutral by the law of nations. On the contrary, it may be confidently asserted that he did nothing *inconsistent with the strict duty of a neutral*. His object in remaining at the island was manifestly to procure payment of what was due to him from the administration, and while so employed, to make such mercantile profit by conducting the usual trade of the partnership as might be practicable. That the island wanted provisions is probable, and that he wished to have an opportunity of supplying it not only on account of the price of flour, but also on account of the profit to be made by a return cargo is certain, but it was strictly consistent with his duty as a neutral to do so. In short, he was neither an enemy by residence nor by reason of any conduct unlawful to a neutral."

Opinion of Pinkney, commissioner, July 1, 1797, case of the *Betsey*, Furlong, master; Article VIII. of the treaty between the United States and Great Britain of November 19, 1794.

"The question which arose respecting our Case of the "*Betsey*," jurisdiction or right to entertain this case having been determined in the affirmative by Furlong, master: Opinion of Mr. a majority of the board, I shall enter into Trumbull, Fifth no argument on that subject, but content Commissioner. myself with expressing my entire assent to that determination.

"But since there is a difference of opinion as to the merits of the case, it is my duty to state the reasons which influence mine.

"Three principal points have been urged against the claimants in various stages of the proceedings: First, that the trade from the United States of America to the French possessions in the West Indies was illegal; second, that the island of Guadaloupe was in a state of blockade; and third, that William and George Patterson, the owners of the vessel and cargo, were natural-born subjects of Great Britain, and not citizens of the United States of America; and further, that George Patterson was an inhabitant of the enemy's country.

"It is not merely held by the American Government that

the trade carried on by its citizens to the possessions of France in the West Indies was consistent with the law of nations and with the duties of neutrality, but such, also, is the sense entertained on this subject by the Government of Great Britain and expressed by the decisions of its supreme tribunal of appeal in matters of prize.

"The doctrine of constructive blockade is also not merely objected to and opposed by the one nation, but likewise disavowed by the same high authority of the other, and it is in full proof before us that both William and George Patterson are and have been, ever since the American Revolution, citizens of the United States. To the two former points it is therefore unnecessary to speak, as also to so much of the third as relates to the citizenship of the Messrs. Patterson. I shall therefore confine my attention to the inhabitancy of George Patterson in the enemy's country.

"It appears from the papers before the board that the *Betsey* arrived at Guadaloupe with a cargo of provisions on the 8th of January 1794; that George Patterson, owner of the vessel and of part of the cargo, was on board in the character of supercargo; that difficulties arose in disposing of the cargo, which was at length forcibly taken possession of by the government of the island; that after considerable delay a quantity of sugar, etc., was received in part payment, laden on board the brig, and dispatched for Baltimore. Thus far it can not be pretended that George Patterson was an inhabitant of the enemy's country, for, the trade in which he was engaged being lawful, it follows that all the usual means of carrying it on were also lawful; of those usual means the supercargo was one, he being by the nature of the character as much attached to the cargo as the master or mate is to the vessel.

"It appears that the vessel sailed from Guadaloupe on her return to Baltimore on the 18th of March, that she was captured on the 20th of the same month and condemned as being enemy's property.

"It appears, also, that George did not embark on board the brig, in his character of supercargo, to return to America, but that he sent her away and remained himself on the island of Guadaloupe, and it is this remaining in the enemy's country, *intra fines hostiles*, which is understood to have given to him the quality of an inhabitant, and to have rendered that property, every transaction relating to which was legal, even in the

understanding of the captor's courts, until the vessel sailed, illegal the moment after, hostile and subject to confiscation.

"To support this doctrine of inhabitancy, and the consequences deduced from it, a passage of Grotius is quoted, a writer who is doubtless entitled to very high respect, but whose meaning in this passage is conveyed in very general terms.

"The words are 'Late autem patet hoc jus licentie (hostis-interficiendi): nam primum non eos tantum comprehendit, qui actu ipso arma gerunt, aut qui bellum moventis subditi sunt, sed omnes etiam qui intra fines sunt hostiles.' B. 3, C. 4, S. 6. In a following section he goes on to say, 'Ceterum ut ad rem redeam, quam late licentia ista se protendat vel hinc intelligitur, quod infantium quoque ac feminarum caedes impune habetur, et isto belli jure comprehenditur.' And again, 'Ne captivi quidem ab hac licentia exempti.' (Secs. 9 and 10.)

"This passage is thus applied to the case before us; if all those who are 'intra fines hostiles' have thereby so far acquired the character of enemies as that we have a right to kill them, *a fortiori* must we have also a right of seizing their property and condemning it as belonging to an enemy.

"Vattel, speaking on this subject (the right of killing an enemy), says: 'Hence the right of killing an enemy in a just war is derived, *when their resistance can not be suppressed*. When they are not to be reduced by milder methods, there is a right of taking away their lives.' (B. 3, C. 8, S. 139.) 'But the very manner by which this right of killing enemies is proved points out also the limits of this right; on an enemy's submitting and giving up his arms, we can not with justice take away his life.' (Ib. S. 140.) 'Women, children, the sick, and the aged are among the number of enemies, but these are enemies who make no resistance, and consequently give us no right to treat their persons ill, or use any violence against them, *much less to take away their lives*; this is so plain a maxim of justice and humanity that at present every nation in the least civilized acquiesces in it.' (Ib. S. 145.) 'As soon as your enemy has laid down his arms and surrendered his person, you have no further right over his life, unless he should give you that right by some new crime, or had before committed against you some crime deserving death. Therefore it was a dreadful error of antiquity—a most unjust and savage claim—to assume a right of putting a prisoner of war to death.' (Ib. S. 149.)

"This language of Vattel is not only consistent with the feelings of humanity and calculated to soften the horrors of war; not only conformable to the first principles of reason and justice and to the nature and mutual relations of man, but it is also sanctioned by the practice of all the modern civilized nations. In ancient Greece and Rome it was indeed lawful and customary to sell prisoners of war, but such conduct now is universally regarded as a distinguishing characteristic of savage and barbarous nations. It was, also, then allowed to slaughter indiscriminately all those who were found in an enemy's city taken by storm, but scarce an instance of this kind occurs in the history of Europe during the two last centuries, and the few which have occurred are spoken of with abhorrence. We have, indeed, in our time, heard of the massacre at Ismael, but who will justify it? This might be sufficient to show that the general expression of Grotius in this passage is not understood to be true, literally in its full extent and without exception; but I beg leave to add that a positive exception doubtless takes place in favor of ambassadors and all public ministers, who, though residing *intra fines hostiles*, are surely not among those who may be lawfully killed or otherwise treated as enemies; and I will further observe that the sense of officers of the British Government has been often and explicitly declared to differ widely from this doctrine, particularly in the case of neutral persons found on the island of Martinico at the time of its capture during the present war. Far from anyone supposing that there existed a right to kill the neutral persons so found *intra fines hostiles*, they were not even treated as prisoners of war. The same was the case at the capture of Guadaloupe, and if that event had taken place while George Patterson was there, I doubt whether there could have been found a single soldier or seaman among the victors who would have supposed that he had a right to kill him unless he met him in arms. Shall we then regard as sanctioned by the law of nations an act from which the feelings of a private soldier would revolt? One exception to his rule is indeed admitted by Grotius himself in favor of those who are found in the enemy's country at the breaking out of the war, and to these he allows time to depart.

"We find, then, that this principle, as laid down by the venerable author, is not absolute and without exception. All those cases where the operation of the rule would not consist with

equity, justice, and reason, which are the true foundations of the law of nations, must stand as exceptions, and it is proper now to examine whether the application of the rule to the case before us be consistent with our sense of those fundamental principles.

“Why did George Patterson remain on the island of Guadeloupe after the vessel of which he was supercargo had sailed? It appears from the papers before us that the cargo over which it was his duty to watch was forcibly seized and taken from him by the government of the island; it appears that the property now in question, laden on board the *Betsy*, was received after considerable difficulty and delay in part payment for the outward cargo which had been so seized, and that a part was still unpaid when the *Betsy* sailed. In such circumstances what was proper and wise to be done by the supercargo? He could no longer remain with the entire object of his charge, which was thus divided, unless he were to add to the inconveniences already suffered from a forcible detention of the property, by the act of the government for a considerable time, by voluntarily detaining the *Betsy*, after she was laden, for a further indefinite time, and until he should receive the sum remaining due from a military power over which he could have no possible control. Such a step would have been contrary to common sense. With which portion of the property, then, was it wise and right to remain? With that which, being on board a neutral vessel, under the care of a neutral captain and crew, in whom he had confidence, and protected by regular papers, he must have regarded as secure from all dangers but those of the seas? Or ought he to remain with that which, being in the possession of a military power, in times of much irregularity and confusion, he could not have considered as being in a state of security? I trust that every merchant and every unprejudiced man would have determined as Mr. Patterson did—to send away the vessel with what he had secured, under the care of his captain, and to remain himself, and continue his efforts for the recovery and security of the remainder.

“Thus far I can see Mr. Patterson in no other light than as a stranger detained in the enemy’s country by the necessity of his affairs. But let us trace his situation still further. We find him remaining in Guadeloupe, in the expectation of receiving from the Government a further quantity of sugar, coffee,

etc., to balance the account, in payment for the cargo which had been seized. What was to be done with this sugar, etc., being received? It must be removed, for we can not suppose or expect that he should suffer it to remain on the island; and how was he to move it? By chartering a vessel for the purpose? Perhaps this was not to be done in the actual circumstances, or, if practicable, it might be so only on disadvantageous terms, and in that case why should he not employ his own vessel; why not order her to return? And since the trade was lawful, why order her out in ballast? Why not order her to bring another cargo of any salable article not contraband? I shall here be told that among the papers before us there is a letter from George Patterson to his brother in Baltimore, requesting him to send the vessel immediately back with another cargo of provisions; and I may be told that this act in a man who, knowing the want of provisions in Guadaloupe, must also have known from public and general report that the British admiral intended very soon to blockade and attack the island, was an act of hostility. There is such a letter, but I must be permitted to doubt the consequences drawn from it. We are to recollect that, the trade from America to the French islands being lawful, there could be no illegality, even much less any hostility, in ordering another cargo of flour to Guadaloupe, or any other French island not actually blockaded or invested. We must reflect that no man is under any legal obligation to regulate his affairs by public report—that the very notoriety of the intention to blockade and attack, presumed in this case, would naturally have led a man in any degree conversant with the history of military enterprises to believe that Guadaloupe was not the island against which an expedition was really meditated, for it seldom happens that a military commander suffers the enemy to be truly informed by public report of the precise point of intended attack, the real plan of his operations. We are to reflect, also, that an intended blockade, known only by public report, is more ridiculous than a constructive one. No one doubts but this vessel and cargo, if taken in the act of entering or attempting to enter a port actually blockaded, would have been justly condemned; and if the capture had taken place under such circumstances, I trust we should not have seen the claimants before this board.

“Hitherto, then, we do not find any act done, or any intention expressed, which stamps Mr. Patterson with the character

of an enemy to Great Britain, nor do we find any privileges enjoyed which mark him as having assumed the character of a subject or even of an *inhabitant* of France. Can he be considered as having his domicile at Guadaloupe? Vattel defines the domicile to be the habitation 'fixed in any place, with an intention of always staying there; a man does not then establish his domicile in any place unless he makes sufficiently known his intention of fixing there, either tacitly, or by express declaration.'

"The letter to his brother, spoken of above, explains to us fully what were the intentions of George Patterson in remaining *intra fines hostiles*. After stating the vexations he had met in the island, he requests his brother to send the *Betsy* back immediately, and far from intimating any 'intention to abandon the society of which he was a member,' or any idea of establishing himself in Guadaloupe, for the purpose of general and permanent commerce, he goes on to declare expressly his intention of returning to Baltimore in the brig, as soon as he shall have collected at Guadaloupe and secured the property which was there at hazard, and there is another paper before us, which proves that this intention soon was really and actually carried into execution; for we have his deposition, bearing date in Baltimore a few months after this transaction. If, contrary to what is thus proved, we knew him to have written letters of advice to his friends and correspondents announcing his intention of residing in the island for the purpose of general and permanent commerce, and requesting their commissions or offering his services; if we knew that he had taken a house, warehouses, or counting house, or formed that sort of establishment of clerks, etc., etc., which is necessary to a merchant employed in the general transactions of trade, he might have been said to have established his domicile, although he might not have declared his intention of staying there *always*; and in the opinion of most writers the property of a man who had so far identified himself with the enemy and mingled his interest and prosperity with theirs would have been liable to confiscation. But Mr. Patterson did none of these things. Whether we consider the acts proved to have been done, or the intentions which we know to have been expressed, we see in him a stranger, coming into the enemy's country on a lawful business, invested with an acknowledged lawful character—without any original intention, expressed or suspected,

of remaining *intra fines hostiles*—involved in difficulties by an act of violence of the government of the place, necessarily detained by the consequences of this act of violence, declaring his intention to quit the country as soon as he can extricate himself and his property from the difficulties in which he was thus involved, engaging in the mean time in no general mercantile transaction, but merely taking such measures as prudence dictated, and such as were consistent with the law of nations, and the acknowledged duties of a neutral, for withdrawing himself and his property as soon as possible.

“Surely circumstances like these form an exception to the doctrine of Grotius, which reason, equity, and justice must approve. A man so situated can not be regarded as an enemy without doing violence to all those principles. I might go on to quote Vattel, Book 1, C. 19, S. 212 and 213, and Book 2, C. 8, S. 99, 107, 108, etc., on the distinction of characters which strangers may assume by residing or sojourning in foreign countries, but it is useless to enlarge.

“This doctrine of the inhabitancy of Mr. Patterson in the enemy’s country is the only ground of the sentence given against the property in question that appears to me to have any pretense to solidity, and this does not, to my mind, bear the test of examination. It is, therefore, my opinion that the claim and complaint of the memorialist in this case are well founded, and that therefore full and adequate compensation ought to be made by the British Government for all the losses and damages which have been sustained by the claimants, William and George Patterson, in consequence of the capture and condemnation of the *Betsey*—Furlong, master—and her cargo.”

Trumbull, fifth commissioner, April 11, 1797; case of the *Betsey*—Furlong, master—Article VII. of the treaty between the United States and Great Britain of November 19, 1794.

“Several members of the board have recorded their opinions, not only on the preliminary question which arose in this case as to the construction of the treaty, but also on the merits of the claimants’ demand of compensation. They have not only recorded the general grounds of their opinions, but have discussed at length several of the topics that were either contained in the printed cases and other proceedings or mentioned at the board in the course of the inquiry. Lest from this latter circumstance it should be

Case of the “*Betsey*,”
Furlong, master:
Minority Opinion
of Sir John Nicholl.

inferred that those topics formed the principal grounds of my decision, I feel myself called upon to state in writing the reasons of my ultimate opinion on the merits of the case.

"At the same time I take the opportunity of declaring that it is not my present intention again to resort to this measure, not thinking that the duty I have undertaken calls for it.

"Upon the construction of the treaty as to the extent of the powers given to the commissioners, it might be questioned how far the decision of the board was binding on the high contracting parties. The decision might be revised and the reasons of each member might be required to appear. I therefore recorded mine. But upon the merits of the claims and the amount of compensation, the treaty has expressly declared the decision of the majority of the board to be final and conclusive.

"It would be extremely inconvenient, if not altogether incompatible with my professional engagements, to state my opinion in writing on the merits of each case.

"It is probable that those who shall chance to read the reasons which may be hereafter recorded in other cases by members of the board, and who shall find certain positions very ably controverted in those reasons, may infer that a difference of opinion in other members was wholly or principally founded on those positions, notwithstanding in truth they might not materially or even in any degree weigh in their final judgment. I must submit in future cases to be exposed to such erroneous inferences.

"In what I am about to state it is not my intention to combat any of the positions laid down in the opinions in writing delivered by other members, however decided my dissent may be from several of them. Much less shall I examine any loose observations in the printed cases or proceedings, or which may have dropped at the board in the course of an unreserved discussion of the merits of the claim. I shall content myself with stating briefly what was my own final impression of the case, leaving undisturbed those reasons which have governed other gentlemen in their decision.

"It appears unnecessary again to state minutely the circumstances of the case; they will be found in the proceedings and in the opinions of other members.

"The first and principal consideration is in respect to the compensation claimed on behalf of George Patterson, the proprietor of the vessel, and of a moiety of the cargo.

"George Patterson was a citizen of America. He went on

board the *Betsey* to the French island of Guadaloupe several months after the existence of open war between Great Britain and France, disposed of his cargo there, dispatched the vessel to America with the (present) return cargo, and with instructions to bring back another cargo to Guadaloupe.

"George Patterson remained behind at Guadaloupe and was resident there at the time of the capture in question.

"All persons who are within the enemy's territory are *prima facie* to be considered as enemies and are liable to hostility. (Grotius.)

"But a person within the enemy's territory is excepted from hostility if it can be shown that he was a neutral and was there for an occasional purpose and not engaged in any transactions connected with the operations of war. A neutral must cautiously abstain from interposing in the war. To prove this, no authority is necessary to be referred to. He is not at liberty to do all acts with the same unguarded freedom as in time of peace. If a neutral has rights, he has also duties. George Patterson's right to compensation depends, then, in my opinion, on his having shown that, notwithstanding he was at Guadaloupe at the time of capture of his vessel and property, still he was there, acting in a manner perfectly consistent with the strict duty of a neutral. The burthen of proof lies upon him. *Prima facie* he was an enemy; he must exculpate himself.

"He carried to Guadaloupe a cargo of provisions. This was not illegal. His cargo, though brought there for sale, was forcibly purchased from him by the governing powers of the island, a circumstance from which he would naturally infer that provisions were at that time necessary to the military operations of the island.

"It was a matter of public notoriety that a British armament of considerable force was at that time acting in the West Indies for the conquest of the French islands.

"Martinique, a neighboring island, was at that time invaded.

"The attack of Guadaloupe was at that time expected.

"George Patterson, though his outward cargo was disposed of and a return cargo of greater value purchased, thought proper to separate himself from his vessel, to dispatch her to America, and voluntarily to remain at this critical period at Guadaloupe, liable to be called upon to do military duty and to act in common with the other inhabitants in defense of the island.

“He did not remain there to withdraw his property or from apprehension of danger to it, for he sent to America for another cargo of provisions, which, from what he had already experienced, he must well know were highly necessary to the defense of the place. His instructions were that the vessel should return with these provisions with all possible speed.

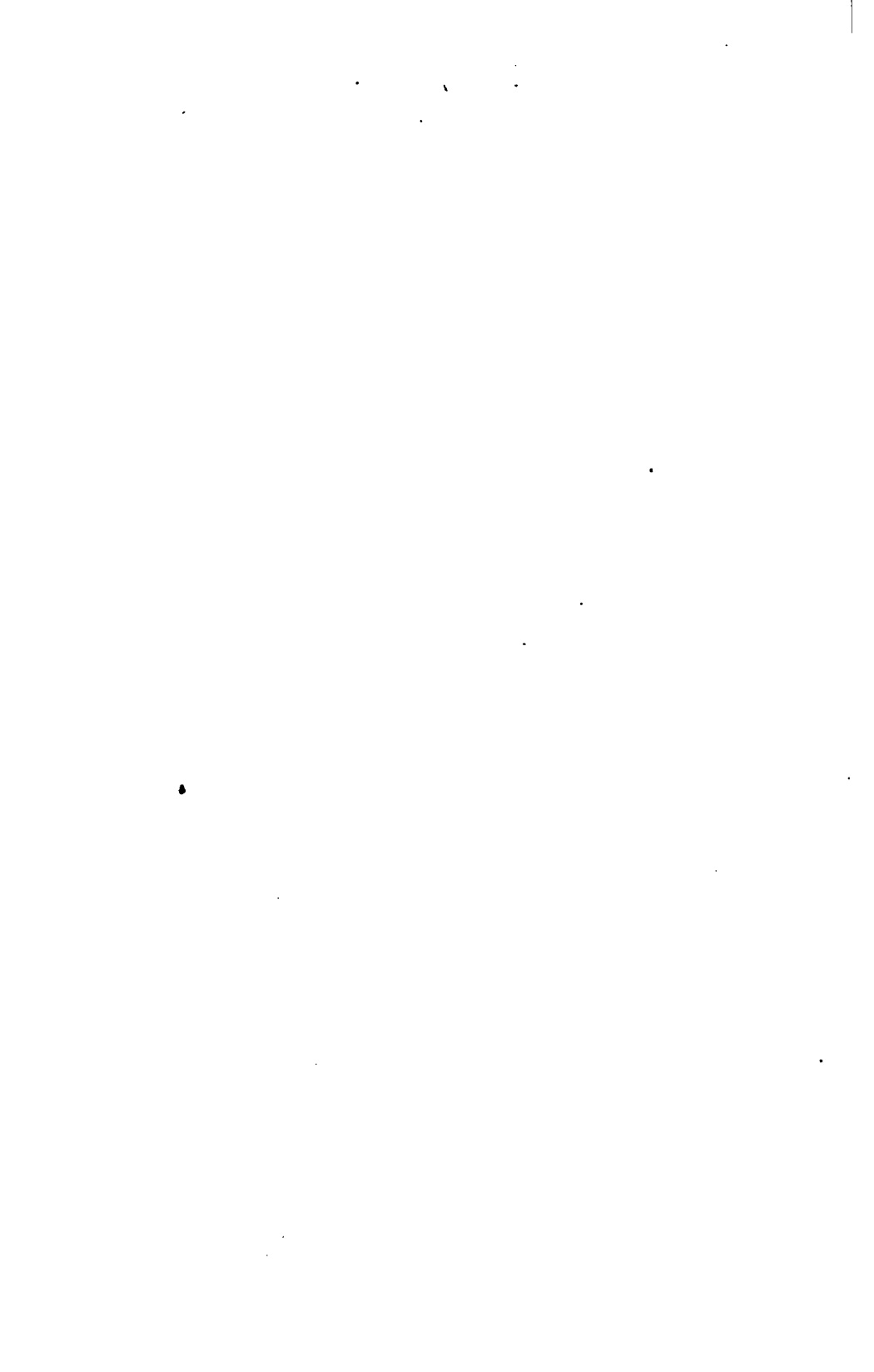
“Whether all this was done with an intention of aiding and adhering to the enemy and of interposing in the war, or merely for a mercantile profit, is not material to be proved. A neutral who supplies the enemy with contraband probably has profit only in view.

“The board is not called upon to lay down general rules or to define abstract principles, but only to decide on the merits of the claim under all its accompanying circumstances. It may be extremely difficult to define precisely what residence in a belligerent country in its nature and duration shall be permitted to a neutral, or what acts amount to an interposition in the war, and although I feel the present case to be by no means clear of doubt and difficulty, yet, under all the circumstances taken together, I am of opinion that George Patterson, voluntarily staying at Guadaloupe at the particular period in question and acting in the manner before stated, was not excepted from hostility, and is not entitled to compensation for the loss of his property engaged in that transaction and taken during the time he so continued at Guadaloupe.

“Mr. William Patterson was owner of the other moiety of the cargo. He remained in America, and was not otherwise engaged in the transactions of George Patterson or responsible for his acts than as being his partner in trade.

“Having very maturely considered the case of this claimant, and with all that deference and respect which is justly due to the decision of a very exalted tribunal, but being bound (if that decision is not conclusive) to decide ultimately upon my own conscientious judgment, I can not but concur with the majority of the board in thinking that William Patterson is entitled to compensation.”

Nicholl, commissioner, case of the *Betsy*—Furlong, master—Article VII., treaty between the United States and Great Britain of November 19, 1794.



CHAPTER LVII.

ACTS OF AUTHORITIES.

1. WHO MAY BE CONSIDERED AS "AUTHORITIES."

Dr. John Baldwin, a citizen of the United States, was engaged in mercantile and other pursuits in the State of Oaxaca, in Mexico, and owned lands and mills there. In the summer of 1833 he set out for the city of Oaxaca with various articles of merchandise, worth about \$5,000. He ascended the River Goazacoalcos to Limnapa, a place of debarkation, and from thence proceeded to Tehuantepec for the purpose of obtaining mules to transport his merchandise to Oaxaca.

On the 21st of May 1833, after his arrival at Tehuantepec, a complaint was made against him by one Gonzales, a revenue officer, to the effect that he had exported six bales of cochineal without having paid the duties on it, which amounted to \$200. On the 23d of May this complaint was submitted to José Flores Marques, judge of first instance, who issued an order to the justices of the peace of the villages through which Baldwin might pass, to seize his person and property and retain enough of the latter to secure the fine of \$200 to Gonzales. Subsequently the justice of the peace of Petapa informed the judge that Gonzales had seized and embargoed for his own use two of Dr. Baldwin's mules. It seems that Marques also undertook to make a more general investigation of Baldwin's conduct, on accusations brought by Gonzales, and examined several witnesses.

In June 1833 a political disturbance took place in Tehuantepec, where a body was formed called the central junta, which appointed a person named Vera to take the place of Marques as judge of first instance. This junta instituted a government, appointed civil officers, had a military force under its command,

and administered affairs in that part of the country. On the 13th of August 1833 Vera took cognizance of the case commenced before Marques, and he subsequently gave orders for the restoration of such of Dr. Baldwin's effects as had been seized, and for the prosecution of the suit against him requiring him to give security for the final judgment; but in the course of the proceedings Dr. Baldwin was arrested and thrown into prison. After ten days' confinement he made his escape. But he was stripped of his property, for, although restitution of it was ordered, but a small part was ever returned to him.

While the wrongfulness of the proceedings against Dr. Baldwin was admitted, the Mexican commissioners contended that the Mexican Government was not liable, as he was imprisoned and despoiled of his goods in consequence of the order given by the intrusive magistrate Vera, appointed by the intrusive government of the central junta, for whose proceedings Mexico was not liable.

The American commissioners answered that the evidence before the board showed that Vera was acting in a judicial capacity, for the benefit of the political community in which he exercised his functions; that the prosecution was on a charge of violating a public law regulating custom-house duties, and that the goods of Baldwin were ostensibly taken to cover the results of the suit against him; that Gonzales, who, as a custom-house officer before the existence of the central junta, made the charge of smuggling against Baldwin, and caused the legitimate judge, Marques, to issue orders for the seizure of his person and effects, conducted, as a member of and secretary of the junta, the proceedings before the intrusive judge, Vera, and procured the actual imprisonment of Baldwin and the confiscation of his property; that the same Gonzales, in another official capacity, after the junta's government was overthrown, ordered and directed the successor of Vera to go on with the suit; that this suit was carried through the subordinate tribunals to the highest court in the State of Oaxaca, and thence sent back through the same course to the court of original jurisdiction; that at the close of these proceedings a judgment of acquittal and restoration was pronounced; and that in the final decree it was distinctly stated that Baldwin had been illegally and causelessly prosecuted; that the evidence did not justify the proceedings against him; that the prosecution was the result of the fault of the government officials, and that if his property could not be re-

stored he was entitled to the value of it and to damages for the injuries he had sustained.

The American commissioners laid it down as a general principle that every political society is responsible for the acts of wrong and outrage inflicted by its rulers on the citizens of any political society in amity with it. They contended that if the injury was inflicted by the civil power *de facto* of the country, that power was bound to repair it, and that if it failed to do so the obligation to make reparation devolved upon the succeeding rulers and government. In this relation they referred to the assumption of liability by the Bourbon dynasty for the acts of the Napoleonic régime; to the liability of the kingdom of Naples for the acts of Murat, who was installed by Napoleon and regarded in Naples as an usurper, and to the liability of the Government of Portugal for the acts of the government of Don Miguel. In this relation the American commissioners said:

“It is not denied that Baldwin is entitled to redress, but it is alleged that the acts of injury complained of were done by persons not acting under legal authority; that these persons are therefore merely private wrongdoers, and that they, and not the government of the country, are responsible for the injuries inflicted. If the facts in the case warranted the position that these persons had no pretext for exercising the functions of civil officers and had assumed official characters for the purpose and as the means of plundering the property and committing outrage upon the persons of citizens and foreigners, and the government had at once interposed its authority, put an end to their proceedings, and punished the aggression with proper severity, it might with more plausibility be contended that it could not be held responsible for their acts. But such are not the facts in this case. The central junta of Tehuantepec was an organized government, exercising the full powers of government, and, so far as appears, intending *bona fide* to establish an enduring government. The standard they raised was the standard of centralism in opposition to that of federalism. The system of government they advocated and attempted to uphold was that which was subsequently approved by the people of Mexico and established throughout the whole country—that which now prevails. The present authorities of Mexico have never treated the members of this junta as lawless insurgents deserving punishment, but on the contrary have commended their conduct on this occasion and bestowed on some of them high official station. It is declared in the report of Juan Vera, the judge of the original court at Tehuantepec, dated in 1835, that Immoteo Gonzales, who instituted the proceedings against Baldwin, ‘had

commended himself to the supreme government of the free State of Oaxaca by demonstrating his zeal for the revenues of the State,' by the part he took in these very proceedings in Baldwin's case. He occupied official station not only before and during the existence of the junta, but held the station of administrator of the city immediately after the suppression of that body. * * * In January 1835 Juan José Salinas, a member of the central junta, which is now represented as an insurgent body, was governor of the department of Tehuantepec."

The American commissioners adverted to the fact that on September 13, 1833, when Vera pronounced sentence confiscating Baldwin's effects, the government of the junta of Tehuantepec was for the time the government *de facto* and in full possession of the civil power of the country; and they referred to Article XIV. of the treaty between the United States and Mexico of April 5, 1831, by which the contracting parties agreed to give to each other's citizens "special protection." They argued that if Mexico permitted a civil power to arise in any of her provinces and exercise for a time all the functions of government, and in the exercise of authority to seize and confiscate the property of an American citizen and imprison his person without just cause, she had violated her treaty obligations; and that her inability to keep down rebellion in her territory, while it might be her misfortune, could not excuse the nonfulfillment of her contract. They further contended that Mexico could not be permitted to set up want of authority in Vera, since the proceedings were begun before his predecessor and continued before his successor, and were never disavowed; that although the judge who succeeded Vera directed the goods to be released, he exacted security for the results of the suit and remitted the case to an assessor, who reported that Baldwin ought to be repossessed of his property and indemnified for his injuries, but declared that as the goods were taken to clothe the troops of the junta, the national treasury could not be held responsible.

The Mexican commissioners took the ground that, apart from the revolutionary character of the junta, the Mexican Government was further protected by an act of February 22, 1832, by which it was provided that, in case of rebellion in any part of the republic, those who withdrew from their obedience to the government should be responsible severally and *in solido*, in their individual property, for whatever may have been forcibly taken by

Question of Individual Liability.

them and their chiefs, whether it belonged to individuals, to corporations, or to the public treasury, and that they should at the same time forfeit their honors and employments.

The American commissioners answered that the Mexican Government, having engaged to afford "special protection" to American merchants and traders in its territories, could not release itself from the obligation by a municipal regulation imposing duties on particular individuals. They further declared that the relief held out by the law in question was wholly illusory. How, they asked, could an injured person obtain redress from individuals whom the power of the government could not reduce to obedience? So long as the rebellious power continued, relief would be hopeless. If it were subdued, the offenders would generally be treated as traitors, with confiscation of property and perhaps loss of life. If, on the other hand, they had strength to make a composition with the government, they would surely be able to defeat the efforts of foreigners to obtain indemnity from them.

On the various grounds which they had stated, the American commissioners held that Baldwin was entitled, for expenses, loss of property, the breaking up of his business, and false imprisonment, to an award of \$24,414.75 as principal, with interest on various items. But as the Mexican commissioners took a contrary view, the case was referred to the umpire.

Preliminary Opinion of the Umpire. The umpire, on February 23, 1841, made an interlocutory report in which he stated that the facts had not been sufficiently established to enable him to render a final judgment. It would be necessary to determine "whether the movement which took place in 1833 in the State of Oaxaca had the character of a revolution or that of a rebellion, whether, consequently, the persons who took part in the affair of Mr. Baldwin acted as authorities of a political party or as simple individuals." If they acted "as simple individuals," it would "remain to ascertain whether the Mexican Government employed all the means in its power to prevent the wrong done by them." The umpire also referred to various matters of proof, and then proceeding to the subject of damages, said:

"The American commissioners allow Mr. Baldwin \$12,000 as compensation for the loss of his time, the interruption of his business, etc., etc., as well as \$3,000 as damages for his imprisonment and the outrages inflicted on his person and his dignity, and, in the last place, \$3,557.25 as compensation for

profits which he lost, in their opinion, in consequence of the seizure of his effects. In order to decide on those points, it is important to learn what are the principles of Mexican law relative to damages due for torts against the person or against the property of another. It is less important to know what is the opinion on this subject of one or another Mexican jurisconsult, than to ascertain what rules are observed in that regard by the Mexican courts of justice and especially by the supreme courts. The result of that examination will serve as a guide for the decision of the claim of Mr. Baldwin touching the damages and prejudices suffered by him. It will then be necessary to prove all the facts on which, according to the principles of Mexican law (in so far as they do not infringe the general principles recognized in the law of nations), depends the question of the amount of damages, whether for the attacks on his liberty or for the seizure of his effects.

"As to the gain of which Mr. Baldwin states that he was deprived by the seizure of his effects, it will be necessary especially to examine whether, according to the principles of Mexican law, damages in respect of a profit of which the injured individual has been deprived comprise only that which follows the injury directly and immediately."

After receiving this interlocutory judgment, **Further Arguments of Commissioners.** the American commissioners addressed to the umpire an argument to show that the proceedings against Baldwin emanated from an authority admitted to be legal, and were continued by a political party not only then in power in good faith, but also using it in the name and for the benefit of the government of Mexico; that after the authority of the junta was ended, some of its members continued in office, and that their acts under the intrusive government were approved, commended, and actually continued by their legitimate successors.

It seems that the central junta by which the proceedings against Baldwin were commenced, of which junta Gonzales, the instigator of the proceedings, was a member and secretary, was organized as early as June 1833 and continued to exercise power in Tehuantepec, without any effort on the part of the Government of Mexico to suppress it, till the following December. The Mexican commissioners stated in their report that the government "made the revolutionary junta of Tehuantepec submit and cease from their political errors by means of an amnesty, but without prejudice to the rights of a third party." The American commissioners, referring to this argument, declared that it was "inferable from the manner in which it (the junta) was induced to cease from exercising its author-

ity, and from the subsequent favors shown to some of its members, that the rule of the junta was actually tolerated by the government of the republic. She used no force to suppress it; she did not treat its members as criminals; she took some of them into favor and confided to them high and responsible stations."

In their first argument the Mexican commissioners said that "the directors of that republic [Mexico], without ceasing to oppose themselves to factions, avail themselves of every occasion that presents itself to terminate their wars through the medium of [judicial] conviction, or of pardon extended to the mutinous. In this situation the Government of Mexico was found at that time. It made the revolutionary junta of Tehuantepec submit and cease from their political errors by means of an amnesty, without prejudice to the rights of a third party; and as the effect of all amnesties is to restore the individuals whom it embraces to their anterior rights and privileges, those to whom Baldwin refers retained their rights to situations and places of honor or profit."

Replying to this argument, the American commissioners said:

"Viewing this case in all its aspects, we must say that it seems very strange to us that it should be pretended that the junta of Tehuantepec was not a political authority for whose acts while it continued the Mexican Government is responsible. It can scarcely be called a rebellion without an abuse of terms. A body of men organized a government which extends over an important part of the republic; they have a military power on foot which sustains their authority; they institute courts of justice which exercise undisturbed power; they organize or rather continue on its former footing the revenue department, which proceeds to collect imposts in conformity to the existing laws of Mexico—the officers are commended for their conduct; this government continues for many months and we hear of no attempt by the government of the country to put it down—of no military force sent to suppress it; but when it does cease the very persons who composed what is now called a revolutionary movement, are continued in office and high favor by the authority against which it said they rebelled."

The American commissioners declared that it was not pretended that the junta acted as private persons or for any personal object, and that if it were, it would be contradicted by the record.

The American commissioners further maintained that, even assuming that the Mexican Government was unable to put

down the junta by force, it was still responsible, and could not leave the injured party to obtain a remedy against the alleged usurpers. The "leaving to an injured party a remedy he can not enforce," was, they declared, "much the same as leaving to him no remedy at all. Those whom the government were unwilling or too weak to punish, would be strong enough to resist the measures which a foreigner might use for the redress of outrages and wrongs." It appeared, indeed, that Baldwin attempted to secure redress from Salinas, one of the junta and one of his persecutors, who, after the amnesty, was made governor of Tehuantepec. Salinas used his power to thwart the process, and the judge who had issued it was made to feel his displeasure and was even assaulted by one of Salinas's political allies. Recalling in this relation the fact that the law of 1832 provided that the offending individuals should, as part of the judgment against them, forfeit their honors and employments, the American commissioners said:

"When the Mexican Government has not seen fit to treat the individuals of the central junta as rebels and to punish them as such, shall it require of a foreigner to do what it has not done or could not do itself in order to get his remedies for injuries and outrages? Would it allow a foreigner to undertake to stigmatize the members of this junta as rebels, and that, too, when they were clothed with official honors and exercising high functions? Our colleagues admit that it was expedient, if not necessary, to reduce them 'by means of an amnesty,' and for that reason they were taken into favor and intrusted with office. In the face of these of facts it would have been unbecomting—we might say disrespectful—in a stranger to fix the charge of rebellion on them. If the government would have permitted the attempt, the individuals concerned would not have submitted to it. This was proved by an experiment."

The umpire, after further consideration of the case, made a formal award to the claimant of various sums, amounting, principal and interest, to \$12,803.39.

Dr. John Baldwin's Tehuantepec claim, commission under the convention between the United States and Mexico of April 11, 1839, MSS. Dept. of State.

In 1847, during the war between the United States and Mexico, the Messrs. McCalmont, by a Belligerent; Greaves & Co., British merchants at Vera Cruz, ordered a quantity of goods from England, but, owing to the blockade of the Mexican ports, directed them to be sent to Havana, to remain there till the Mexican ports should be opened. On

the capture of Vera Cruz by the United States forces, General Worth, being in command there, under date of March 31, 1847, opened the port to foreign commerce and published a tariff, by which the same duties as were charged in the United States were imposed on importations at Vera Cruz, with 10 per cent *ad valorem* added. This tariff appearing to be in several particulars objectionable, the British and other foreign merchants at Vera Cruz presented a memorial on the subject to General Worth, who in consequence modified the duties. On the strength of this modified tariff the claimants ordered their goods to be sent from Havana to Vera Cruz, where they arrived on the 20th and 27th of May. But before their arrival a new tariff was received from the government of the United States at Washington and put into operation. In this new tariff the duties on woolen goods were higher, but on cotton goods, with the exception of one particular kind, were lower than those in General Worth's modified tariff. As their merchandise contained a quantity of woollens and various kinds of cottons, some of the particular kind in question, the claimants, before its arrival, sent representations to Washington praying for modifications of the new tariff, and when their merchandise arrived noted protests against the imposition of duties upon it under that tariff. The collector agreed that the goods might remain in deposit until an answer to the claimants' representations should be received from Washington. The goods so remained till an order was received from Washington, under date of June 10, 1847, by which the tariff was again altered and the evils which had formed the subject of the claimants' representations almost entirely removed. But when they offered to pay duties according to the schedule of the 10th of June they were informed that it was not retroactive, and were required to pay duties according to the first Washington tariff, which was in force when the goods arrived. The claimants were thus compelled to pay on woollens \$11,733.58, and on one kind of cottons \$7,154.29, more than could have been exacted under the tariff of the 10th of June. A claim for the refund of this difference having been made, the Government of the United States refused to allow it, first, on the ground that a similar application by Baron Gerolt, the Prussian minister, in behalf of German merchants, had been refused, and second, on the ground that the tariff of June 10 was not retroactive, and that the Secretary of the Treasury could not remit the duties. As to the first ground, it appeared that

there was a misunderstanding, since the German merchants, in behalf of whom Baron Gerolt solicited relief, shipped their goods from Germany for Mexico with reference to the Mexican tariff, which was then in force, and which was much higher than the United States tariff under which they actually were required to pay duty. As to the power of the Secretary of the Treasury to remit duties, it seemed to be a question merely of municipal authority, not affecting the question of international justice.

The claim of the Messrs. McCalmont, Greaves & Co., as it has been described, came before the commission under the convention between the United States and Great Britain of February 8, 1853, and, the commissioners differing, it was referred to the umpire, who said:

"It can not be said that these duties were not levied according to law; nevertheless, as the modifications in the tariff were made at the suggestion of the claimants, it seems a hard case that they should be the only parties not allowed the benefit of the alteration. The documents appear to be in order, and certified by F. M. Dimond, collector.

"It is pretty certain that the authorities at Washington did not quite understand the case, or I think they would have allowed the claimants the benefit of the provisions of the modified tariff. I therefore award to Messrs. McCalmont, Greaves & Co., or their legal representatives, the sum of \$11,733.58 on the 15th January 1855.

"The claim for \$7,154.29, for overcharge of duties on cotton goods, I reject, believing it not right to select a particular kind of cotton goods from a large invoice on which to make a claim, when the duties on the other portion must have been far lower than they would have paid under the Mexican tariff.

"These duties, as before stated, were levied in conformity with the law; and it is only the peculiar circumstances and hardships in the case of the woollens that could justify this commission in granting any portion of the claim."

Bates, umpire, convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. pp. 339-350.)

A claim was made for the detention of goods
Tariff Imposed by by the Mexican authorities, with a view to
Military Author- their confiscation. The goods were imported
ity: The Avalos into Mexico at Matamoras in 1852, and paid
Tariff. duty under the tariff promulgated by General
 Avalos, who was then in command of the military forces of Mexico in that quarter. At the time of the seizure of the goods an insurrection existed on the Mexican side of the Rio Grande, assisted by irregular bands coming from Texas. The

Avalos tariff was in force at Matamoras from October 1851 to March 1853, when it was abrogated by a decree of the federal government. It imposed different duties from those prescribed in the statutes of the Mexican Congress, and legalized the importation of some articles which, under those statutes, were prohibited. The goods imported by the claimant under that tariff were seized in February 1853 and detained for confiscation on the ground that they were illegally imported.

The Mexican commissioner, Mr. Palacio, *Opinion of Mr. Palacio.* took the ground that the Avalos tariff was in-

valid, and did not supersede the tariff previously and afterward in force under the acts of the Mexican Congress, showing that under the constitution of Mexico the levying of duties and the regulation of importations were matters exclusively within the powers of the general congress, and that the military commandant of a State was not empowered to modify such tariff regulations, nor the President to authorize or order him to do so, or to approve of his act when done. Mr. Palacio contended that there did not exist, at the time of the proclamation of the Avalos tariff, a state of war such as would have made the tariff legitimate as an act of military necessity. He admitted that the public peace was disturbed in the neighborhood of Matamoras, but contended that there was no actual state of war, and that martial law did not prevail. Mr. Palacio said:

"I think that it is necessary to show that there was a *public war, a recognized war, a war with a belligerent*, because under these circumstances alone could General Avalos be justified in acting as he did. The powers vested in him suppose a state of lawful war, since it is alleged that he exercised them under the law of war; and as they are besides the powers of a general in the field, it is indispensable to show that he was placed in the conditions which give rise to those powers. If such a proof does not exist, there will remain nothing else than a Mexican military commandant, more or less anxious to put down a domestic rebellion which had not been converted, either by declaration of the authorities or by force of circumstances, into a foreign or intestine war. Such a position did not authorize Avalos either to act as a general in the field or to take measures which, while violating the constitution of his country, affected the international relations of the republic and were likely to produce greater evils to Mexico than the capture and even the burning of Matamoras. If whenever a military commander is menaced with a mob of rebels and adventurers he be authorized to act as Avalos did, there can be neither domestic safety nor peace among nations."

Opinion of Mr. Wadsworth. The American commissioner, Mr. Wadsworth, took the ground that the goods must be treated as having been validly imported. The tariff, he said, was promulgated by General Avalos upon the advice of the municipal authorities of Matamoras and the revenue officials of that port, in a desperate emergency, when perhaps no other available means was at hand to save the city, the forces of the government and its authority on the frontier. The proof was strong that on the whole it was acquiesced in by the government, and that the temporary repudiation of it in the case of the goods imported by the claimant was only a partial resistance exhibited to satisfy the remonstrances of merchants at other ports in Mexico.

Decision of the Umpire. The commissioners, having referred their differences to the umpire, Dr. Francis Lieber, he said:

"I can not agree with the Mexican commissioner regarding the so-called Avalos tariff and the illegality of any importation under that tariff from the United States into Matamoras. What can a private individual do if the military commander of a whole State, pressed by rebellion, prescribes a tariff in order to obtain the means to subdue the rebels, if this tariff, contradictory to the general law of the land though it be, is openly maintained for a long time and apparently countenanced by the general government, and especially if this is done at a period when, unfortunately, risings, rebellions, and revolutions have become chronic? Is not all that the law of nature and of nations says of *de facto government* true of such a state of things? General Avalos may have been mistaken; he may have had sinister motives or not. The individual, and especially the alien, could not possibly ascertain and distinguish, and therefore was not bound to do so. *Nemo ad impossibilia obligatur*. The Avalos tariff, it seems to me, had all the permanency and vigor in it requisite for a *de facto* government or decree."

The umpire accordingly held that the claimant was entitled to indemnification for the loss of the use of the goods while he was deprived of his possession of them, for storage and commissions, and for the expenses of recovering possession of them. He allowed interest at the rate of 6 per centum per annum, which was the rate allowed by courts in Mexico, where no special rate had been agreed upon.

Albert Speyers v. The United States, No. 23, United States and Mexican Commission, convention of July 4, 1868, MS. Op. II. 1.

This award was made on condition that the claimant within a certain time produce proof of his citizenship of the United States. This he failed to do, and his claim was ultimately dismissed on that ground.

The Avalos Tariff: A question as to the Avalos tariff was raised in another case, in which the claimant demanded the difference between the regular and the Avalos rates on specie imported and exported by him at Vera Cruz. It is to be observed that this difference of tariffs did not affect citizens of the United States alone, but all other foreigners, and Mexicans as well, whether at Vera Cruz or at any other port of the republic. It also appears that owing to representations made by the diplomatic agents in Mexico, the Mexican Government decided that the Avalos tariff should be discontinued at Matamoras, and that importers who had paid duties under it should give bond for the payment of the difference between the two tariffs in the event of Congress ordering that the full duties should be paid.

Sir Edward Thornton, who had succeeded Dr. Lieber as umpire, examined the treaties between the United States and Mexico and declared that he was unable to discover any stipulation that prevented Mexico from imposing in one locality a different tariff from that in force in another. There was no evidence to show whether the Mexican Congress obliged those who had given bond at Matamoras to pay the balance of the duties. If it did, the claimant has no ground of complaint. If it did not, it acquiesced in and sanctioned the Avalos tariff, which might then be considered as authorized by the Congress for the port of Matamoras. However impolitic it might be for any country to discriminate with regard to duties in favor of any particular one of its ports and against the others, and however much foreign governments might be justified in remonstrating against such a proceeding, it was very questionable whether anyone had a right to claim compensation for an injury which was somewhat doubtful, and the extent of which, as in the present case, it would be almost impossible to prove. Sir Edward Thornton expressed the opinion that no such right existed. He also doubted very much whether the goods imported under the Avalos tariff at Matamoras ever came into competition with those imported through the other ports of Mexico or ever caused any decrease in the sale or price of the latter. He therefore awarded that the claim be disallowed.

In May 1853 L., having some goods at McGuffinsville, on the left bank of the Rio Grande, was induced by General Frias, military commandant of the Department of Chihuahua, and by the respective collectors of the frontier and land custom houses of El Paso, to import them into Mexico on condition that he should pay a lower rate of duty than was laid down in the tariff. The goods were imported and the duty paid, and, the necessary permits having been obtained, L. took the goods to Chihuahua. The Mexican Government, having heard of the transaction, did not approve it, and instructed that L. be compelled to pay the full amount of the tariff duties. While the matter was under discussion, L. was required to give security, and not being able to find any other than his own goods, he deposited a portion of them in the custom-house. These goods were held for from two to three weeks, when they were given up without enforcement of the additional duties.

On a claim for loss by reason of this detention of the goods, it was held that the Mexican Government was right in not enforcing the payment, since the transaction was entered into with the regular customs authorities and the goods were accompanied by the necessary permits, particularly as it appeared that other merchants had enjoyed the same privilege without being molested. But, considering that the transaction was of itself of a doubtful nature and really an infraction of law, it was also held that the Mexican Government had a full right to investigate the matter and to demand security for the payment of the duties in the mean time. On this ground an award in favor of the claimant was refused.

Thornton, umpire, *James A. Clay, administrator of the estate of Isaac Lightner, v. Mexico*, No. 5, United States and Mexican Commission, convention of July 4, 1868, MS. Op. IV, 19.

On January 20, 1849, during the presidency of Sr. Herrera, a provisional executive decree was issued to the effect that vessels bringing in coal for certain purposes should be exempt from tonnage dues, and that until Congress confirmed the exemption, bonds for the payment of the dues should be given. Under this decree the Pacific Mail Steamship Company gave bonds in 1849, 1850, 1851, 1852, and 1853. In the year last mentioned, during the presidency of Santa Anna, the secretary of the treasury revoked the exemption and exacted payment of the bonds, and the claim was for the amount paid on them.

Congress never confirmed the Herrera decree, but claimant contended that the nonaction of Congress operated as a confirmation. The commission held otherwise. They moreover referred to the fact that in 1849 the steamship company sent an agent to Mexico to secure a confirmation of the decree by Congress, and that after effecting a ratification by one house he returned to the United States, leaving his mission unfulfilled.

William H. Aspinwall v. Mexico, No. 163, United States and Mexican Claims Commission, convention of July 4, 1868, MS. Op. III. 103.

February 2, 1858, Joseph S. Cuculla, a citizen of the United States, advanced at New Orleans to certain partisans of the so-called

The Zuloaga and Miramon Governments.

Zuloaga government in Mexico the sum of \$40,000, to be used "in the service of the nation," and to be repaid in installments from the proceeds of the maritime custom-houses whenever that party should capture any. A claim for the sum so advanced, with interest, except \$1,200 which had been repaid by the Maximilian government, was presented by Cuculla to the commission under the convention between the United States and Mexico of July 4, 1868. The commissioners, Messrs. Wadsworth (United States) and Palacio (Mexico), concurred in rejecting it, on the ground (1) that the contract was unneutral and unlawful, and (2) that the Zuloaga government was not an "authority" of the Mexican Government.

Discussing the second point, Mr. Wadsworth said that the overthrow of the republican constitution of Mexico of 1824 was followed by a series of struggles, always between two parties of well-defined and opposite tendencies—the liberals, in favor of equal rights, the republican form of government, and the reformation of old abuses, and the conservatives, in favor of exclusive privileges of race, class, and the church, and of the monarchical form of government. In 1846 the republicans overthrew Paredes and recalled from exile Santa Anna, "a pretended friend of the rights of the people," who, as early as the spring of 1847, "betrayed his party, placed himself by a compromise at the head of the clerical and monarchical party, accomplished a revolution, and inaugurated himself dictator." March 1, 1854, however, the liberals, said Mr. Wadsworth, "under the lead of Generals Alvarez and Comonfort, supported by such men as Benito Juarez and Miguel Lerdo de Tejada, proclaimed the plan of Ayutla—a free state, free religion, free

press, equal rights for all, an invitation to free immigration, the abolition of class privileges, in short, a complete reform of old abuses." The people of Mexico "supported this plan, and, in spite of the influence of the church and the power of the army and the fears of conservatism, it triumphed. Santa Anna and his party were overthrown, and he finally [was] expelled from the country in the fall of 1855." At Cuernavaca, October 4, 1855, a republican assembly elected as President General Alvarez, who "formed a cabinet of the leading patriots of the country." October 17, 1855, he issued a proclamation for an election to delegates to a National Congress, who were to meet "for the purpose of reconstituting the nation under the form of a popular representative democratic republic." In November followed the important law of Juarez, abolishing the special courts of the clergy and of the army and reforming the whole administration of justice. February 18, 1856, the National Congress assembled at the capital; and on February 5, 1857, it proclaimed, continued Mr. Wadsworth, "the liberal and enlightened constitution which to-day is the supreme law of the Mexican land." "Ignacio Comonfort was elected the first President under this constitution. He took the oath of office on the 1st of December 1857; he conspired with the church and the army and overturned the constitution by their sudden help on the 17th of the same month, to the surprise and grief of the great body of the people. On the 20th of the next month the troops of the capital, under the lead of Zuloaga, who had been in revolt against Comonfort since the 11th of January, finally succeeded in an assault on the *acordada*; and next morning Comonfort, with a few followers, left the city." Continuing, Mr. Wadsworth said:

"Zuloaga immediately named a junta called 'representatives of the States,' but who were simply truculent followers of Zuloaga resident in the city. (See Mr. Forsyth's letter to General Cass, January 29, 1858.) This junta named him President on the 21st of January. On the 22nd all the representatives of the foreign powers at the capital, except the American minister, acknowledged Zuloaga. The American minister followed this example on the 27th of January, and thus a government *de facto* is established, it is claimed. This government at once restored the old abuses and the old class privileges, reenacted the courts of the clergy and the army, and reduced the masses (or endeavored to do so) to the old slavery, under the plan of Tacubaya!

"Juarez made his escape from the city before the fall of Comonfort. By the constitution of 1857 the presidential office

devolved upon the chief justice in case of the default of the President. Thus Juarez became the Chief Magistrate of the nation. To oppose the organized power of the church and the army, in possession of the capital, by a surprise, the new President had neither armies nor revenues. He had nothing but faith in himself, his cause, and the Mexican people. He set up the standard of the republic and the constitution at Guanajuato on the 19th of January 1858, appointed his cabinet, and issued his manifesto as President. In this character he was speedily recognized by nearly all the States; first by a coalition of the northern States, soon afterwards by those of the South. On the 22nd and 25th of January, Ocampo, as minister of relations, addressed dispatches to the American minister at the capital advising him of the organization of the constitutional government under the new administration. These dispatches were received *two days* after the American minister had given his recognition to the revolutionary government. * * *

The new President, at first without organized resources, was at a great disadvantage. After many perils and hair-breadth escapes, he reached Acapulco; and thence, with a portion of his cabinet, he sailed by way of Panama, Havana, and New Orleans to Vera Cruz, where he arrived the 4th of May 1858. The next month Mr. Forsyth broke off the relations which he had established with the Zuloaga government and withdrew the legation. His course in this respect was approved by his government; but there is no evidence on file in the State Department of the United States of any approval of his conduct in recognizing the movement of Zuloaga. His interesting and apologetic dispatch of the 27th of January 1858, communicating the news of his hasty recognition of the revolutionary attempt to overthrow the government to which he had been accredited, was received in silence by the President of the United States and General Cass. He was not sent back to Mexico; but his government, leaving the business of the legation in charge of the veteran and distinguished American consul at the City of Mexico, John Black, on the 27th of December 1858 sent out to Mexico a special agent to investigate the situation of affairs, notifying him that the Liberal party in Mexico had the hearty sympathy of the administration, which at the same time was disposed to recognize it, if this could be properly done. (General Cass to Mr. Churchwell, December 27, 1858.) Mr. Churchwell's report sustained the government of Señor Juarez, and on the 7th of April 1859 Mr. McLean gave it a formal recognition by the government of its powerful neighbor—a recognition which has been maintained under the trials and through all the dangers which the two republics have encountered from that time to the present moment. The attempts at revolution by the church party under the 'Plan of Tacubaya' never had any real support from the people of Mexico. It maintained itself chiefly over limited areas, in the central portions of the country, by the advantages derived from the wealth of the church and the revolt of the

troops in the capital. This was a surprise, and found the people unprepared. That they viewed the movement with disfavor and indignation all that went before and that followed demonstrated beyond cavil or doubt. They never submitted to it for a moment.

"It was truly a popular movement in Mexico that found strength enough to assail and overthrow Santa Anna, entrenched behind the church, the army, and the blind conservatism of the country; that enabled the liberals to disestablish a venerable and powerful church, abolish its parochial exactions, secularize its property, take away its *fueros*, and reduce it to its proper place in a free state; that enabled the same great party to subdue an insolent military power and sweep away those privileges which enabled it to oppress the people, abolishing also the exclusive privileges of races and classes, and in place of these lies and wrongs to substitute a free state, offering equal rights to all. It seems to me that an American minister in Mexico was sadly out of place in January 1858 who could not see that the constitutional government rested on the basis of popular regard and support in Mexico, having millions of people to sustain it, while the revolt of the Zuloaga brigade was only the spasm of a dying power (unreasonably long in departing), resting its principal hope of support upon the 'priests and friars, and the women, their stanch friends.' (Forsyth's letter to American Secretary of State.) What followed the suppression of this revolt under Zuloaga, however. Mr. Forsyth could not foresee, though many of us have lived to see it. The defeated party brought what was then supposed to be the first military power of Europe and the world to restore their fortunes and expel the constitution of 1857. This time there was no disguise. The domestic traitor and the foreign invader fought for the monarchy and the hierarchy. The banners of the king and bishop floated side by side. In the name of order and religion they killed, plundered, and burned in Mexico for over five years, and Juarez and the Mexican masses would not give up the plan of Ayutla—and Napoleon and Maximilian, aiding Almonte, Miramon, Marquez, Padre Miranda, Labastida, and the rest, failed equally with Zuloaga and his brigade to tear the constitution of 1857 from the Mexican soil, where indeed it seems to be firmly rooted. These facts prove incontestably that the great majority of the people of Mexico are attached to the liberal government they have founded, have uniformly supported and maintained it, and instead of acquiescing in the attempts under Zuloaga and others to supplant it, or submitting to these attempts, that they have resisted heroically and successfully until they have put down all enemies under their feet.

"Where, then, is the evidence of a *de facto* government? The possession of the capital will not be sufficient, nor recognition by the American minister with or without the approval of his government. Recognition is based upon the preexisting fact;

does not create the fact. If this does not exist, the recognition is falsified. It may entail unpleasant consequences upon the power which improperly accords it, but can not increase or diminish the rights or obligations of the other government struggling to maintain its supremacy. If, therefore, the Zuloaga movement in Mexico was the government *de facto*, it was because the facts existing at the time made it so. If it was a government, *the* government in Mexico, it was because it claimed and possessed the sovereignty over that independent nation we call 'the Republic of the United Mexican States.'

"When may this sovereignty be said to exist? Perhaps Mr. Austin, in his lectures on jurisprudence, has expressed this notion of sovereignty as concisely and accurately as anyone: 'If a determinate human superior, not in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.' (Vol. 1, p. 226.)

"Says Wheaton: 'The habitual obedience of the members of any political society to a superior authority must have once existed in order to constitute a sovereign state.' (Dana's ed. p. 34.) This habitual obedience of the members of a political society (of the 'bulk' of them) must, in fact, exist to constitute a government. It will be seen how absurd it is to claim that on the 27th day of January 1858 the 'habitual obedience' of the 'bulk' of the people of the United Mexican States had been shown to the 'plan of Tacubaya,' or the armed pretension of the Zuloaga brigade. Sufficient time had not elapsed to ascertain the sentiments of the people of the numerous and widely extended Mexican States. As soon as these *could* act they came with arms in their hands to suppress the revolutionary attempt (odious to them) and to punish its authors. In the light of subsequent events, at least, no man can doubt that the vast majority of the Mexican people refused obedience to Zuloaga and adhered to the constitutional government, making good their rights by force of arms.

"It will not change this essential and controlling fact to plead a custom amongst foreign diplomatic representatives in Mexico whereby the possessor of the capital was always recognized. It is to be hoped that no such custom had been established. If any such existed, it was simply flagitious. It offered encouragement to every bully at the head of a brigade to overthrow the government of the country, and made foreign representatives morally responsible for many of the misfortunes of Mexico. Such unwarranted conduct, however, on the part of the agents of the foreign governments could not and did not transfer this habitual obedience of the bulk of the people to the leaders of revolt in the capital. Such influences at the capital will in part explain what I may truly call, in the language of Mr. Adams addressed to Earl Russell in reference to the recognition by Great Britain of belligerent rights in the

rebel States, the 'unprecedented and precipitate' action of the American minister in Mexico. It neglected the prudent, wise, and just principles practiced by the United States on many occasions before that time—principles adhered to firmly, when many motives derived from sympathy and self-interest would have made a more indiscreet and less-justifiable course of conduct more agreeable, perhaps more popular. The conduct of Mr. Monroe's administration with reference to the question of acknowledgment of the South American republics, and of General Jackson's in relation to the independence of Texas, will support what I say, and form precedents much more entitled to respect at the hands of a tribunal like this than the hasty and unfortunate action of the American minister in Mexico. In the summer of 1836, more than a year after the battle of San Jacinto, the American Congress passed a resolution to the effect 'That the independence of Texas ought to be acknowledged by the United States whenever satisfactory information should be received that it had in successful operation a civil government capable of performing the duties and fulfilling the obligations of an independent power.' I can not do better than quote from the special message of President Jackson, sent December 1836 to Congress, counseling delay in the recognition contemplated by the foregoing resolution, in order to show what I regard as the correct course to be taken on the important subject of recognizing new governments which claim to have in fact by force expelled and supplanted their predecessors.

"All questions relative to the government of foreign nations have been treated by the United States as questions of fact only; and our predecessors have cautiously abstained from deciding upon them, until the clearest evidence was in their possession to enable them not only to decide correctly, but to shield their decisions from every unworthy imputation. * * * In the contest between Spain and her revolted colonies, we stood aloof and waited not only until the ability of the new states to protect themselves was fully established, but until the danger of their being again subjugated had entirely passed away. Then, and not until then, they were recognized. * * * It is true that with regard to Texas the civil authority of Mexico has been expelled, its invading army defeated, the chief of the republic himself captured, and all present power to control the newly organized government of Texas, annihilated within its confines. But, on the other hand, there is an appearance at least of an immense disparity of physical force on the side of Texas. The Mexican republic under another executive is rallying its forces under a new leader, and menacing a fresh invasion to recover its lost dominions. Upon the issue of this threatened invasion the independence of Texas may be considered as suspended; and were there nothing peculiar in the relative situation of the United States and Texas, our acknowledgment of its independence at such a crisis could

hardly be regarded as consistent with the prudent reserve with which we have hitherto held ourselves bound to treat all similar questions.' * * *

"Our attention has been called to another evidence of the responsibility of the constitutional government of Mexico for the acts in general of the Zuloaga government. It is said the former has admitted its liability in principle, by inserting in the rejected treaty of Puebla, negotiated April 28, 1862, between the British plenipotentiaries and General Doblado, a stipulation (Art. IX.) for the payment of 660,000 piasters robbed from the 'Calle de Capuchinas,' in the month of November 1860, and for the moneys taken from the 'conducta,' at Laguna Seca, etc. A mistake has been made by the learned counsel for claimant, in supposing that the seizure of the 'conducta' at Laguna Seca was effected by the Zuloaga or Miramon authorities. The money was taken by an officer of the constitutional government (General Degollado), which always recognized its liability and very early in 1861 made provision for its repayment, which, however, failed from the inevitable bankruptcy supervening at the close of the civil war. The 660,000 piasters were taken by the order of Miramon from the possession of the English legation and was a high-handed act of violence committed by the revolutionary party. That the Mexican Government in the convention of Puebla agreed to pay the money carried away by its adversaries can not, however, under the surrounding circumstances be fairly construed as an admission of liability for the acts of the Zuloaga and Miramon party. I have examined the whole correspondence, and it is certainly clear that the Mexican Government uniformly protested its nonliability for such acts. Yet it is equally clear that the government in the spring of 1861, immediately after the overthrow of Miramon, and again in the spring of 1862 after the intervention of the three powers, was disposed to make concessions both to France and England. It will be seen that Señor Zamacona was even willing to make some equitable adjustment of the Jecker bonds, rather than encounter the dangerous enmity of France. But these concessions, extorted by a duress as actual and relentless as ever pressed upon an embarrassed and exhausted government, were made to buy its peace and, rejected by its powerful adversaries, can not now furnish any assistance to this commission in determining the interesting question presented in this case. Nations as strong even as Great Britain sometimes assume a liability, rather than risk the consequences.

"Neither will the drafts of April 12, 1862, in favor of American citizens, on the Secretary of State of the United States, payable out of the contemplated American loan, help to fix the liability of the Mexican Government in this case. If those cases form an exception, the surrounding circumstances furnish an ample explanation and apology. None of these cases

nor all of them can be regarded as admissions on the part of the constitutional government of liability for acts of Zuloaga, Miramon, Marquez, and their equally criminal adherents, aiders, and abettors, amongst whom the proofs and documents furnished by him place the claimant."

Mr. Palacio, while concurring in the views of Mr. Wadsworth, in the course of his opinion said:

"In the latter days of 1857 a military insurrection, of which Felix Zuloaga was the leader, took place at the capital of Mexico. The government had given him the command of a brigade, and by enticing and seducing these forces he was able to control the capital, from which the constitutional President had fled, and to proclaim himself President of the republic at the head of a cabinet of his own nomination. The rebellion had ramifications in all those places of the republic in which the armed force, united with the clergymen and the servile party could temporarily overpower the constitutional authorities. * * * Thus it is that the revolutionary movement of Zuloaga was seconded in the capitals of some of the States, and the leaders of these local movements assumed the characters of governors of said States, and made themselves obeyed in proportion to the armed force they could employ. * * * The regular army almost entirely supported the Zuloaga rebellion; the great riches of the clergy were profusely employed in its favor; the old monarchical party, in which there were some able and influential men, constituted the nucleus of the rebels; and all these elements together opposed serious obstacles to the reestablishment of legal order. But an immense majority of the people took sides with President Juarez; * * * under his direction they were organized and armed; and they fought until they finally triumphed, reestablished the constitution of 1857, and installed in the capital as President * * * the same extraordinary man who at a later time directed the efforts of the Mexican people in the defense of their nationality and liberties against the foreign intervention, invoked by the same party and nearly by the same men who headed the rebellion of 1858. Members of that party, and afterward supporters of the fragile throne of Maximilian, were the exiles who * * * were at New Orleans in February 1858, with the character of rebel fugitive from Mexico. * * *

"The recognition of a new government made by foreign powers only shows that said powers *believe* that such a government is really a government. If this *belief* is not correct, it will not produce any result. And when the error is acknowledged and rectified, not even those momentary results of the erroneous belief, whatever they might be, will then remain. * * * Without the ratification of his government, the action of the

American minister could not be considered in this case as the national action of the United States. Far from giving that ratification, the Government of the United States * * * left unanswered the note of Mr. Forsyth, and sent there a commissioner to investigate the facts. This commissioner obtained more reliable and unbiased information than that of Mr. Forsyth, and, being convinced that the government of Juarez, besides being the legal one, was supported by the people and necessarily ought to overcome the rebels, he enabled the government to rectify the error of its representative. * * * The United States accredited a new minister (Mr. MacLane) to the liberal government of Mexico, received the minister sent by this government, and entertained international relations with the same liberal government (the enemies of which received the assistance of Cuculla), without paying attention to the fact that Zuloaga and Miramon occupied the capital of Mexico, sent notes to the State Department, and issued decrees withdrawing the exequaturs of the American consuls."

Joseph H. Cuculla v. Mexico, No. 779.

In the case of *J. G. A. McKenny v. Mexico*, Case of McKenny. No. 106, a claim was made for the destruction of property by alleged authorities of Mexico, January 20, 1859. At that time Zuloaga was not at the head of the revolutionary movement which he and others had inaugurated on the 11th of January 1858, but had been displaced by Echegaray, Robles, and Pezuela on the 20th of December (1858). January 24, 1859, he was restored by Miramon for a few days to such power as he had possessed, but Miramon himself was proclaimed president on the 31st of the same month. Miramon continued to exercise such authority as he could till August 13, 1860, and then, after an interregnum of a day, was reelected by a junta at the capital. He was installed again as president on the 15th of the same month and continued to hold himself out as such till December 24, 1860. Zuloaga, Echegaray, Pezuela, Miramon, and Pavon all belonged to the party which supported the plan of Tacubaya. Claimant undertook to show that Zuloaga, Pavon, and Miramon were in succession the heads of a *de facto* government, to which the persons who inflicted the wrongs upon him adhered. Mr. Wadsworth adhered to the views previously expressed by him as to the legal standing of the leaders of the opposition to the constitutional government and the absence of any liability on the part of Mexico for their acts, though, as the result of further investigations, it had been found that there had

been a more marked diplomatic recognition by the United States of the Zuloaga government than had been supposed in the case of Cuculla. In the course of his opinion Mr. Wadsworth said:

“When does one possess the sovereign power in a state? The answer to this question is evident enough. He possesses it, having no superior in the state himself, when the people, or the mass of them, acknowledge his authority and respect it by rendering to him habitual obedience from fear or favor. But can anyone, as a fact, be in possession of the supreme power in a state when the people never did acknowledge his authority or respect it either? When his demand upon their obedience was always met by their resistance, and when this resistance was made good by arms, and the pretender overcame, exiled, and, returning, shot? These questions have but one answer.

“Turning now to the argument of counsel for claimant in this case, it will be seen that it is attempted to show that Zuloaga possessed the sovereign power in Mexico, because the minister and Government of the United States recognized his pretensions, and the question of fact is neglected and ignored; for I can not treat the reference to Commissioner Wadsworth's statement of the facts in the opinion in Cuculla's case as any attempt to show that the facts supported the claim of Zuloaga. * * * The principal effort made by the argument is to show that the Government of the United States approved the recognition of the Zuloaga government extended to it by Mr. Forsyth. This may be properly inferred from the conduct of the Government of the United States, for it continued to hold diplomatic intercourse with the Zuloaga administration for several months after Mr. Forsyth's recognition. Nevertheless it is strictly true that Mr. Forsyth's dispatch to his government, communicating his important step, was received in silence, and it is also true that the same government was inclined to restrict its recognition of this new power in a manner quite unusual and inconsistent with its claim to the sovereign authority in Mexico. Mr. Cass, speaking of Mexico, says: ‘That republic is without any recognized government, exerting an authority over the whole country. The government of General Zuloaga is restricted to but a portion of it, while the rest of the country, comprising possibly a majority of the States, is in open opposition to this government and is in arms against it.’ (Mr. Cass to Mr. Forsyth, June 23, 1858.) * * * The haste with which diplomatic relations were broken off in May (1858) following, and approved in so many words by Mr. Cass, also tends to convince me that the Government of the United States was satisfied a mistake had been committed by Mr. Forsyth. * * *

"We must not forget that the Government of the United States made no move to restore the broken relations with Zuloaga, but did afterwards, on the 27th day of December 1858, send an agent into Mexico to collect information on the subject of the existence of a government in that country, with a view to recognizing that of President Juarez if the facts would justify such a step, and did subsequently, on the 7th of April 1859, at Vera Cruz, recognize a fact which was never afterwards falsified, viz, the *de facto* existence of the government of President Juarez. But, take it for granted that the Government of the United States was fully committed to the recognition by its minister of the Zuloaga government made January 27th, 1858, it by no means follows that this fact is conclusive against the Government of Mexico. All that can be claimed for it is that it would bind the United States so long as diplomatic relations continued with the government thus recognized—it could not bind the government and people of Mexico unless Zuloaga was in fact in possession of the sovereign power. In determining this fact, the recognition of the United States and of other foreign states may be considered as some evidence of the fact, entitled to more or less weight according to circumstances.

"In my opinion the recognition extended to Zuloaga by the ministers of these foreign states, under the circumstances, is entitled to very little, if any, weight in determining the question of fact. Although Comonfort had overturned the constitution of 1857 on the 17th December 1857 by a coup d'état, he was unquestionably in possession of the powers of government, and the undoubted ruler, recognized and obeyed as such by the people generally. The sudden revolt of a body of the troops in the capital under Zuloaga, sustained by the clergy, on the 11th of January 1858, after a conflict of nine days resulted in the defeat of Comonfort and his expulsion from the capital on the 20th of that month. Now, the recognition of this insurgent chief by the representatives of foreign states was made two days afterwards, and by the minister of the United States seven days afterwards. At the time these diplomatic functionaries were in possession of no fact tending to prove that Zuloaga possessed the sovereignty of Mexico, except the single fact that he had seized the capital by surprise, leaving all the rest of the extensive territory and large population of Mexico subject to the government of Comonfort, or his successor under the constitution of 1857. Can I be expected to attach any weight to such a recognition as evidence of the existence of the supreme power in the hands of Zuloaga? * * *

"Certainly I do not consider that the recognition of Zuloaga by the Government of the United States (conceding this to the fullest extent claimed) settles the question for Mexico or this commission; but it is argued by counsel that the act of the United States Government in recognizing Zuloaga is conclusive

upon Mr. Commissioner Wadsworth, because he is the judicial representative of the United States in this commission, and that for this reason he is precluded from even inquiring into the propriety of the recognition by the United States of the government of Zuloaga. It is scarcely necessary to remark that this view is founded upon a total misconception of the nature and character of the office of a commissioner under the convention between the United States and Mexico. Mr. Commissioner Wadsworth is not a 'judicial representative of the United States in this commission,' nor a 'judicial officer' of that government. The authority which he possesses he derives from both the United States and Mexico, and is obliged to exercise it impartially for the benefit of both. He would possess neither office nor authority without the consent and concurrence of both nations, and is no more bound by the official acts or municipal regulations of the United States than by those of Mexico. He derives his appointment to a place on the board—a place created by the action of both governments—from the Government of the United States, indeed, but is no more bound by this appointment to represent the interests of the United States than those of Mexico, and no more bound by the acts of that government than his colleague on the board, or their umpire. He is an impartial arbiter selected by the United States, but deriving all his powers from the United States and Mexico, nor more the officer of the former than of the latter.

"But the argument is fatal to the party using it. On the 20th of January 1859 the United States was in the attitude of refusing to recognize the Zuloaga movement. Not only had relations with the insurgents been broken off in May 1858, and never restored, but the Government of the United States had sent Mr. Churchwell, a special agent, in December of the same year, to Mexico to procure information in relation to the existence of a government there *de facto*, signifying its sympathy with the Liberals, and its wish to recognize President Juarez if it could properly be done. Mr. Churchwell's report was favorable to the government of President Juarez, and his government, acting on it, sent out a minister to Vera Cruz, and recognized as the *de facto* government that of the distinguished gentleman above named. Although this act of final recognition occurred in April 1859, it recognized a fact ascertained by Churchwell before January 20, 1859. Indeed, it can not be considered as anything less than a withdrawal of the recognition given by Mr. Forsyth, and as an admission that the fact on which the recognition was based did not exist. For it is undoubtedly true that the power and authority of Zuloaga (and of his successors), which on the 22nd and 27th January 1858 were confined to the capital, had been very considerably extended over other portions of Mexico by December and January and April 1859, and if Juarez in fact possessed the sovereignty of Mexico in December 1858 and January and April 1859, much more did he possess it in January 1858, before the power of the

rebels had been extended by arms and the influence of the church. If, therefore, either of the commissioners on this board is bound by the action of the Government of the United States on the question of government *de facto*, he would be obliged to conclude that Echegaray and Pezuela were not in possession on the 20th January 1859, when claimant's intestate suffered the very cruel losses now complained of.

"However, I leave my decision where it was rested in Cucculla's case and in a very considerable number of other decisions upon claims founded on wrongs committed by Zuloaga and Miramon authorities, viz: Upon the fact that the great mass of the people of Mexico continued to adhere to and obey the government of President Juarez from the start, and continued to resist the attempt to set up another government instead thereof under Zuloaga and his successors, finally suppressing all such attempts and quenching them at last in the blood of Maximilian and Miramon."

Claims growing out of acts of the Zuloaga or Miramon government, or their partisans, were dismissed by the commissioners in the following cases: *Ezekiel B. Steele v. Mexico*, No.

189, MS. Op. I. 621; *George Edward and Mary Caroline Burr v. Mexico*, No. 31, MS. Op. II. 533; *Christian Herman Schultz v. Mexico*, No. 415, MS. Op. I. 543; *Richard Romain v. Mexico*, No. 917, MS. Op. I. 615; *George Ganie v. Mexico*, No. 396, MS. Op. II. 398; *Helena D. Chase v. Mexico*, No. 408, MS. Op. II. 398; *William Halpin v. Mexico*, No. 335, MS. Op. III. 57; *J. C. & F. M. Lohse v. Mexico*, No. 339, MS. Op. III. 58; *Amilcare Roncari v. Mexico*, No. 476, MS. Op. III. 58; *L. L. Lawrence v. Mexico*, No. 485, MS. Op. III. 59. In the case of *Tomas Marin v. The United States*, No. 751, the claimant, a citizen of Mexico, asked for an award for \$300,000 for his capture, imprisonment, and ill treatment by the naval forces of the United States in 1860. In March of that year President Juarez, who was then in Vera Cruz, where he was about to be besieged by General Miramon by land and by Admiral Marin (the claimant) by sea, urged Captain Jarvis, of the U.S. S. *Savannah*, to capture Marin, who was daily expected and who had by a decree been declared to be a pirate. A few days later Commodore Turner, with the aid of the *Indianola* and *Wave* (two steamboats in the service of the Juarez government), and of a number of high Mexican officers on board the steamers, captured Marin and his two vessels. The capture of the expedition was disapproved by the United States, but it was of

great service to Juarez. Mr. Wadsworth held that the Mexican Government was estopped by its own act from presenting a claim against the United States. Claimant's counsel contended that Juarez was not at the time the head of the Mexican Government, but only the head of one of two factions which were contending for power. The commissioners both rejected this theory, having acted in all their deliberations on a contrary assumption. (MS. Op. VI. 161.)

The Confederate States. The commercial house of Prats, Pujol & Co., of New Orleans, Louisiana, of which Salvador Prats, a citizen of Mexico, was a member, in 1862 put 213 bales of cotton, of which they were the owners, on board the British brig *M. A. Sterens* at Barataria, there to remain till the blockade of the port should be raised by the United States, when the brig was to proceed, as she then lawfully might do, to Havana. April 27, 1862, two days after the capture of New Orleans by the United States, and when the United States was in possession of Barataria, one Henry Wilkinson, in command of an armed launch, with twenty armed men, acting under the authority of the Confederate States, boarded the brig and, declaring that he had orders to do so, burned both vessel and cargo. Salvador Prats, as a citizen of Mexico, brought a claim against the United States for the value of the cotton before the commission under the convention of July 4, 1868. He alleged in his memorial that he was and always had been a citizen of Mexico, and was and always had been legally domiciled in Campeachy, though he had a commercial house at New Orleans.

Mr. Ashton, agent and counsel of the United States, having moved to dismiss the claim on the ground that the commission had no jurisdiction of it, and that, on the facts disclosed, the United States was not liable for the injuries alleged, the case was argued on these points and submitted.

Opinion of Mr. Wadsworth. Mr. Wadsworth delivered the following opinion:

"The commercial house of Prats, Pujol & Co., doing business in the city of New Orleans, on the 2d of April or 7th of January 1862 (the dates are in conflict), shipped on a quasi British brig, the *M. A. Sterens*, 213 bales of cotton, to be delivered at the port of Havana; the brig not to sail, however, until the port of New Orleans should be opened by the United States: so claimant asserts.

"This vessel with her cargo and passengers (including a

member of said firm) was lying at Barataria when, on the morning of the 27th of April 1862, two days after the capture of New Orleans by the fleet of the United States, commanded by the renowned Admiral Farragut, a naval force in the service of the so called Confederate States of America, coming up from Fort Livingston, under command of one Henry Wilkinson, burned the brig and cotton to prevent their capture by the vessels of the United States.

"Claimant, asserting ownership to one-half the cotton, as a member of said firm and as a Mexican citizen, demands an award in his favor for half the gold value of said 213 bales of cotton at the price then current in the port of Havana.

"He claims in his memorial to be by birth a Mexican citizen, always domiciled at Campeachy. The only evidence of domicile offered by him is his own affidavit, in which he states that he had resided for many years in the city of New Orleans, where he *seems* to have been residing at the time of the loss.

"At the time of the destruction of this cotton a civil war was raging between the United States and a portion of its citizens styling themselves 'the Confederate States of America;' and this war, conducted both by land and sea on the part of the United States, had then lasted over a year, attaining to large dimensions. Numerous battles between large armies had been fought, and a blockade of the entire coast and all the ports of the so-called Confederate States, including New Orleans, had been proclaimed and made effective by a competent naval force of the United States. Two days before the losses complained of the Confederates held, by force of arms, the entire State of Louisiana, with the city of New Orleans, together with an extensive territory reaching from the confines of Mexico almost to the capital of the United States.

"The subsequent history of the contest shows how truly it must be characterized as war and be governed by its laws, although carried on within the State. It required a period of four years on the part of the United States to bring this war to a successful close; employed a million of men in arms, and exhausted several thousand millions of treasure.

"It is true that, while other nations prior to the event now under review had made haste to accord to the insurgents belligerent rights, Mexico, animated by friendly sentiments toward the government and people of the United States, withheld such recognition. Nevertheless, the fact remains fixed and undisputed that on the 27th of April 1862 civil war existed, and of the magnitude we have indicated.

"The question, then, most prominently presented by this claim of Salvador Prats for our decision is that of the responsibility of a government for injuries committed by its rebel enemies against aliens in time of civil war.

"It is attempted in the argument for claimant, however, to vary this question on two grounds, viz:

"1st. That since, by the fourteenth article of the treaty of 1831 between the United States and Mexico, each government

engages to give its 'special protection' to the persons and property of the citizens of the other, transient or dwelling in its territory, etc., each government has thereby contracted to guarantee the safety of such persons and property.

"2d. That, as neither the United States nor Mexico ever recognized the so-called Confederate States as a belligerent, the former government is not at liberty to rely upon the fact of belligerency to exonerate itself from responsibility for injuries committed by the insurgents to citizens of the latter, however the question may be changed as to the subjects of those powers who recognized the belligerent rights of the Confederates.

"The argument for claimant treats this stipulation for special protection as a guaranty of security under all circumstances; but we do not take that view of it. The most literal interpretation of special protection can not make an insurance.

"The whole article defines the character of this protection and shows that the government merely designed to place aliens, transient or dwelling within their territory, on an equality with citizens in this respect. Herein consists this special protection. Indeed, it stipulates no more than every just government must undertake in behalf of its own citizens within its own jurisdiction. We do not think by this article either of the governments has agreed to afford any more or further protection to strangers within its borders than is justly due to its own citizens, or meant to establish any inequality between subjects and strangers either in the matter of protection or in the mode or measure of redress for injuries to persons or property. Each government *has* given special protection to all having a right to invoke it whenever it does all in its power to enforce *its* laws, repress and punish violence, and put down by force of arms armed revolt.

"In these particulars, for aught that here appears, the United States is blameless so far as claimant is concerned. He makes no charge against the United States for failure to enforce her laws before they were overthrown at New Orleans by war; and after the war broke out it will be difficult to deny the magnitude of the sustained exertions of the United States or the sacrifices incurred by that government to suppress and put down the violence of the insurgents.

"So, also, we dissent from the view taken of the consequences of the refusal by Mexico to recognize the rebel enemies of the United States as a belligerent power, and placing it thereby on an equality of belligerent rights with the parent government inside the jurisdiction of Mexico. Such refusal did not deprive the United States of the exercise of any right of war or any immunity resulting from a state of war; but merely refused, in a spirit friendly to the United States, to extend those rights to the insurgents.

"Nonresponsibility on the part of the United States for injuries by the Confederate enemy within the territories of that

government to aliens did not result from the recognition of the belligerency of the rebel enemy by the strangers' sovereign. It resulted from the *fact* of belligerency itself, and whether recognized or not by other governments. But the proclaimed recognition of the fact by a government is conclusive evidence of the fact, and, so to speak, an *estoppel* as to that government. This, probably, is all Mr. Adams meant in his dispatch to Mr. Seward (quoted in an argument, June 11, 1861, Diplomatic Correspondence, 105.) If responsibility on the part of the United States in the absence of such recognition is intimated, we do not concur with that distinguished minister, for had Great Britain never recognized the Confederates as belligerents at all, the consequences of the state of war as a fact to Great Britain, as to all other neutral powers, would have been the same: such as the liability of their vessels on the high seas to search and seizure as prize by the armed cruisers of the United States, and to capture for attempts to violate the blockade. These rights the United States exercised against Mexico and all other nations, and did it in virtue of the fact of war, and not because of the recognition of the belligerency of the insurgents by those powers or any of them. Mexico conceded to the United States the exercise of these rights of war against her, and is equally estopped now with other nations to deny the *fact* or to ignore the changes which the war introduced into the relations between the two governments.

"The existence of a civil war the United States could not and did not deny. The whole of it is, that government denied the necessity or propriety of the recognition of its rebel citizens as a belligerent power, when first accorded, at that time and under the circumstances. While such a recognition did not create or change the fact of war, it increased the opportunities of the rebel enemy without increasing or diminishing the rights of the United States growing out of the existence of war.

"So far, therefore, as the responsibility of the United States to Mexico in this case is concerned, it is in nowise increased or diminished by the failure of the latter to accord belligerent rights to the Confederates.

"The naked question therefore remains: Is the United States responsible for injuries committed during the late civil war within the arena of the struggle by the armed forces of the so-called Confederate States to the property of aliens, 'transient or dwelling?'

"We have no difficulty in answering that question in the negative.

"The Confederate armed forces were in no sense 'authorities of the United States' within the meaning of the convention under which we are assembled.

"If we admit for the moment that, under the convention, the United States is liable for neglect of a duty stipulated by treaty or imposed by the law of nations, and if such a duty in the present instance be postulated it would be difficult to show

such neglect, in view of the history of the late civil war, and particularly of the capture of New Orleans. But no such duty, in fact, rested on the United States after the commencement of the war. That government was under no obligation, by treaty or the law of nations, to protect the property of aliens situate inside the enemy country against the enemy. The international duty of the United States or its engagements by treaty to extend protection to aliens, transient or dwelling, in its territories, ceased inside the territory held by the insurgents from the time such territory was withdrawn by war from the control of that government, and until her authority and jurisdiction were again established over it.

"The principle of non-responsibility for acts of rebel enemies in time of civil war rests upon the ground that the latter have withdrawn themselves by force of arms from the control and jurisdiction of the sovereign, putting it out of his power, so long as they make their resistance effectual, to extend his protection within the hostile territory to either strangers or his own subjects, between whom, in this respect, no inequality of rights can justly be asserted.

"Rutherford has placed it upon this ground in his valuable work. Speaking of the duty of a nation to prevent its citizens from offending against the subjects of other states, and the consequences of neglect in this particular, he says: 'But such neglect does not make a nation accessory to the acts of subjects that are in a state of rebellion and have renounced their allegiance, or that are not within its territories, for in these circumstances the subjects, whatever they may be of right, are not under its jurisdiction in fact. (Institutes, p. 509, Second American Edition.)

"Aliens residing and trading inside the rebel territory acted at their peril. Indeed, the fact of residence and trade constituted them enemies of the United States in common with the rest of the inhabitants whose 'spirit and industry' contributed to the resources of the enemy. The house of Prats, Pujol & Co., conducting business in New Orleans in 1862, was engaged in commerce injurious to the United States. Shipping cotton by that house to Havana from New Orleans, while the latter port was held by the enemy, whether blockaded or not, subjected the property to capture on the high seas as prize of war. The fact that one of the house was an alien, even if domiciled in Campeachy, would not exempt his share.

"We are at a loss, therefore, to perceive on what ground aliens resident in the hostile territory could claim the protection of a power lawfully exercising the rights of war against that territory and all its inhabitants.

"It is certain, if the forces of the United States, in the course of their operations to reduce the forts of the enemy below New Orleans and to capture the city, had destroyed the vessel and cotton, that government would not thereby have incurred any responsibility to claimant's government.

"This doctrine was affirmed in the strongest terms by Mr. Marcy in answer to M. De Sartiges, claiming indemnity for losses suffered by French merchants during the bombardment of Greytown. (S. Ex. Doc. No. 9, pp. 4-7, 35 Cong. 1 sess.)

"The American Secretary asserts, as a principle never doubted, that 'foreigners domiciled in a belligerent country must share with the citizens of that country in the fortunes of their wars.' In the debate on this subject in the British Parliament Mr. Marcy's position was justified. Lord Palmerston said: 'Those who go and settle in a foreign country must abide the chances which befall that country.' The Attorney-General, speaking for the law officers of the crown, said: 'The principle which governed such cases was, that citizens of foreign states who resided within the arena of war had no right to demand compensation from either of the belligerents for losses or injuries sustained.' (Hansard, Parl. Deb. 3d Series, Vol. 146, pp. 37-49.)

"The French and English claims in this case were abandoned, and no compensation was ever made to American merchants.

"If, therefore, persons residing within the arena of the struggle have no right to demand compensation from either of the belligerents, much less can such persons rightly demand indemnity from one belligerent for losses inflicted by the other.

"This question arose out of the trouble in Italy in 1849, on the occasion of the demand of the English Government for injuries suffered by her subjects from acts of war at Florence and Naples, in which Austria was also implicated. Prince Schwartzemberg distinctly repelled the claim for the Austrian cabinet, that of Florence being willing to refer the question to the Government of Russia. The latter country declined the umpirage on the ground that the acceptance of such an office would admit that the question was involved in doubt, or rested on some foundation, and, under the advice of Count Nesselrode, Her Majesty's government desisted from its pretensions.

"We are not aware of an instance where such claims have ever been conceded by any nation able to protect itself, or at liberty to refuse such unjust demands.

"The nonresponsibility of the United States for the acts of its late rebel enemies, while forcibly withdrawn from the jurisdiction of that government, must have been generally conceded by other nations; for, although many citizens of American and European states were resident in the hostile territory during the struggle, and suffered losses common to all inhabitants of the arena of war, no nation has made a demand upon the United States for indemnity (unless the present case forms the exception), while it is certain that that government would promptly repel all such demands.

"To admit the principle would place just governments, driven to the employment of arms for the suppression of wicked attempts at their overthrow, under serious disadvantages, and very much strengthen and embolden the cause of

insurrection. It is not likely, therefore, soon to find a place in the code of nations.

"The claimant's case is not free from grave suspicions, and might be rejected on other grounds; but we finally disallow and reject his claim on the ground that the United States Government is not responsible for the destruction of his cotton by the naval forces of the so-called Confederate States of America during the late civil war.

"The motion to dismiss and disallow the claim is granted."

Opinion of Mr. Palacio. Mr. Palacio, concurring, delivered the following opinion:

"This is a claim for the value of a number of cotton bales destroyed by an officer and twenty men of the navy of the so-called Confederate States during the war of the secession.

"Before determining whether the United States are or not bound, in consequence of this fact, to indemnify the claimant, it is necessary to examine whether the same fact can be duly considered as an *injury made by the authorities of said States*.

"It is well known that these injuries arise either from an act of positive and direct violation of the rights of the injured, or from the condemnable neglect of extending the necessary protection to said rights.

"It is, in my opinion, self-evident that, in the present case, there was not any aggressive and direct action on the part of authorities of the United States; because the authors of the fact, which has given origin to the claim, are neither *de facto* nor *de jure* authorities of the United States, nor of any of the States of the Union. It is sufficient to prove it—the consideration that those who acted as the authorities of the so called confederation had been declared rebels and traitors by the supreme federal authorities; and that whatever question may arise within the United States in regard to the propriety or legitimacy of that declaration, the foreign nations can not but accept it and acknowledge the power of pronouncing it, which the Constitution has vested in the President and the Congress of the United States, the supreme rulers of the nation. So the denomination of rebels inflicted on the Confederates by the explicit declaration of those powers, against whom they were in arms, ought to be considered out of question by the foreign governments. It was not the province of said governments to investigate whether the political movements of the so-called Confederate States were or not legitimate and in accordance with their local legislations. They are bound, on the contrary, to respect the action of the President and Congress of the United States, who deprived those States of their participation in the National Government and declared them enemies of the nation until, by their submission, they might lose such a character and be restored into the Union. In the mean time, those States could not enjoy the political *status* to which, in another case, the Constitution framed would have entitled

them; nor constitute an independent nationality, whose acts and resolutions were to be considered by the international law as perfectly valid, and emanated from a legal source entirely distinct from the Federal Government. In consequence of this the authorities appointed or elected by said States can not be considered as legitimate, nor their official capacity as such authorities recognized as far as the relations with the foreign governments are concerned.

"As for the responsibility arising from the neglect of due and efficient protection, the following is to be considered:

"It is the duty of the governments to protect in an efficient manner, against all kinds of unjust aggression, all persons residing within their jurisdiction and under the shelter of their laws. To this protection the alien residents are no less entitled than the citizens, but it would be wrong, however, to pretend a better right to it in the former case than in the latter; and the reason is very clear, because the supposition that a government is obliged to protect in a more efficient manner the foreign residents than the natives would be equivalent to admit that the duty of said government is not to secure in the highest degree, and in the most practicable manner permitted by law, the same protection to the persons and property of its own citizens. And, in fact, if anything would be done in favor of the aliens which would have been omitted in favor of the citizens, these would undoubtedly be entitled to claim against the government that failed to employ for their protection the efficient means it had in its power. The duty of the government is not to omit any practicable measure tending to that purpose; and hence we are forced to conclude, either that something impracticable is pretended in favor of the aliens, or that something practicable and efficient has been omitted in the protection of the citizens. These are entitled to *all* that is possible in the matter, and consequently there remains *nothing* to add in regard to the aliens.

"It is, therefore, a wrong construction of the word *especial*, used by the convention to qualify the protection due to foreign residents, to suppose that it means something more accurate and scrupulous than what is due to the native. It is simply a great mistake, because such a construction would involve a legal impossibility and an absurdity. That word *especial* can only be construed as a *superlative*, tending to ascertain so perfect a protection as to make it impossible to have it better. It can never be understood as a *comparative*, tending to establish a distinction between the foreign and the native residents, favorable to the former and unfavorable to the latter.

"It being thus ascertained that the duty of protection on the part of the government, either by the general principles of international law or by the especial agreements of the treaties, only goes as far as permitted by possibility, the following question arises: What is the degree of diligence required for the due performance of this duty? And the answer will be very obvious—that diligence must be such as to render

impossible any other, better or more careful and attentive, so as not to omit anything, practical or possible, which ought to have been done in the case. Possibility is, indeed, the last limit of all the human obligations: the most stringent and inviolable ones can not be extended to more. The purpose of trespassing this limit should be equivalent to pretend an impossibility: and so the jurists and law writers, in establishing the maxim *ad impossibile nemo tenetur*, have merely been the interpreters of common sense.

"The same truth will be expressed in a more practical language by saying that the extent of the duties is to be commensurate with the extent of the means for performing the same, and that he who has employed all the means within his reach has perfectly fulfilled his duty, irrespective of the material result of his efforts. To ask of him some other thing, would be the same as to pretend an action *ultra posse*, which is positively an absurdity.

"Let us see, now, what are the means that a government can employ for the protection of foreign and native residents against all kinds of injuries to their persons and property.

"In the regular course of social events the protection of the rights of the inhabitants of a state, either citizens or aliens, is commended to the courts of justice, which are vested with sufficient authority to redress the grievances and to punish the criminals. And the government that has done its best for the capture of a wrongdoer, and brings him to trial before a court of justice, has perfectly fulfilled its duty, either in case the injured resident is a foreigner, or when he is a native citizen. As for the courts, they will have also fulfilled their duty by fairly applying and enforcing the laws, whatever they may be in relation to the case.

"Let us suppose, however, that the wrongdoers resist the legitimate authorities and oppose against them military forces enough to check their efforts and make impossible the capture and punishment they attempted. Let us suppose that the ordinary agents of the authority to which the capture of the offenders has been committed find them in arms and protected by numerous bodies of men; that they are able to oppose a battalion to a company, a division to a brigade, or a strong *corps d'armée* to a division, sent against them to enforce the laws. What else can be done by the authorities for the perfect fulfillment of their duties? It is clear that the only means the legitimate authorities possess to preserve order and maintain the empire of law consist in raising the military forces required to subdue the rebels, in obtaining from the national representative the pecuniary resources necessary to meet the expenses of the war, in calling around them all the good citizens and leading them to fight against the disobedient; in declaring, in fine, that these are rebels and enemies of the nation whose legal and moral existence they have attacked by their resistance. There is no doubt that all these measures

have created a new situation and changed the legal *status* of some persons, as well as the character of public affairs. If we are willing to call everything by its own name we shall be bound to admit that the *state of peace* in which every law is enforced and obeyed without resistance and the duties of public officers performed without obstacle has been replaced by a *state of war*, in which the nation can not make justice for herself but by means of arms. We shall also be bound to admit that those who commenced by merely being offenders, who were to be submitted to the action of the judicial authorities, have become rebels, and ought to be treated as the enemies of the nation. A *state of war* being thus *de facto* and undeniably existent, the duty of the government must be measured in accordance with it, and its responsibility must be determined without losing sight of that important fact. The state of war exists irrespective of the recognition of other nations. No written declaration, no legal fiction, can be sufficient to destroy this fact, as palpable as positive, 'that the nation pursues the rebels by means of the armies because she is unable to bring them before the courts.'

"Under such a state of things it is not in the power of the nation to prevent or to avoid the injuries caused or intended to be caused by the rebels, either to the foreign residents or to the native citizens of the country; and as nobody can be bound to do the impossible, from that very moment the responsibility ceases to exist. There is no responsibility without *fault (culpa)*, and it is too well known that there is no *fault (culpa)* in having failed to do what was impossible. The *fault* is essentially dependent upon the will, but as the will completely disappears before the force, whose action can not be resisted, it is a self-evident result that all the acts done by such force, without the possibility of being resisted by another equal or more powerful force, can neither involve a fault nor an injury nor a responsibility.

"It must not appear strange to speak of violence (*vis major*) when the question is of nations, and even of very powerful ones. It is not impossible that said nations, although perfectly able to obtain at last an easy and final victory over their enemies, on account of their overwhelming superiority, should not display the same resources in all the acts of the war, and always and everywhere provide, at the opportune moment, what was required to prevent the injury.

"Nobody has thus far believed that the duty of governments was to indemnify their citizens for the losses and injuries sustained by cause of war; and it is not easy to perceive the reason why an alien might be entitled to claim what is refused to the citizen. Nations can and must afford protection, and prevent and punish the offenses, by all the means they have within their reach; but none has had the temerity to maintain as a principle of public law the duty of indemnifying for losses and injuries caused by *the enemy*.

"The propriety with which we employ this word when we speak of civil wars can be easily perceived. Enemies are all those against whom the nation has been compelled to employ the public force and to put itself, for its own conservation, on a footing of war. It matters little that the other nations may or may not recognize the position of the rebels as belligerents. Such a recognition can entail certain liabilities and duties to the government that deems proper to make it; but neither a new obligation can be imposed on account of it upon the contending parties, nor much less any alteration introduced in the diplomatic intercourse with the foreign powers who have not made the recognition.

"For this reason it is very easy to disclose the fallacy of the argument presented in favor of the claimant, and based on the ground that the American Government refused to England the right of claiming, as the logical consequence of her recognition of belligerency of the Southern States. It is said that England has no right because she recognized the rebels as belligerents; and hence it is concluded that Mexico, who did not make that recognition, is perfectly entitled to claim and obtain remuneration. This argument, *a contrario sensu*, as the scholars used to say, fails in the present case by want of an essential requisite. The reason assigned in the first part of the argument is not the only one to be considered, and consequently the conclusion is not right. If the refusal made to Great Britain of any right to claim against the acts of the Confederates should be based exclusively on the ground of their recognition as belligerents, perhaps it would be proper to conclude that the other nations, who never recognized the rebels as belligerents, are fully entitled to claim. But this is not the case. Mr. Adams did not say to Lord John Russell that England had no right only on account of said recognition. This reason was one among many others, and perhaps it was employed only on account of its conclusive character when applied to England. Arguments *ad hominem* of this kind are much in favor among diplomatists.

"It is certain that such an argument can not be used against Mexico. The government of this republic, as a good friend of the United States, always refused to recognize the rebels as belligerents. But this recognition is not the *only* reason existing to reject the claim. We can not conclude from the fact that Mexico did not recognize the belligerency of the Southern Confederacy, that the United States have contracted a responsibility which is in fact inconsistent with the state of things above described.

"It is natural and proper that a nation carrying on a war, whether foreign or civil, should endeavor, for the sake of duty and convenience, to prevent her enemies from causing the mischiefs which they might attempt to commit. If, in this respect, she does all in her power, and all that can be accomplished by means of her resources, it can be said that she

fulfills the whole of her duties, both toward her own citizens and the citizens of foreign countries. The evils which it was not possible to avoid constitute a calamity for which she can not be responsible; and there is not a shadow of reason in pretending that either a nation or an individual should be bound to do in behalf of others more than he has done in his own defense. If the nation herself could not avoid suffering incalculable losses, it is clear that she could not possibly avoid those sustained by others. Her only duty was to cause the war to be as short and exempt from disasters as possible; and if she endeavored to do this and employed all the means within her reach, she can not be blamed for omission or neglect of duty, and consequently can not have any responsibility. The United States fulfilled that duty nobly and worthily, and the immense magnitude of its efforts, which everybody knows, shows that the sufferings occasioned by the gigantic struggle could not be possibly avoided.

"The claimant argues that the act of which he complains was not an act of war, perpetrated by the enemies of the United States, but rather a crime committed by its subjects within its jurisdiction. The natural consequence of this aspect of the case should be that the complainant ought to have applied to the courts and prosecuted before them all his legal resources until exhausting them. Should the compliance with his just pretensions have been refused, then he would have been able to exact the responsibility of the country which had not done him justice. If in response to this it is said that there were no tribunals to which one might have applied, or that their action had no sufficient efficacy against the authors of the crime, this would only prove the fact that the country was in a state of war; that its authorities were not recognized or obeyed by the rebels; that the government was almost unable to try and punish them; and that, it being engaged in the important task of defending its existence and its prerogatives with arms, it had to try the transgressors of the laws, not as authors of private wrongs, but considering them as public enemies. The alternatives of the following dilemma are both equally conclusive. There were tribunals with sufficient power to punish the delinquents, or there were not. If there were any, then the claimant ought to have applied to them, that the American nation might have fulfilled the duty of doing him justice. If there were not, the existence of delinquents in a country against whom the ordinary tribunals and authorities are impotent, and against whom it is necessary to employ force, is a conclusive proof, both of the state of war and of the character of enemies of those who committed the offense. It is, no doubt, possible that the regular action of the courts should fail at times to be as effective and efficacious as usual, and that a crime should remain unpunished; but the national responsibility can not exist, nor can the government of the complainant prefer any claim unless he should prove that he

diligently exercised all his legal resources, and the rendering of justice to him was deliberately refused.

"The argument offered by the claimant, founded on a doctrine of Chitty, is likewise destitute of importance in this case. However worthy of respect that doctrine may be, it can not have application in the present question. Said doctrine refers to the obligation of indemnifying those who have to perform some act in favor of others, when they have failed to do it, even in fortuitous cases, or in cases of force.

"If we were to make a full exposition of that doctrine we should find its origin in the Roman law with reference to the contracts *stricti juris*, the extension given by the pretor to those denominated *bona fide* and *prescriptis verbis*, its introduction into the common law first, and then into the jurisprudence of the courts of equity; but it is not necessary to enter into such an exposition to be able to perceive that said doctrine of indemnification only refers to the case of the nonfulfillment of a specified obligation relative to a concrete fact nominally promised. It will be very easy for anyone versed in the science of law to perceive the difference existing between that kind of obligations and those which arise from a mere principle of justice, indeterminate in its extension, susceptible of infinite variety in the cases of its application, of an immense latitude in its construction, and of a very ample discretion in the selection of the proper and adequate means of making it effective; but to perfectly understand the point in question it is sufficient for us to direct our attention toward the foundation upon which the said doctrine rests. If it establishes the responsibility of the promiser, even in fortuitous cases, it is in consideration of the omission of him who bound himself without limitation and without making an exception of such cases. Such omission can only exist in those cases in which an express contract or stipulation has been made, and in which the object of said stipulation is to be executed according to the limits and conditions established by the promiser; but obligations of a general character, whose fulfillment can be demanded in a thousand fortuitous cases, are confined within the limits fixed by their own nature and the reasons of universal justice. To that kind of obligations belongs that which a government has of protecting the residents of the country, both foreign and native. Its limitation, by means of a contract, that it might not be exacted in fortuitous cases and in cases of force, would only be necessary when determinate and well-defined facts should have been promised, since the one who offers to perform such facts is the only one entitled to decide not to perform it, and to receive in its default the payment of indemnification.

"The irresponsibility of the government for the mischiefs caused by the rebels in a civil war has in its favor the opinions and decisions of eminent statesmen. The English Government, which is not in all cases the best guide in international questions, when seeking to enforce the rights of its subjects,

has, on several occasions, run the risk to be censured by the public opinion in its own country, as well as by foreign cabinets, and this on account of its obstinacy in exacting indemnifications for damages sustained in the civil wars of other countries.

"The case of D. Pacifico is very well known, in which Great Britain compelled the Grecian Government to pay indemnification for damages suffered in consequence of a mutiny, which said government resisted and succeeded in repressing. Greece, unable, on account of its weakness, to oppose the demands of the British cabinet, yielded to them; but she protested that her submission was only due to force, and that she was persuaded of the great injustice of which she was the object. That same opinion was expressed by the French envoy, Baron de Gros, to his government, and the cabinet of St. Petersburg also expressed it to the English Government in terms extremely severe. It also happened that both houses in England condemned the course followed by the ministry, and its members were obliged to resign.

"On another similar occasion England demanded from the imperial Government of Austria the payment of a certain indemnification for damages sustained by some of its subjects in consequence of revolutionary movements in Tuscany and Naples, and it was agreed to submit the question to the decision of the Czar of Russia, who, as soon as he acquainted himself with the case, declined to act as arbitrator, for the reason that it was not proper for him to decide about so evident a case, it being clear and beyond doubt that England was not right in the least. There are not, undoubtedly, many instances like this, in which a sovereign should have condemned in such severe terms the pretensions of another with whom he is not at war.

"The American Government also had occasion to decide this question. In a riot which occurred in New Orleans in 1859, in consequence of the excitement created by the news of the shooting of several Americans in the Island of Cuba, some Spanish subjects suffered insults and damages. When the Government of Spain made the claim, the American Secretary of State, the illustrious Daniel Webster, while expressing the sorrow his government felt at what had happened, and while promising to punish the delinquents, peremptorily declined all responsibility and the payment of indemnification. The Spanish Government subsequently declared that it was completely satisfied.

"After these precedents it is painful to see the claimant cite in support of his pretension the course followed by England, France, and Spain in making the celebrated tripartite convention of London concluded in October 1861 for the purpose of claiming indemnity for the alleged damages sustained by the subjects of said powers in Mexico at the time of the civil wars. Everybody knows what was the real and true design of those three governments, and that they did not succeed in their

enterprise. On the other hand, it was very strange that such precedents should be invoked by a Mexican, and in a claim supposed to be made in the name of the same government which considered itself highly offended by the conduct alluded to.

"This is my opinion on this question, which induces me to concur with my distinguished colleague in the point that the claim preferred by D. Salvador Prats against the United States before this commission ought to be rejected."

Salvador Prats v. The United States, No. 748, convention between the United States and Mexico of July 4, 1868. The commissioners rejected a claim for the value of cattle and other property which it was alleged that the owner was compelled to abandon on a ranch in Texas which was taken possession of by troops of the Confederacy. (*Nierce Olirares v. The United States*, No. 749, MS. Op. VI. 160.) They also dismissed a claim against Mexico based on the seizure by Confederates of a schooner in the waters of Bagdad, Mexico, in November, 1864. (*Baltimore Insurance Co. v. Mexico*, No. 756, MS. Op. V. 446.)

The references by Mr. Palacio to the New Orleans riot and the case of Pacifico are hardly accurate. In the case of the New Orleans riot, Mr. Webster acknowledged a special obligation to indemnify the Spanish consul; and in the end compensation was made, though as an act of good will and not of obligation, to the private subjects of Spain. In the case of Pacifico, a resolution of censure was adopted by the House of Lords, but the subject was then brought before the Commons. In the latter chamber, Lord Palmerston, in a speech of remarkable power, defended his course on three grounds: (1) That there was a neglect by the Greek Government to render protection; (2) that no measures were taken by that government to afford redress; and (3) that there were in fact no tribunals in Athens that could be trusted for that purpose. At the close of the debate, which lasted four nights, the House of Commons, by a majority of forty-six (310 ayes to 254 noes) adopted a resolution offered by Mr. Roebuck as follows: "That the principles which have hitherto regulated the foreign policy of Her Majesty's Government are such as were required to preserve untarnished the honor and dignity of the country, and, in times of unexampled difficulty, the best calculated to maintain peace between England and the various nations of the world."

In the case of Edward Alfred Barrett v. The Confederate Debt. The United States, No. 18, the claimant, a British subject, resident in England during the civil war in the United States, alleged that in October 1864 he purchased for a valuable consideration and was still the possessor and absolute owner of a certain "cotton-loan bond" of the Confederate States of America, by which the Confederate States bound themselves to pay to the bearer £200 sterling, with interest at 7 per cent per annum, semiannually, on the 1st day of March and the 1st day of September in each year, until redemption of the principal at par; that the government of the United States, in 1865, "seized all the public assets of the said Confederate States and especially a very large quantity of cotton,

hypothecated by the said Confederate States government for payment of the said cotton loan, and thus prevented those States from paying their cotton-loan bondholders;" and that in consequence of such seizure by the Government of the United States the principal of the bond remained unpaid, and no interest had been paid thereon from the 1st of March 1865. The claimant demanded £200 and interest.

The agent of the United States, believing the claim to be outside of the scope of the submission under the treaty, sent a copy of the memorial to the Secretary of State who protested against the presentation of the claim and asked that it be withdrawn. This request not having been complied with, the agent of the United States, under specific instructions from the Secretary of State of December 9, 1871, filed a motion to dismiss for want of jurisdiction, on the ground that the memorial stated "no case for a claim against the United States within the intent" of the treaty.

Arguments were submitted on this motion, and on December 14, 1871, the commission rendered the following unanimous decision:

"The commission is of opinion that the United States is not liable for the payment of debts contracted by the rebel authorities.

"The rebellion was a struggle against the United States for the establishment in a portion of the country belonging to the United States of a new state in the family of nations, and it failed. Persons contracting with the so-called Confederate States voluntarily assumed the risk of such failure, and accepted its obligations, subject to the paramount rights of the parent state by force to crush the rebel organization, and seize all its assets and property, whether hypothecated by it or not to its creditors.

"Such belligerent right of the United States, to seize and hold was not subordinate to the rights of creditors of the rebel organization, created by contract with the latter; and when such seizure was actually accomplished, it put an end to any claim of the property which the creditor otherwise might have had.

"We are therefore of opinion that after such seizure the claimant had no interest in the property, and the claim is dismissed."

Am. and Br. Claims Commission, treaty of May 8, 1871, Hale's Report, 154. See also Howard's Report, 60, 531, 537. The same principle was applied in the case of *Alfred Raoul Walker v. The United States*, No. 13, in which damages were claimed for the loss of trust funds which were invested by order of a South Carolina court in bonds of the Confederate States. (Hale's Report, 153.)

**The Maximilian
Government.**

In the case of *Charles J. Jansen v. Mexico*, No. 81, a claim was presented to the commission under the convention between the United States and Mexico of July 4, 1868, growing out of the confiscation of the bark *Francis Palmer* and her cargo by the Imperial authorities in Mexico in 1866. Mr. Cushing, as agent and counsel of Mexico, moved to dismiss the claim on the ground that the injury complained of was not committed by the authorities of the Mexican Republic, but by the invading forces, naval or military, of the Emperor of the French. The claim was dismissed, Mr. Wadsworth, the United States commissioner, delivering for the commission the following opinion:

"This claim is for the value of the bark *Francis Palmer*, etc.

"The bark, an American vessel, owned by claimant, an American citizen, was seized at Port Angel, Lower California, in July 1866, by some Mexican soldiers, taken into the port of Guaymas, and libeled on a charge of violating Mexican law. Before any judicial determination of the guilt or innocence of the vessel, and on the night of the 13th September 1866, she was sailed out of the port by the Mexican customs and other officials and lost to the owner.

"The seizure of the vessel, in the first instance, and the judicial proceedings against her were acts proceeding from the authorities of the so-called empire and adhering to the cause of the late Archduke Maximilian. The officials who were guilty of the robbery of the vessel also adhered to the same party, and seized the vessel to facilitate their escape from the hands of the troops of the Mexican republic.

"The French naval forces, supporting the war of the intervention in Mexico and the pretensions of the Archduke, took possession of Guaymas on the 29th of March 1865 and held it till it was evacuated, on the 13th of September 1866.

"There can be no doubt of the fact, therefore, that this aggravated injury was inflicted by the authorities and officials of the so-called empire, supported and countenanced by the French naval forces.

"The American consul at Guaymas, in his letter of 20th September 1866 to the Assistant Secretary of State, speaks of the affair as 'proceedings of the officers of the defunct empire.'

"The question is now, therefore, directly presented for our consideration whether indemnity for injuries inflicted by the officials of the Maximilian government upon American citizens has been provided for in the convention between the United States and Mexico?

"The language of the convention confines indemnity to injuries arising from acts of 'authorities of the Mexican Republic.' Since it was the direct aim of the French intervention and the Maximilian empire, so called, to overthrow the republican form

of government in Mexico and substitute a monarchy in its place, it will not be allowable to consider, in any literal sense, the officials of the monarchical experiment as 'authorities of the Republic of Mexico.'

"It may well be doubted whether the language of the convention was not designedly employed to exclude all claims against Mexico growing out of the pretensions of the monarchy. But if the United States can hold the republic of Mexico to responsibility for injuries inflicted by the agents of the so-called empire, it must be upon the ground that the latter, at the date of such injuries, was a government *de facto*, and that the former, as its successor, can not escape responsibility for the acts of the government for the time being in possession.

"It will be proper, therefore, to inquire whether it was such a government, and whether, if it was, the United States is at liberty to assume that ground in view of the history of that remarkable chapter in the life of the New World which is known as the French intervention in Mexico.

"That intervention was born out of the opportunity presented by the war of the rebellion in the United States—was an attack upon the popular institutions and republican form of government so deeply embedded in the affections of the people of the United States, and designed to check the growth and undermine the power and influence of the United States, the principal guaranty of the security and liberties of the people of Mexico and of every other republic in the Americas against the monarchies of Europe.

"If these propositions be true, it will be seen that the war of the intervention in Mexico was also a war against the United States, and that the firm, complete, and permanent possession of the Government of Mexico by the so-called empire only was possible in the event of the success of the rebellion in the United States and the destruction of the power and influence of that republic.

"Thus the United States, on the one hand warring against the rebellion, and Mexico, on the other, resisting the intervention of the foreigner leagued with the traitor, were fighting a joint battle for themselves and all others, the republics of this continent.

"That this is true is evident from the spontaneous and cordial manner in which the people of the two republics exchanged sympathies during the trials to which they were subjected, respectively, by rebellion and intervention, and by the friendly anxiety with which the other American republics watched the progress of the struggle. Moreover, as the rebellion in the United States precipitated the intervention upon Mexico, so the suppression of the former, by expelling the army of the French, terminated the latter.

"In view of these prominent facts we would not expect to find that the government and people of the United States regarded the fugitive rule of the Austrian prince with any

favor, gave it any recognition, or contemplated the possibility of holding the government of the Mexican republic responsible for its injustice.

"To make the position of the United States plain upon this important subject, and to show how truly it accorded with the principles and sympathies of the people of that country, it is needful to rehearse a few of the prominent facts of Mexican history for the last few years.

"The long contest in Mexico between conservatism, represented by the church and the army aspiring to a restoration of the monarchical form of government and the perpetuation of the old ideas and abuses, and liberalism, representing the masses of the people, firmly attached to the republican form, and incessantly struggling to sweep away the ideas which belonged to a past age, and to liberate themselves from great oppressions, culminated in 1855, when the liberals, under 'the plan of Ayutla,' overthrew the party of the monarchy and expelled Santa Anna.

"This notorious man, on the 1st July 1854, commissioned Señor Gutierrez Estrada (the same who afterward offered the crown to Maximilian) to negotiate in Europe for the establishment of a monarchy in Mexico. The following extract from this commission is interesting in view of subsequent events:

"I confer upon him (Señor Estrada) by these presents the full powers necessary to enter into arrangements and make the proper offers at the courts of London, Paris, Madrid, and Vienna to obtain from those governments, or from any one of them, the establishment of a monarchy derived from any of the royal races of those powers, under qualifications and conditions to be established by special instructions."

"The revolution under 'the plan of Ayutla' called the aged and patriotic Alvarez to the presidency. Two measures signalize his brief administration and characterize the liberal movement: 'The law of Jaurez,' November 22, 1855, organizing and reforming the administration of justice, but chiefly celebrated for its abolition of the privileges of the clergy and the army (military and ecclesiastical *fueros*), and the proclamation of 17th October 1855, summoning a constituent congress 'for the purpose of reconstituting the nation under the form of a popular representative democratic republic.'

"This constituent body met on the 18th February 1856 and continued its labors till the 5th of February 1857, when it proclaimed the constitution of that date. This instrument, in all substantial effects, is closely modeled on that of the United States. It divides, limits, and distributes the powers of the government, purely republican in form; it guarantees the political and personal rights of the citizen; it abolishes the *fueros* and secures the equality of the citizen; it proclaims a cordial fraternity with foreigners; the abolition of judicial costs; the freedom of religion and of the press; and the equal responsi-

bility of all persons and classes of persons to the same impartial laws and tribunals.

"I need not be more specific. The instrument embodies the most liberal principles of free, responsible, popular government known to modern society.

"Ignacio Comonfort was the first president elected under this constitution. He took the oath to support it, and was inaugurated December 1, 1857.

"On the 17th of the same month the President betrayed the people who had honored him with their confidence, and uniting with Zuloaga in the interest of the church party or *reaccionaires*, pronounced against the constitution and made himself dictator. On the 11th of January 1858 Zuloaga and the church party abandoned Comonfort, and on the 20th of the same month drove him from the capital and country.

"On the 22d of January Zuloaga convoked in the capital a junta of twenty-eight persons of his own choice, and these named him president. This revolution is known as 'the plan of Tacubaya.' As the long and bloody struggle which followed, including the war of the intervention, was a contest between the principles of the constitution of 1857 and the party of the republic on the one hand, and 'the plan of Tacubaya' and the party of the monarchy on the other, I will briefly state some of the points of this plan, as follows, viz:

"1. The inviolability of church property and revenues, and the reestablishment of old ecclesiastical exactions.

"2. The reestablishment of the *fueros*, or the special ecclesiastical and military tribunals, with exclusive civil and criminal jurisdiction of all matters affecting the army and clergy.

"3. The restoration of a state religion, sole and exclusive.

"4. The censorship of the press.

"5. The restoration of the system of interior duties (*alcavala*) and of special monopolies.

"6. The exclusive system of emigration from Catholic countries.

"7. The old central dictatorship in the interest of the *reaccionaires*.

"8. The monarchy under European patronage.

"By the constitution of 1857, in default of a president, it is provided that 'the president of the supreme court of justice shall enter upon the exercise of the functions of president.' (Article 79.)

"At the time of this notable 'default' of Comonfort the office of 'president of the supreme court of justice' was held by Benito Juarez, a native-born Mexican citizen, and the presidency was devolved on him by the constitution. He raised the standard of the constitution and the republic at Guajuato on the 19th of January 1858, and, supported by the States and the people, he maintained the contest against the reaction with varying fortunes, but with a fortitude and constancy under great difficulties worthy of the virtues of his

private character and his zeal for reform and republican institutions. His cause triumphed: the liberals entered the capital on the 25th December 1860, the president and his cabinet on the 11th February following.

— Miramon, with other chiefs of the monarchical party, military and ecclesiastical, left the country to invite the intervention of Europe, while their adherents at home confined all armed resistance to the government to predatory excursions by roving bands under such leaders as Marquez, 'the butcher of Toluca.'"

— The ministers of France, England, and other European powers resident in Mexico, two days after the expulsion from the capital of Comonfort by Zuloaga, recognized the government of the latter. Five days after the American minister Mr. Forsyth followed their example; but his government practically repudiated his act by making haste to establish relations with the government of President Juarez, continued through all subsequent trials, so far as possible to the present time.

— A perusal of the official correspondence (Mexican documents 1861-1862) leaves no doubt of the real sympathy of the French, English, and Spanish cabinets with the cause represented by Zuloaga and Miramon, and the partiality of the Government of the United States with the cause sustained by Juarez.

— The hesitation shown by the English cabinet to recognize the constitutional government after its complete triumph is in significant contrast with the immediate recognition of Zuloaga, an insurgent, holding nothing but the capital. (Lord J. Russell to Sir C. Wyke, No. 1, March 30, 1861.) Although 'the final triumph of the liberal party' is here admitted, the recognition of a government *de jure* and *de facto* both, is to be upon conditions: the constitutional government must first admit its responsibility for the wrongs and crimes of Zuloaga and Miramon.

— The character of this government thus regarded with disfavor is contrasted with that of the insurgents in these words by the British representative subsequently displaced by Sir Charles Wyke:

" 'However faulty and weak the present government may be, they who witnessed the murders, the acts of atrocity and of plunder, almost of daily occurrence, under the government of General Miramon and his counselors, Señor Diaz and General Marquez, can not but appreciate the existence of law and justice. Foreigners, especially, who suffered so heavily under that arbitrary rule and by the hatred and intolerance toward them, which is a dogma of the church party in Mexico, can not but make a broad distinction between the past and the present.' And, again:

"I do not believe it possible that the church party or that the former rule of intolerance and of gross superstition can ever be restored to power; so far, at least, has been secured by the result

of the last civil war—the first contest for principles, it may be remarked, in this republic.' (Mr. Matthews to Lord J. Russell, May 12, 1861.)

"The successor of Mr. Matthews (Sir Charles L. Wyke) brought different views and sympathies to inspire his labors near the Government of Mexico. He viewed President Juarez and his liberal government with disfavor, distrust—almost disgust. He had no confidence in its intentions, ability, or stability. The church party, though beaten, he did not (or would not) regard as subdued. His only hope was 'in the small moderate party,' who perhaps might step in before all was lost 'to save their country from impending ruin.' In one of his earliest dispatches this diplomatist calls for foreign force as the only remedy. He says:

"Such is the actual state of affairs in Mexico, and your lordship will perceive, therefore, that there is little chance of justice or redress from such people except by the employment of force to exact that which both persuasion and menaces have hitherto failed to obtain.' (Sir C. Leunox Wyke to Lord J. Russell, May 27, 1861.)

"Later dispatches marking the progress of Sir Charles's opinions prove that he had been enlisted or deceived into the support of the intrigue at the capital of Mexico fomented by those pecuniary and political interests to be finally ruined unless the party of Miramon, under some form, should be restored to power. October 28, 1861, he writes:

"Every day's experience tends to prove the utter absurdity of attempting to govern the country with the limited powers granted to the executive by the present ultra-liberal constitution, and I see no hope of improvement unless it comes from a foreign intervention or the formation of a rational government composed of the leading men of the moderate party, who, however, at present are void of moral courage and afraid to move unless with some material support from abroad.' (Dispatch to Lord J. Russell.)

"September 29 previous he was of opinion that an occupation of the Mexican ports by the British naval forces, by its moral power, would enable 'the moderate and respectable party,' to turn out the Juarez administration and form a government willing to treat, etc. The next step to armed intervention for the overthrow of an 'ultra-liberal constitution' and the formation of a government with a strong executive was easy.

"In these efforts to disparage the government of the Liberals and procure its overthrow by foreign force Sir Charles Wyke was preceded or zealously seconded by the French chargé, M. de Saligny, and the bishops and military chiefs of the church party—part of them at the courts of Spain and France and part intriguing in the capital of Mexico. It would be interesting to set forth the principal reasons for this combined hostility against the government of the Liberals. Apart from political considerations, which were allied with a

sympathy with the church party and the reactionary ideas it represented, there were large pecuniary interests to be compromised by the overthrow of the Miramon government. Not to speak of the reclamations for the massacres of foreigners and the plunder of their effects, the bonds which Mr. Jecker held or had put in circulation amounted to \$15,000,000, and the whole of them were likely to be lost if the Liberal government was suffered to consolidate its power uninfluenced by foreign coercion. Against these combinations, therefore, of political and pecuniary interests, supported by powerful influences within and without the state, the government of President Juarez had no defense except in the confidence of the Mexican people and the sympathy of the government and people of the United States—the one exhausted by a civil war just ending, the other paralyzed by a similar struggle just beginning.

“The civil war in Mexico had exhausted the resources of the country, and the government was bankrupt. Bands of marauders under the chiefs of the church party, the same which had massacred the wounded prisoners and beardless boys at Tacubaya, and the foreign surgeons who humanely attended them (which chiefs the intervention afterward took into its alliance), ravaged the country, filling it with murders and nameless crimes. The illustrious patriot, Ocampo, retired to private life, among others was ruthlessly put to death.

“The only available resources of the government in such an emergency were the customs revenue. *Seventy-seven per cent* or more of these were pledged for the regular payment of the interest and principal of the debt due English, French, and Spanish subjects.

“On the 17th of July 1861 the Congress suspended for two years all payments, ‘including the assignments for the loan made in London, and for the foreign conventions,’ and recovered the complete product of the federal revenues into the treasury. The government placed this suspension upon the ground of necessity, imperious by reason of the perils of society.

“This deplorable measure furnished the English and French ministers (the representative of Spain had been expelled) an occasion to break off diplomatic relations with the Liberal government, which they promptly and without reluctance embraced, July 25, 1861.

“In the mean time the Mexican exiles (headed by Almonte, Miramon, Padre Miranda, etc.), assisted by the pecuniary interests compromised by the overthrow of the Miramon government, were laboring at European courts for intervention in support of a monarchy in Mexico to be founded on the conservative elements represented to be powerful in that country. The time was propitious. The progress of the rebellion in the United States induced a hasty belief among the partisans of monarchy in Europe in the destruction of the American Union,

and the consequent failure of republican government. The embarrassments of the Government of the United States and the dangers which encompassed it suggested and encouraged European pretensions in the affairs of this continent. Santo Domingo and Mexico presented irresistible enticements. Both, it was thought, offered opportunities to limit the growth of the United States and secure existing European dependencies on this continent whether the rebellion in that country succeeded or failed.

"Moreover, let us add to this, that Spain, France, and England had grievances against Mexico to redress, more or less serious, and some of them very just. Accordingly, Spain, probably hearing by 'the fine ear of Europe,' that France and England contemplated a combined movement against Mexico, herself took the lead, issued orders for the reinforcement of the garrison at Havana, and for the preparation of an expedition to be directed against Vera Cruz and Tampico, and then invited the co-operation of the other two powers. (Earl Cowley to Lord Russell, September 5, 1861; and same to same, September 10, 1861, and September 17, 1861; also, Sir J. Cramp-ton to Lord J. Russell, September 13, 1861, and September 16, 1861.)

"A complete unison of action in Mexican affairs between the cabinets of London and France was earnestly desired by M. Thouvenel as early as September 5, 1861, and that early he wished to obtain the opinion of Lord Russell as to whether the association of the Spanish Government in the affair might not be advisable.

"The views of the different signatories to the subsequent treaty of London, in the beginning, were rather ill-defined or purposely obscured.

"One is very much puzzled to ascertain the real purpose of Spain in the beginning—Spain that took the lead, and furnished the largest force, first to reach Vera Cruz, and first to leave it.

"She started full of dreams born of ancient recollections, and perhaps saw in the distance a prince of the house of Bourbon on the throne of Mexico, but finally fell into the views of the English cabinet; still, however, down to the conferences at Orizaba expecting something to 'turn up' for her advantage. When, however, at Orizaba she saw the French Emperor (having reinforced his military contingent) leading the Austrian prince by the hand, she embarked her troops, decimated by disease, and returned to Havana.

"England hesitated in the beginning, but as the affair progressed her views narrowed and became more distinct.

"M. Thouvenel, after communicating to Lord Russell through the Count de Flahault his views in reference to several contingencies that might be realized, proceeds to say that he 'is, however, of opinion that the two governments should carry their common understanding still further, and devise means for promoting the political reorganization of Mexico,' etc.

"In reply the English minister says: 'With respect to the measures to be taken for the future peace and tranquillity of Mexico, Her Majesty's government are ready to discuss the subject with France, Spain, and the *United States*. But it is evident, that much must depend on the actual state of affairs at the time when our forces may be ready to act on the shores of Mexico.' (Lord J. Russell to Earl Cowley, September 23, 1861.)

"Afterward, however, the cabinet of London seems to have reduced its views to the very well-defined objects set forth in the treaty of October 31 following.

"The government of His Majesty the Emperor, from the first, knew what it wished to accomplish by intervention, and, without giving its ulterior designs too much prominence, explained them to its allies with sufficient frankness.

"On the 11th October 1861, while the means of combining the action of the two governments were under discussion, M. Thouvenel, in a dispatch to Count Flahault, rehearses a conversation had with the ambassador from England, and of which the latter was to give an account to his government.

"Her Majesty's government, it seems, was ready to sign a convention with France and Spain to the end of obtaining redress by force from Mexico for certain grievances, etc., provided it should be declared in said convention that the forces of the three powers were not to be employed in any ulterior object whatever it should be, and above all not to interfere with the interior government of Mexico.

"M. Thouvenel was perfectly agreed that the grievances of the respective governments, together with the means of redressing them, and of preventing them in the future, constituted alone the object of an 'ostensible convention.' He admitted, also, without difficulty, that the contracting parties might bind themselves not to derive any political or commercial advantage to the exclusion of each other, or of any other power; *but, beyond this, to interdict in advance the eventual exercise of a legitimate participation in the events which their joint operations might originate, seemed to him of no use.*

"M. Thouvenel was of opinion also that it was evidently to the interest of France and England (Spain is not here in his thought) to see established in Mexico a state of things that would secure the interest existing already, and favor a development of the exchanges of the two countries with a land so richly endowed. The events just then taking place in the United States, M. Thouvenel thought, added new importance and (he was pleased to say) *urgency* to these considerations. He was led to suppose that, if the issue of the contest between the North and South should accomplish their definitive separation (a different eventuality seems not to have been contemplated) both confederations would naturally look to Mexico for compensations. The only obstacle which would prevent such an event, not indifferent to England, in the opinion

of the Emperor's government, would be the constitution of a government in Mexico strong enough to redress wrongs and stop interior dissolution. The interest of France and England in the regeneration of Mexico would not allow them to neglect any symptom giving hope of the success of an attempt. As to the form of government, England and France had not any preference, provided it afforded sufficient guaranties. But if the Mexicans themselves, tired of trials, decided to react—should come back, and, consulting the instinct of their race, find in monarchy the repose and prosperity which in vain they looked for in republican institutions, M. Thouvenel did not think the two governments ought absolutely to refuse to aid them, if there was a chance, bearing, nevertheless, in mind that they were perfectly free to choose whatever means they might think best to attain their object.

"The respect shown for the principle of nonintervention and the will of the people in the foregoing by the Emperor's government is only equalled by the disinterestedness and prevision of what follows. Says M. Thouvenel:

"In developing these ideas in the form of an intimate and confidential conversation, I added that in case my prevision was to be realized, the government of the Emperor, disengaged from all preoccupation, rejected, in advance, the candidature for any prince of the imperial house; and that, desirous to treat gently all susceptibilities, it would see with pleasure that the election of the Mexicans and the assent of the powers should fall on some prince of the house of Austria."

"Summing the whole up, M. Thouvenel said, in a word, to Her Majesty's minister, that in drawing up the convention they should say what they would do, but not what they would not do.

"We learn also from this interesting dispatch that it was the wish of the English cabinet that the United States should become a party to the convention. M. Thouvenel, however, could not then have desired such a result.

"These opinions of the French minister seem to have been heartily concurred in by the Spanish minister, M. Calderon Collantes, who even thought it better to abstain from going to Mexico at all than to go under the conditions proposed by the English project. (Barrot to M. Thouvenel, October 21, 1861. See also dispatch from same to same, November 6, 1861.)

"Even after the treaty was signed the Duke of Tetuan unhesitatingly adhered to the opinion of the government of the Emperor. He authorized the French minister to inform his government that very 'elastic' instructions would be given the Spanish commander.

"At all events, the English cabinet placed its views in the treaty, and the three powers signed it on the 31st October 1861 at London, none of them deceived (I most surely believe) as to the purposes of the intervention, unless it was Spain.

"The English cabinet was entirely possessed of the Emperor's purpose to avail himself of eventualities (and to create them, for that matter) for the purpose of introducing a monarchy into Mexico; and was not unwilling to see the experiment tried at the cost and upon the responsibility of the French.

"The contingency of a march on the City of Mexico was foreseen by the English minister, but he was careful to instruct his plenipotentiary that while he had nothing to say against 'the measures in contemplation,' nevertheless, the 700 marines, constituting the whole of Her Majesty's forces co-operating, were not to join in such expedition. (Lord Russell to C. Wyke, November 15, 1861.)

"In the mean time the United States Government was not an unconcerned observer of this combination against its neighbor. That government conceived itself so far interested that it offered to the cabinets of London, Paris, and Madrid to guarantee the interest upon the debts of Mexico secured by conventions with these powers, including the London loan, for five years, provided they would refrain from the employment of force against their helpless debtor. (Mr. Seward to Mr. Adams, August 24, 1861, No. 71; same to Mr. Corwin, same date; Lord Lyons to Earl Russell, September 10, 1861; Mr. Adams to Mr. Seward, September 28, 1861.)

"In reference to this proposition M. Thouvenel observed to the English minister resident at Paris: It might not be possible to prevent the United States from offering money to Mexico, or to prevent Mexico receiving money from the United States, but neither England nor France ought in any way to recognize the transaction. (Earl Cowley to Lord J. Russell, September 24, 1861.)

"Lord Russell put the proposition aside by remarking to Mr. Adams that the offer was not co-extensive with their demands. Yet it is certain both England and France broke off diplomatic relations with Mexico on account of the law of July 17, 1861, suspending for two years the payments on these debts. To prosecute a war against the constitutional government of Mexico, at the moment exhausted by the civil war, for the remainder of their pecuniary claims would seem to be not only cruel, but unwise on the part of these governments. Few of the wrongs complained of could be attributed to the government of Jaurez, while nearly all had been inflicted, sometimes with savage barbarity, by the party of Zuloaga and Miramon.

"The loan by the United States to Mexico of \$2,000,000 a year would have recovered the customs into the Mexican treasury, and have enabled the government to restore its finances and settle all just demands. The acceptance of it by the allies would have given peace to a distracted land and spared it all those miseries which for five years were poured out on it, to no end except the enduring disgrace of the European intervention.

"We now know that the offer of the United States was rejected because the objects sought by the allies were not simply pecuniary; and, above all, did not contemplate an increase of the influence of the United States.

"This government, the moment it was apprised of the conference looking to a combined intervention, sought explanations of the powers, expressing its considerable alarm and deep concern. (Mr. Seward to Mr. Adams, September 24, 1861; same to Mr. Dayton, November 4, 1861; Lord Russell to Earl Cowley, September 27, 1861; Mr. Seward to Mr. Adams, October 10, 1861; Mr. Schurz to Mr. Seward, September 7, 1861.)

"The answers were uniformly reassuring, and disavowed any designs upon the territory or independence of Mexico, or any purpose to intervene in the internal affairs of the country.

"Such, however, was the friendly concern of the United States for its neighbor republic, and its conception of its own interest in this alarming movement of the powers, that it communicated to the cabinets of London and Paris its willingness to enlarge its offer of pecuniary assistance to Mexico, if this might dispense with the use of force against that republic; but no notice seems to have been taken of this offer, the cause having already been judged. (Mr. Seward to Mr. Adams, October 10, 1861; Lord Lyons to Lord J. Russell, October 14, 1861.)

"The treaty of London was signed October 31, 1861, and by its terms the United States was to be invited to become a party.

"It seems probable that the allies would never have decided to discuss and settle by themselves the stipulations of a treaty, naturally so interesting to the United States, and to which that power was to be invited to affix its signature, only after everything had been arranged, except for the prevalence of the civil war in that country.

"The treaty was communicated to the Government of the United States by the ministers at Washington of the allies, by a joint note, November 30, 1861, inviting the United States to accede to it.

"Mr. Seward declined this invitation by a reply dated December 4, in which he admitted that the United States had claims to urge against Mexico, but that the President deemed it inexpedient to seek satisfaction of those claims at that time through an act of accession to the convention. For this declension two reasons were urged, the first founded on traditions derived from Washington, the father of his country, who recommended that entangling alliances with foreign nations should not be made. The second was couched in these words:

"Mexico being a neighbor of the United States on this continent, and possessing a system of government similar to our own in many of its important features, the United States habitually cherish a decided good will toward that republic, and a lively interest in its security, prosperity, and welfare. Animated by these sentiments the United States do not feel inclined

to resort to forcible remedies for their claims at the present moment, when the Government of Mexico is deeply disturbed by factions within, and war with foreign nations. And, of course, the same sentiments render them still more disinclined to allied war against Mexico.'

"Upon the 17th of December following, the commander of the Spanish forces took possession of Vera Cruz, and the castle of San Juan de Ulloa.

"The 23d of November previous the law of 17th July 1861, suspending payments had been repealed, and payments according to the convention ordered.

"The French and English armaments arrived subsequent to the Spanish, and on the 10th of January the plenipotentiaries issued their proclamation to the Mexicans from Vera Cruz. This emphatically denied plans of conquest and restoration, and purposes of interfering in the politics or the government of the country. The Mexicans were invited to the work of regeneration, over which spectacle the allies were to preside impassively. Even the supreme government of Juarez was addressed.

"On the 17th of January the government of the Emperor, dissatisfied with the precipitation of his Spanish ally, and deeming it inevitable that the allied forces must march into the interior of Mexico, informed the English Government of its intention to reinforce the French troops in Mexico.

"The preliminaries of Soledad followed, February 19. It was a negotiation with the government of Juarez, acknowledging its strength and stability, resting on public opinion, and protesting the purpose of the allies not to attempt anything against the independence, sovereignty, and integrity of the territory of the republic, and providing for the opening of negotiations at Orizaba.

"These preliminaries were condemned by all the allied governments; severely so, at first, by the Spanish, and uniformly and unqualifiedly so by the French Government.

"Moreover, a difference had developed itself among the plenipotentiaries with reference to the French ultimatum. The French claims had swollen to twelve million piasters, leaving others of more recent date to be ascertained and added, and for the first time the Jecker bonds were brought forward by M. de Saligny. General Prim and Sir Charles Wyke were rather indignant; the affair wore the aspect of an intrigue and of oppression. The spirit manifested boded no good for the future. The commissioners, however, with fresh advices from Europe, proceeded toward the conference of Orizaba, set for the 15th of April, but a final rupture took place on the 9th of that month.

"General Miramon had before made his appearance, with Padre Miranda and others, at Vera Cruz. Sir Charles Wyke, remembering the plunder of the English legation of six hundred and sixty thousand piasters, denounced Miramon as a robber, and demanded his expulsion from the allied camp. But

now, at Orizaba, General Almonte, direct from the court of the Emperor and the palace of Miramar, made his entry, and spoke of a march on the capital in the name of the monarchy and Maximilian. He said he had the Emperor's license, 'the confidence of the French Government, and came to re-establish monarchy in Mexico in favor of an Austrian prince.'

"In effect the English and Spanish argument was: 'We have all assumed the attitude of people coming to negotiate; how can we take that of people having in their camp a leader of insurrection?' This was quite true, and the French admiral could not gainsay it, and M. de Saligny did not pretend to conceal the fact that *he* had never wished to negotiate with Juarez, and that he had always been of the opinion that a monarchy should be substituted for the republic.

"The Spanish and English plenipotentiaries required the expulsion of Almonte. M. Jurien de la Gravière, without repeating M. de Saligny's declaration for a monarchy, said that he had *orders*; that General Almonte had the confidence of his government, and that they could not compel him to leave the ranks of the French army. The French declined to await the 15th of April, with a view to an effort to treat with Juarez, but marched out of the position assigned under the preliminaries of Soledad, and the English and Spanish went home.

"From this time forward the intervention is relieved from all obscurity. Its design is set forth in a dispatch from Earl Cowley to Earl Russell, dated May 2, 1862, in these words:

"I would deceive your lordship if I concealed from you my personal conviction that there exists a fixed determination, though not avowed, to overturn the government of Juarez whatever may be the consequences of that act, and whether civil war results from it or not.'

"General Prim, in his letter dated Orizaba, April 14, 1862, and published in the Spanish newspapers shortly afterward, says:

"The triple alliance no longer exists. The soldiers of the Emperor remain in this country to establish a throne for the Archduke Maximilian—what madness—while the soldiers of England and Spain withdraw from Mexican soil.' He could not support this radical change in the treaty of London, and the political system of Mexico, (being 'a Spaniard,') '*if a prince of the Austrian monarchy was to be imposed on it.*'

"However, His Majesty the Emperor of the French makes his designs on Mexico clear from the beginning by his letter to General Forey, dated Fontainebleau, July 3. 1862. This historical document contains specific instructions. The French army was to march on the capital. When this was reached General Forey was to have an understanding with the *notable* persons of every shade of opinion who might have espoused the French cause. Those notables, in pursuance to such understanding, should organize a provisional government, which would submit to the Mexican people the question of the form

of political rule which should be definitely established, etc. But the Emperor himself, always ruling by virtue of the popular will, is careful to respect this principle. He says, therefore:

“The end to be obtained is not to impose upon the Mexicans a form of government which will be distasteful to them, but to aid them to establish, in conformity to their wishes, a government which may have some chance of stability and will assure to France the redress of the wrongs of which she complains.”

“Possibly some absurd persons may be found who will ask General Forey why the Emperor should spend men and money to establish a regular government in Mexico, and to such the Emperor furnishes an answer. He says:

“In the present state of the world’s civilization Europe is not indifferent to the prosperity of America, for it is she which nourishes our industry and gives life to our commerce. It is our interest that the Republic of the United States shall be powerful and prosperous, but it is not at all to our interest that she should grasp the whole Gulf of Mexico, rule thence the Antilles, as well as South America, and be the sole dispenser of the products of the New World. * * * If, on the contrary, Mexico can preserve its independence and maintain the integrity of its territory, if a stable government be there established with the aid of France, we shall have restored to the Latin race on the other side of the ocean its force and its prestige; we shall have guaranteed the safety of our own and the Spanish colonies in the Antilles; we shall have established our *benign* influence in the center of America, and this influence, while creating immense outlets for our commerce, will procure the raw material which is indispensable to our industry.”

“Added to all this, the gratitude of regenerated Mexico would always favor the beneficent source of her blessings. Such was the programme and such the reasons in support sketched by the hand of a man then supposed to be the ablest politician in Europe. This, however, was before the days of Sedan; well, it was even before the noble Carlotta lost her reason and Maximilian his life.

“It will be seen that the Emperor sent the treasures and the brave soldiers of France to Mexico not merely to enforce violated rights, but, as M. Billaut, minister without portfolio, in a debate in the French Chambers, February 1863, after some admirable declamation about the Crimea, Italy, China, etc., observed with great effect, glancing next toward Mexico, ‘There, also, great political vistas are open to clear-sighted eyes; diverse interests come in contact, and it is not opportune to neglect them.’

“What the clear sight of the Emperor beheld as the fruits of the intervention, therefore, were these:

“1. A pecuniary redress of wrongs suffered by Frenchmen, including payment under the conventions,

"2. The regeneration of Mexico under a stable monarchy with an Austrian prince.

"3. An insurmountable barrier to the too great expansion of the Anglo-Saxon race in the New World, represented by the United States, by restoring the power and prestige of the Latin race.

"4. A benign French influence in the center of America, founded on the gratitude of Mexico, and creating immense outlets for French commerce.

"After a long delay, some disasters to the French arms, and a resistance not foreseen by the Emperor and his advisers, General Forey, largely reinforced from France, entered Mexico on the 10th of June 1863. Almost the entire Mexican nation, including all parties, were in arms or in opposition to the intervention. Only one shade of political opinion sustained the French cause. General Forey at once proceeded to organize the Emperor's benevolent plan of government in order that the Mexican people might freely manifest their wishes as to their form of rule; and, as the Mexican nation was, with singular unanimity, outside the French lines, supporting the constitutional government, it was not General Forey's fault that his choice of a body of notables was limited to a small area and number of persons compared with the whole territory and population.

"The indefatigable M. de Saligny took upon himself the whole labor of digesting a plan of government for the Mexican people and selecting its agents. He made a lucid and able report to General Forey June 16, 1863, which was adopted by that distinguished officer and the same day carried out by a decree signed 'Forey, General of Division, Senator of France, Commander-in-Chief of the Expeditionary Corps in Mexico.'

"This decree provided that a special decree should designate a superior junta of government, composed of thirty-five Mexican citizens, according to the recommendation of the Emperor's minister. This junta should nominate three Mexican citizens, charged with the executive power, and two substitutes for these high functions. (The archbishop was still absent in Europe.) The junta should choose from the Mexican citizens, without distinction of rank or class, 245 members, and these, associated with the junta, should constitute the assembly of notables. This assembly should occupy itself especially with the form of the permanent government of Mexico. The sessions of the junta and notables should not be public; in short, they were to be secret. Other minor particulars of this decree may be omitted.

"Two days afterward General Forey, by special decree, named the thirty-five persons who were to constitute the superior junta. They all belonged to the defeated party of Zuloaga and of Miramon, Sir Charles Wyke's robber, recently expelled

by the allies from Vera Cruz. This junta named for the executive functions:

"First. His Excellency Don Juan N. Almonte, general of division.

"Second. The most illustrious Señor Don Pelagio Antonio de Labastida, archbishop of Mexico.

"Third. His Excellency Don Mariano Salas, general of division.

"The substitutes were Ormaechea, bishop elect of Tulancingo, and Pavon, president of the supreme court.

"Forey, by proclamation, sanctioned the assumption of executive power by this triumvirate, to date from 24th June.

"The notables, nominated from the population of the city, assembled, and on the 10th July 1863 adopted and promulgated this decree. Its importance on the question under investigation requires its insertion entire:

" 'The assembly of notables, in virtue of the decree of the 16th ultimo that it should make known the form of government which best suited the nation, in use of the full right which the nation has to constitute itself, and as its organ and interpreter, declares with absolute liberty and independence as follows, viz:

" '1. The Mexican nation adopts as its form of government a limited hereditary monarchy, with a Catholic prince.

" '2. The sovereign shall take the title of Emperor of Mexico.

" '3. The imperial crown of Mexico is offered to His Imperial and Royal Highness the Prince Ferdinand Maximilian, Archduke of Austria, for himself and his descendants.

" '4. If, under circumstances which can not be foreseen, the Archduke of Austria, Ferdinand Maximilian, should not take possession of the throne which is offered to him, the Mexican nation relies on the good will of His Majesty Napoleon III., Emperor of the French, to indicate for it another Catholic prince.

" 'Given in the hall of sessions of the assembly on the 10th of July 1863.

" 'TEODOSIO LARES,

" 'President, etc.'

"The next day the notables completed their labors by vesting the regency of the empire, until the arrival of the sovereign, in the executive triumvirate already theretofore created.

"Here was a slight departure, it must be confessed, from the programme laid down in the Emperor's letter to General Forey. This, in terms, provided that the provisional government to be established by an understanding between Forey and the notables should 'submit to the Mexican people the question of the political régime which is to be definitely established.'

"The notables knew the futility and the impossibility of submitting their work to approval and ratification by the people of Mexico. Nevertheless M. Drouyn de l'Huys, not insensible to public opinion, to say nothing of the committals of

the Emperor, wrote on the 17th of August following to General Bazaine, then in command of the French forces in Mexico, that it was indispensable that the scheme of the notables should be ratified by the popular will, and he was directed to collect the suffrages in such a manner that no doubt should hang over the expression. The mode of ascertaining this will was left to the general, but this essential point was commended to his constant care by the Emperor.

"The reply made by the Archduke in October following (the 3d) to the deputation, headed by Señor Estrada, which offered him the crown, made known that his acceptance of the offered throne must depend upon the result of the vote of the whole country.

"These instructions were very embarrassing to General Bazaine. In point of fact, he could not carry them out. He had under his control a very small part of the Mexican people and soil. Even his lines (incessantly penetrated by a hundred guerrilla bands) embraced but about one-eighth of the population and one-thirtieth of the territory. The Emperor surely had not looked at a map of Mexico. Bazaine might overawe the 700,000 people in reach of his arms, but outside 7,000,000 sustained the government of Juarez. There was no remedy for it but a campaign against the Mexicans in order to collect their votes.

"The military results of that campaign in 1863-64 will appear when I come to describe the territory occupied by the French troops in June following, the date of the entry of Maximilian into the capital.

"Just exactly how Marshal Bazaine collected the suffrages, in obedience to the particular charge given him by the French Emperor through his minister, M. Drouyn de l'Huys, it is difficult to determine, for after a patient search I have nowhere been able to find his official report.

"This much is certain, that the decree of the assembly of notables was never submitted to any vote of even that part of the people subject to the control of the French arms.

"What seems to have been done in obedience to the orders of the great champion of universal national suffrage, and to satisfy the scruples of the coy prince at Miramar, was simply this: A circular dated December 2, 1863, under the orders of the regency, was issued by the subsecretary of state and government dispatch, José Maria Gonzalez de la Vega, directed to a few political prefects appointed and upheld by the French, notifying them that private letters and reports addressed to the regency by 'reliable persons' assured that as soon as the empire is recognized by four or five principal departments of the interior his Illustrious and Royal Highness the Archduke Ferdinand Maximilian would commence his march; and these prefects are directed to procure this recognition.

"In response to this circular the prefects of Pachuco, of the first district of Mexico, and of Puebla, and perhaps a few

others, under date 4th December 1863, certify that it being beyond doubt that the departments mentioned in the circular will be occupied by the French forces in a few days, the inhabitants will joyfully manifest their adhesion. One even reports, as already held, on the 29th November, a *fête champêtre*, under the auspices of the French officers, at which the inhabitants, in a delirium of joy, rang bells, fired off rockets, and sent up two balloons with the names of the Emperor and Empress upon them.

"It is probable that a number of municipalities within the territory overrun by the French arms, and completely, by appointment or otherwise, in the French interest or under its control, signified their adhesion to the decree of the notables.

"Both Maximilian and Mejia, in their defense before the court martial at Queretaro, relied alone upon the vote of the notables, and 'the adhesion of many municipalities remitted to the Emperor-elect.' (Mexican Documents, 1867, page 53 [40th Congress, 1st session, S. Ex. Doc. No. 20], published by the United States Government, and extract from the defense of General Mejia annexed hereto.)

"I append hereto some translations of these prefect reports from the *Periodico Oficial*, published at the City of Mexico December 15, 1863.

"In this reckless manner the French general and his government paltered with their solemn pledges and the sacred right of a people to form and regulate their own internal government.

"Maximilian, furnished with such evidences of the popular will, 'began his march' from Miramar on the 11th of April, and entered the City of Mexico on the 12th day of June 1864, accompanied by that excellent, amiable, and most unfortunate princess, Carlotta.

"At this date only so much of the extensive territory of Mexico as was occupied by the French troops owned the rule of the new Emperor.

"The only States then wholly occupied by the invaders and their few and feeble Mexican allies were Mexico and Yucatan. In Vera Cruz they held the port and the towns on the line to the City of Mexico. The rest of the State, including over twenty towns, adhered to the constitutional government, and was defended by several thousand troops.

"In Puebla the only point held by the French was the capital of the State. The rest of its territory was in the armed possession of the state and federal governments. In Michoacan, Morelia and the towns on the line to Mexico were occupied. The state government at Pastcuaro and Rivas Palacio (of excellent fame), with federal troops, dominated the rest of that State. So in Guanajuato the French held the capital and the town of Leon alone. The rest of that important State adhered to the republic.

"In San Luis Potosi the French likewise held the capital, but the state government and federal forces, five thousand strong and well disciplined, held the remainder of the territory.

"In Tamaulipas only the port of Tampico was occupied.

"In Jalisco the enemy was confined to the capital by a force ten thousand strong under General Uraga. In Zacatecas and Toluca the French likewise held the capitals.

"The constitutional government held undisputed sway over the States of Nueva Leon, Coahuila, Chihuahua, Sonora, Sinaloa, Oajaca, Chiapas, Guerro, Durango, Tabasco, Lower California, Colima, and Tehuantepec. From this perhaps we must except the ports of Acapulco and Mazatlan, on the Pacific.

"If, now, we consult a map and table of population, we will see that the French held on the 12th June 1864 about one-thirtieth of the Mexican territory, and less than one-tenth of the population. Outside of the French lines was an inflamed, united, and hostile people.

"The new Emperor was without an army or a fleet. His revenues were pledged in advance for debts which they were unable to carry. His only real military support was the French expeditionary corps, and his only pecuniary resource a fragment of a loan raised under French patronage at a most usurious rate. The support given by the party which 'brought the Moors into Spain,' was not only feeble, but treacherous. Under such circumstances the young Austrian began the desperate adventure of subduing and pacifying the country, and founding a monarchy in Mexico. The result is now known. His rule was as wide and his power as ample the day he entered the capital as at any future period.

"The party of the republic was led by a man of no ordinary endowments. He was a republican and a reformer who had laid the ax to the root of the tree. He believed in his cause and his countrymen. He was upright, patriotic, temperate, patient, resolute—for that matter, obstinate. Difficulties never deterred, defeats never discouraged him. Supported by the best and bravest of Mexico, he carried the flag of national independence and republican self-government from the capital to the remotest border of the land, until, by the unaided efforts of his countrymen, he brought it back to the ancient city in triumph.

"Substantially the whole Mexican people supported the constitutional government. There was no party of the monarchy that deserved the name. The presence of a victorious French army failed to develop such a party.

"Says General Prim, in his letter to the French Emperor, dated Orizaba, March 17, 1862:

"I have, moreover, the profound conviction that the partisans of monarchy are very few in this country. * * * The vicinity of the United States, and their severe reprobation of

monarchy, has contributed to create a hate for it here. * * * For these reasons and others that can not escape the attention of your Imperial Majesty, you will understand that the general opinion of this country is against monarchy. If logic does not demonstrate it, facts prove it, for during the two months that the flags of the allied powers floated over Vera Cruz, and now that we occupy Cordoba, Orizaba, and Tehuacan, important towns where there is no Mexican force, the partisans of monarchy have made no demonstrations to tell of their existence.'

"General Prim's appreciation of the real truth appears where he says:

"You can easily carry Maximilian to Mexico and crown him king, but the King will find no adherents in the country but conservative chiefs,' etc.

"This is literal. The people were almost unanimous in their hatred of monarchy and foreign intervention; only defeated chiefs and a despoiled hierarchy were the support of the new monarch. If the late French Emperor, in his unfortunate exile, should again read the letter of his former friend, General Prim, fallen, too, in a world of changes, he will be struck with these words—

"A few rich men are willing to receive a foreign monarch who comes supported by your Majesty's soldiers, but the monarch will have nothing to sustain him when the time shall come for your soldiers to withdraw, and he will fall from the throne, as others will fall, when the mantle of your Imperial Majesty shall cease to protect and defend them.'

"In like manner Sir Charles Wyke, as late as March 27, 1862, with ample opportunities of observation, and no faith in republican government, was of opinion that a party in Mexico 'did not exist' favorable to monarchy (dispatch to Lord Russell); and although this gentleman had no partiality for President Juarez, he expressed the opinion in the final conference between the Spanish, French, and English plenipotentiaries, at Orizaba, April 9, 1862, that a majority of the Mexican people was favorable to the existing government, and that it would be difficult to find partisans of a monarchy.

"Earl Russell also communicates to Earl Cowley, British minister resident at Paris, June 14, 1862, his information 'that the majority of the Mexican people were liberal and republican, and that it would be impossible for the French troops to establish monarchy in Mexico with any chance of stability.'

"The opinion of the American Government, equally enlightened, emphatic, and sound, never underwent any change or modification from the beginning of the intervention until its final eclipse in the blood of the victim of the French Emperor. March 3, 1862, Mr. Seward addressed these weighty words to the American ministers at London and Paris:

"The President, however, deems it his duty to express to the allies, in all candor and frankness, the opinion that no monarchical government which could be founded in Mexico, in the presence of foreign navies and armies in the waters and

upon the soil of Mexico, would have any prospect of security or permanency. * * * Under such circumstances the new government must speedily fall unless it could draw into its support European alliances, which, relating back to the present invasion, would, in fact, make it the beginning of a permanent policy of armed European monarchical intervention injurious and practically hostile to the most general system of government on the continent of America, and this would be the beginning rather than the ending of revolution in Mexico.'

"The same minister, in a dispatch to Mr. Dayton of 26th September 1863, expressing the solicitude of the Government of the United States awakened by the progress of the war of intervention, says: 'This government knows full well that the inherent normal opinion of Mexico favors a government there republican in form and domestic in its organization in preference to any monarchical institutions to be imposed from abroad.'

"And again, as late as December 6, 1865, Mr. Seward, in a dispatch to the French minister in Washington, holds this language: 'Having thus frankly stated our position, I leave the question for the consideration of France, sincerely hoping that that great nation may find it compatible with its best interests and its high honor to withdraw from its aggressive attitude in Mexico within some convenient and reasonable time, and thus leave the people of that country to the free enjoyment of the system of republican government which they have established for themselves, and of their adherence to which they have given what seems to the United States to be *decisive and conclusive, as well as very touching proofs.*'

"This accumulated testimony is rendered conclusive by the subsequent history of this attempt to found a monarchy in Mexico. The people and government of that country never ceased their armed resistance to this invasion of the foreigner. Hundreds of combats were fought and many thousand brave Mexicans laid down their lives for their native land and well-derived rights. The contest raged in every State where the invading foe was found; even the line from the capital to Vera Cruz was incessantly assailed, and frequently cut; the empire consisted only, so to speak, of the ground upon which stood the feet of foreign soldiers. *These* were the empire; when these were withdrawn, as General Prim had assured his Imperial Majesty the Emperor of the French, the costly but unsubstantial fabric which he had erected fell, and the poor play ended.

"At the time Maximilian entered his capital the rebellion in the United States was drawing to a close. The organized power of that republic at that moment was grinding to pieces on the fields of Virginia that great revolt which may be truly styled the enemy of the whole continent, since it had revived the alliance of kings against America, an alliance in a former age baffled by President Monroe.

"As soon as the United States had ended its formidable domestic troubles it brought its powerful influence to bear to procure the withdrawal of the French army from Mexico. The efforts of Mr. Seward to this end were unceasing, adroit, and resolute. He had steadily refused to recognize the Maximilian government, and had uniformly made known to the French and other European cabinets that the United States maintained the most friendly relations with the republican government of President Juarez. October 23, 1863, he writes Mr. Dayton: 'M. Drouyn de l'Huys should be informed that the United States continue to regard Mexico as the theater of a war which has not yet ended in the subversion of the government long existing there, with which the United States remain in the relation of peace and sincere friendship; and that for this reason the United States are not now at liberty to consider the question of recognizing a government which in the further chances of war may come into its place.'

"So, again, on the anniversary of the entry by the new Emperor into his capital, June 12, 1864, Mr. Seward writes the United States chargé at Paris: 'It is already known to the government of France that the United States are not prepared to recognize a monarchical and European power in Mexico, which is yet engaged in a war with a domestic republican government and a portion of the Mexican people.'

"On the 30th of the same month, writing to the same official, Mr. Seward says: 'What we hold in regard to Mexico is that France is a belligerent there, in war with the Republic of Mexico.'

"On the 6th of November following he writes: 'The United States still regard the effort to establish permanently a foreign and imperial government in Mexico as disallowable and impracticable. * * * They are not prepared to recognize, or to pledge themselves hereafter to recognize, any political institutions in Mexico which are in opposition to the republican government with which we have so long and so constantly maintained relations of unity and friendship.' (Same to same.)

"This dispatch adroitly presses the removal of the French forces as a means of preserving 'the inherited relations of friendship' between the two countries.

"The dispatch of December 16, 1865, from the same minister to Mr. Bigelow, is particularly in point on the question in this case. There in answer to an invitation from His Majesty's government to recognize the institution of Maximilian in Mexico as a *de facto* government, as the price of the withdrawal of the French intervention, Mr. Seward replies, 'that the recognition which the Emperor has thus suggested can not be made.'

"Previously, on the 6th December, Mr. Seward, writing to the French minister in Washington, in answer to the same suggestion from the Emperor, had, with regret, felt 'obliged to say that the condition the Emperor suggests is one which seems quite impracticable.'

"Pressing the withdrawal of the French troops, Mr. Seward insists that 'the real cause of our national discontent is that the French army which is now in Mexico is invading a domestic republican government there which was established by her people, with whom the United States sympathize most profoundly, for the avowed purpose of suppressing it and establishing on its ruins a foreign monarchical government, whose presence there, so long as it should endure, could not but be regarded by the people of the United States as injurious and menacing to their chosen and endeared republican institutions.'

"In reply to this dispatch, M. Drouyn de l'Huys, in a letter addressed to the French minister at Washington January 9, 1866, after seeking to reconcile the proceedings of the Emperor in Mexico with the principle of nonintervention by labored arguments, which have been nowhere more criticised and condemned than in France, announces *that the French Government is hastening to make arrangements with the Emperor Maximilian which, while satisfying its interest and dignity, allows it to consider the part of its army on Mexican soil at an end.*

"On the 12th February following Mr. Seward, addressing the Count de Montholon, replies at length to this dispatch. He lays down the position of the American Government on the whole subject with distinctness and much emphasis. He affirms that the proceedings in Mexico adopted by a class of persons to found a monarchy on the ruins of the republic were without authority and prosecuted against the will and opinions of the Mexican people, and that, in supporting these proceedings in derogation of the inalienable rights of the people of Mexico, the original purposes of the French expedition seem to have become subordinate to a political revolution, which would not have occurred had not France forcibly intervened, and which could not be maintained if that intervention should cease; that the United States had not seen any satisfactory evidence that the people of Mexico had called into being or accepted the so-called empire; that they are of opinion that such acceptance could not have been freely procured or lawfully taken at any time in the presence of the French army; that this government, therefore, recognizes and must continue to recognize in Mexico only the ancient republic, and can not consent, directly or indirectly, to involve itself in relation with or recognition of the institution of the Prince Maximilian in Mexico.

"Mr. Seward says: This is held without one dissenting voice by his countrymen, and that the judgment of the United States thus expressed has been adopted by every state on the American hemisphere; and that thus the presence of European armies in Mexico, maintaining a European prince with imperial attributes, without her consent and against her will, is deemed a source of apprehension and danger by the United States and all the independent and sovereign republican states on the American continent and its adjacent islands; and he denies

that foreign nations can rightfully intervene by force to subvert republican institutions in any one of those states. Seeking relief of the Mexican embarrassments without disturbing the amicable relations of the United States with France, Mr. Seward presses for definitive information of the time when French military operations may be expected to cease in Mexico.

"This, in effect, closes the correspondence, for M. Drouyn de l'Huys, in reply, addressing the French minister in Washington April 5, 1866, confines himself to announcing that the Emperor has decided that the French troops should evacuate Mexico in three detachments, the first to depart in the month of November 1866, the second in March 1867, and the third in November of the same year. By a subsequent change of programme the whole force was withdrawn at once, and in the month of February 1867.

"While this negotiation was in progress a treaty was arranged between the prince, Maximilian, and the Emperor of Austria for the enlistment of troops in Austria for service in Mexico. Mr. Seward, in a series of dispatches dating from March 19 to April 30, 1866, stimulated the American minister in Vienna, Mr. Motley (who seemed to hesitate), to an energetic protest, and, in the event that troops were allowed to depart before an answer to the protest, he was even ordered to retire from Vienna. In this last dispatch (April 30) Mr. Seward states the real conviction of the people of the United States in a sentence, as follows:

"The European war against the Republic of Mexico has been from the beginning a continual menace against this government, and even against free institutions throughout the American continent."

"The protest, however, was effectual, and Count Mensdorff, in his reply dated May 20, assured the United States Government that no troops would be allowed to depart for Mexico.

"This practically closed the romantic enterprise in Mexico. The French troops withdrawn, all hope of new recruits from Europe cut off, the empire fell into cureless ruin.

"In anticipation of the departure of the foreign troops, the whole people of Mexico rose in arms. The officials and adherents of the so-called empire were seized with a panic and hastened to provide the means of escape from the justice and the vengeance of their outraged countrymen. On the night of September 13, 1867, these guilty betrayers of their country, at Acapulco seized the bark *Francis Palmer*, claimant's vessel, and sailed away after their sole security, the withdrawing French. So it was in every part of the country. The French evacuation was followed by the flight of the imperialistic families, and the liberal forces hung on the retreating rear of the French columns, occupying every evacuated town.

"On the 1st of February 1867 Miramon was defeated by General Escobedo at San Jacinto. The second of the same month Colima surrendered to General Corona. On the 5th,

the French marched out of the City of Mexico. On the 13th, Maximilian marched for the fatal City of Queretaro. On the 21st, President Juarez, with his ministers, entered the city of San Luis Potosi amidst the joy and acclamations of the inhabitants.

"Queretaro and Puebla were speedily invested by the liberal troops. Puebla was taken by storm on the 4th of April by Porfirio Diaz. On the 10th, Marquez, the assassin of Tacubaya, but the lieutenant-general and main prop of the crumbling empire, was defeated and driven into the City of Mexico. Diaz began the siege of the capital with twenty thousand men on the 17th. On the 15th of May Queretaro fell, and Maximilian, with Generals Miramon and Thos. Mejia and his entire force of eight thousand men surrendered at discretion. On the 14th of June, a court-martial, constituted under the orders of the constitutional government and sitting in the theater of Iturbide, at Queretaro, condemned Maximilian, Miramon, and Mejia to be shot. The sentence was approved by the commanding general, Escobedo, and the government, and was carried into execution on the morning of the 19th of June. On the 20th the City of Mexico with its garrison surrendered to General Diaz, but the infamous Marquez had already disappeared and made his escape.

"This brief recapitulation of facts, which have now become history, will demonstrate that the empire in Mexico, introduced by the visionary politician, who then, also, was preparing France for destruction, was sustained only by his bayonets, and fell by the uprising of the people of Mexico the moment these bayonets were withdrawn under the pressure of public opinion in France, and the growing discontent and impatience of the people and government of the United States.

"It is believed that in no event would the monarchical substituted for the republican form of government in any state of this hemisphere by armed European intervention ever be recognized by the United States or any other American republic so long as such intervention continued. The United States has been pledged against such intervention for fifty years.

"In considering the question of government *de facto*, it will be observed that it was attempted in Mexico, not only to change the person of the ruler, but the form of government, and in a direction opposed to the history, tendencies, and prejudices of every republic in North and South America.

"Such a change, in fact, could only be accomplished by invasion from without or revolution within the state. In the former case the force must accomplish a secure and permanent conquest. In the latter the change must be supported by the mass of the people and rest upon their consent. Should foreign intervention aid this change we can never regard the fact as accomplished or as resting upon the favor of the people unless the new government is strong enough to maintain itself after the foreign aid shall be withdrawn.

"Here, a French conquest of Mexico was never desired or aimed at.

"On the contrary, the government of his Imperial Majesty uniformly declared that there was no purpose of intervention on his part in the internal affairs of Mexico. Having grounds of war against that country, the occasion was to be embraced to extend an opportunity to its inhabitants, assumed to be ready to accomplish their own regeneration. In point of fact, the French Emperor, deceived by the Mexican exiles and betrayed by persons near him whom he trusted, but who were interested in Mexican bonds, lands, and mines, overestimated the strength of the conservatives of that country and the influence of the church, whose power he understood in France. Add to this he miscalculated the result of the rebellion in the United States. His scheme for restoring the Latin race in Mexico (where it never existed) and increasing 'immensely' French power and commerce, at best visionary and romantic, would have been simply insane had he not believed the people of Mexico willing to support or accept the monarchy once established by his arms.

"A change in the form of government in Mexico as a fact, therefore, never existed, because it never rested for a moment upon the popular consent, and the Emperor never expected to accomplish it by the permanent armed occupation of the country.

"However this may be, there can be but one government in the same state at the same time. The French found a government in Mexico when they came there, and recognized it at Soledad; when they left, it was still there, stronger than when they found it; it is there now, stronger than any government Mexico ever had, having put down all enemies under its feet, the monarchical party crushed by the weight of its crimes and the odium attached to responsibility for foreign invasion.

"This government, elected according to the constitution and laws, always in possession of much the largest portion of its territory, was sustained against domestic treason and foreign levies throughout its long and severe trials by the Mexican masses, and upheld by the sympathy of every republican state in the Americas.

"But, waiving these considerations, it is impossible for the United States successfully to claim that the so-called empire was a government *de facto*. The government of that country uniformly and expressly refused to regard it as such, when the inducements to do so were strong and the danger of refusing great. On the contrary, it recognized the republic and maintained relations of amity and friendship with it to the close, as it had done from the beginning of its trials. This fact must oppose an insuperable barrier to any and all reclamations by the United States against the Republic of Mexico for the acts of the Maximilian authorities, so called. There could be but one government at a time, as a matter of fact, and the United

States has determined the question between the two contending parties for itself.

"Wisely, the decision could not have been otherwise. The government and people of the United States understood and heartily approved the cause for which the people and government of Mexico fought and suffered; the plan of Ayutla and the constitution of 1857; equal rights secured by a government of all the people; resistance to military and ecclesiastical oppressions; a free religion and a free press; cordial fraternity with the people of all nations.

"The anarchy in Mexico of which Europe complains was made by the friends of class privileges, state religions, and monarchy, conservatives of the dregs of old Spanish colonial policy, and abuses founded on ideas which belong only to past ages.

"Says Mr. Seward to the Marquis de Montholon, February 12, 1866; 'We can not deny that all the anarchy in Mexico of which Mr. Drouyn de l'Huys complains was necessarily and even wisely endured in the attempts to lay sure foundations of broad republican liberty.'

"But the people of the United States also understood what the intervention in Mexico meant for themselves: the destruction of the republican form; a monarchy on their borders to endanger their peace, menace their institutions, and check their growth; a speculation in their downfall at the hands of the rebellion then raging. A government in the United States that had shown any sympathy with such an enterprise would have sunk beneath the power of public opinion.

"Moreover, the people of the United States knew the monarchical attempt in Mexico would fail. They believed the people of that country would crush it; but, in any event, they were of one mind on the subject, and intended, when the hour came, it should fail.

"Yet more, the trials of their neighbors, borne so bravely and patiently, had their fullest sympathy. They were too near the scenes of suffering and cruelty to be deaf to the cries of patriots dying for their native soil and national independence. If Europe heard the guns which shot Prince Maximilian to death, Americans, however shocked by their report, yet heard the groans of the victims of his folly and ambition. On the 20th of October 1865, at Uruapan, under a presumptuous and barbarous decree of the pretended Emperor of the 3d of that month, were shot to death prisoners by the fortune of war, Generals Arteaga and Salazar, Colonels Diaz Paracho, Villa Gomez, Perez Milicua, and Villanos, five lieutenant-colonels, eight commanders, and a number of subordinate officers. Hear them a moment, for they were men and brethren.

"General Arteaga writes to his mother, Dona Apolonia Magallanes:

"**ADORED MOTHER:** I was taken prisoner on the 13th instant, and to-morrow I am to be shot. * * * Mama, in spite

of all my efforts to aid you, the only means I had I sent you in April last; but God is with you, and He will not suffer you to perish, nor my sister Trinidad, *the little Yankee.*'

"And Salazar to another mother:

"**'ADORED MOTHER:** I go down to the tomb at thirty-three years of age, without a blot upon my name. Weep not, but be comforted, for the only crime your son has committed is the defense of a holy cause—the independence of his country. For this I am to be shot. * * * Direct my children and my brothers in the path of honor, for the scaffold can not at-taint loyal names.'

"And Gomez to a father:

"**'MY DEAR FATHER:** I employ my last moments in writing to you. * * * I would like to leave an honored name to my family. I have worked for it, defending the cause I embraced; but I could not succeed. Patience!'

"Patience did its perfect work at last, and the national cause triumphed for which these martyrs bled. The ashes of Salazar may now repose in peace by the side of his children in his mother's town.

"To-day the Liberals of Mexico, in possession of the blessings of national independence and the right of self-government, won at the price of such costly blood, have the opportunity to prove that it was not shed in vain, by union among themselves, moderation toward their opponents, and justice toward all men.

"It results from the foregoing investigation that the so-called empire was not a government *de facto*; because, lacking the element of popular support or of habitual obedience from the mass of the people, it rested alone on the assistance of foreign force, which contemplated and extended only a temporary interference, and because another government, disputing successfully its pretensions, bore rule in Mexico as a fact, in possession of much the largest part of the territory, and sustained by the mass of the people.

"It further results that the United States, at least, is not now at liberty to claim a government *de facto* for the Prince Maximilian, having always during the contest in Mexico recognized the republic and repudiated the empire—committed no less by the sympathies of its people with the people of Mexico in their arduous struggle for the republican form (endeared to the people of the United States) and liberal principles (which they also cherish) than by their appreciation of the fact that the European intervention attacked the United States and every other republican state in America.

"I have said nothing about governments *de jure*, because, outside of the field of moral considerations, a government *de facto* is also a government *de jure*.

"I feel assured, moreover, that the Government of the United States can not desire to hold the Republic of Mexico responsible for the acts of the so-called empire by obtaining awards here,

which must condemn the stand taken by that government in behalf of republican institutions in its hour of trial and danger; but that this case has found its way here in the name of that government, in pursuance of a purpose to acquit itself of responsibility to claimants, by the final judgment of this impartial tribunal.

"For my part, I cheerfully accept the responsibility thus imposed and the labor which belongs to it.

"Claimant may have a remedy for the wrong which he has sustained; but he must look elsewhere than to the government of the Republic of Mexico.

"It is therefore considered by this commission that the Republic of Mexico is not responsible for the injury complained of herein, and this claim is rejected and disallowed.

"APPENDIX.

"[No. 74.]

"OFFICE SECRETARY OF STATE AND GOVERNMENT DISPATCH,

"POLITICAL PREFECTURE OF THE DISTRICT OF PACHUCO,

"Pachuco, December 4, 1863.

"I have received your notes of the 2d instant and of the 28th ultimo, with the copy, No. 52, of the Periodico Oficial, to which they make reference, and which has been opportunely circulated, giving it the greatest possible publicity, the acceptance of our emperor, Ferdinand Maximilian, having been solemnized here on Sunday last, as the most auspicious event of our time for the welfare and prosperity of the Mexican Empire. I have the satisfaction of this news having been received with general applause, and of our demonstrations having been joined in by the people, hurrahing for His Majesty the Emperor, the Empress, for religion, for His Excellency General Almonte, for the regency, and for the prefect who subscribes, in the civic procession which took place, with music, ringing of bells, and rockets, and in which was carried a crown with the name of the Emperor.

"And if this event, which I have scarcely sketched even superficially, has created such vivid satisfaction, you will comprehend how much greater it will be when it is confirmed by reports and private letters that the near arrival of our Emperor may be considered certain, seeing that it is so easy to comply with the condition imposed by His Majesty, when all the honest inhabitants of the empire and all the towns await his coming as their salvation from all the evils and horrors which they have suffered and still suffer in some parts of the country.

"The presence of the Emperor will give courage to the timid, vigor to those who are devoted to the empire, attract the few disconcerted ones, assure all, and secure peace with greater certainty than can be done by armies, for his presence will be the most perfect guaranty for all persons, interests, and properties, while in our foreign relations it will give us that respectability which we lack, and will infuse confidence among us and in all mercantile transactions.

"I join you in congratulations for the certainty of the coming of our Emperor as a most fruitful cause of beneficent results, and the firmest pledge of the benefits which are being prepared for Mexico after the violent storm in which was being wrecked our religion, our independence, and social being, saving us from the abyss to which an unbridled demagoguery was rapidly conducting us.

"Meanwhile, I will watch constantly for the preservation of order in this district and for the propagation of good ideas.

"Accept, then, my congratulations and the protestations of my greatest appreciation and consideration.

"The political prefect,

"M. BELLE CISNEROS.

"To the SUB-SECRETARY OF STATE AND DISPATCH OF GOVERNMENT,
Mexico.

"MEXICO, December 9th, 1863.

"True copy.

"The Sub-Secretary of State and of the Dispatch of Government,

"JOSÉ MARIA GONZALEZ DE LA VEGA.

"SECRETARY OF STATE'S OFFICE AND GOVERNMENT DISPATCH,

"POLITICAL PREFECTURE OF THE DISTRICT OF PACHUCA,

"Pachuca, December 5, 1863.

"I have the honor to inform you of the occurrences which have taken place, since last Sunday, during the week ending to-day.

"On Sunday, the 29th ultimo, in the afternoon, in consequence of a *fête champêtre*, at which were present all the French officers and the principal families of the city, for the purpose of celebrating the acceptance of the crown of Mexico by His Highness the Archduke Ferdinand Maximilian, a civic procession was formed composed of all the ladies and the other persons attending the banquet, all of whom, in an organized column, amid numberless rockets and the ringing of bells, passed through the streets, the ladies carrying the Mexican and French flags, the imperial crown, and numerous crowned eagles. The people joined the retinue, and their enthusiasm bordered on delirium, hurrahing for the Emperor of Mexico, for religion, for the Emperor of the French, and for the prefect. This was followed at night by two magnificent balls, the most perfect order having been observed during the whole day. Two balloons were sent up, with the names of their Majesties the Emperor and the Empress of Mexico.

"MEXICO, December 9th, 1863.

"True copy.

"The Sub-Secretary of State and Dispatch of Government,

"JOSÉ MARIA GONZALEZ DE LA VEGA.

"OFFICE OF THE SECRETARY OF STATE AND

"DISPATCH OF GOVERNMENT, POLITICAL PREFECTURE AND

"MILITARY COMMANDANCY OF THE DISTRICT OF TULA,

"Tepiji, December 4, 1863.

"By your circular of the 2d instant I am highly gratified to be informed that private letters and advices addressed to the regency by reliable persons agree in assuring that the prince will begin his journey as soon as four or five departments of the interior recognize the empire, as also that in the course of a few weeks the departments of Guanajuato, Leon, Aguascalientes, San Luis Potosi, Guadalajara, and Zacatecas will be occupied, which will have great influence in terminating the war, and consequently in the complete pacification of the country.

"I have the honor thus to reply to your circular referred to.

"Be pleased to accept the protestations of my distinguished consideration.

"The political prefect *ad interim*.

"FELIPE BLANCO.

"To the SUB-SECRETARY OF STATE AND GOVERNMENT DISPATCH.

"MEXICO, December 9, 1863.

"True copy.

"The Sub-Secretary of State and Government Dispatch.

"JOSÉ MARIA GONZALEZ DE LA VEGA.

"OFFICE OF THE SECRETARY OF STATE AND
"GOVERNMENT DISPATCH, POLITICAL PREFECTURE OF
"THE FIRST DISTRICT OF THE DEPARTMENT OF MEXICO,
"Palace of the Political Government, Toluca, December 4, 1863.

"By your circular note of 2d instant I have been informed, with the satisfaction it deserves, of the important news you are pleased to communicate to me in reference to the confirmation by corroborating letters and reports of reliable persons of the acceptance of the throne of Mexico by His Highness the Archduke Ferdinand Maximilian as soon as four or five departments of the interior recognize the Empire.

"It being beyond doubt that the departments to which your refer in the circular in question will be occupied within a short time, and that their inhabitants will draw up at once their acts of adhesion to the empire, for, according to the reports received every day through various sources, the towns of the interior desire nothing else than to see themselves free from the pressure exercised over them by the Juarists in order to declare their sentiments in favor of it, therefore, in effect, the acceptance of His Highness may be considered an accomplished fact.

"I have ordered the circular to be printed, with the speeches of Mr. Gutierrez Estrada and of His Highness, for the information of the inhabitants of the district under my command, and there remains nothing further than to congratulate most cordially the regency for the agreeable information you have communicated, and which, I can assure you, will be satisfactory to all the worthy inhabitants, who desire anxiously that the day may come when they will see our new and worthy Emperor seated upon the throne of Montezuma.

"Be pleased to report to the regency and accept the assurances of my attentive consideration and esteem.

"The political prefect,

M. DE LA SOTA RIVA.

"To the SUB-SECRETARY OF STATE AND GOVERNMENT DISPATCH, Mexico.

"MEXICO, December 9, 1863.

"True copy.

"The Sub-Secretary of State and Government Dispatch.

JOSÉ MARIA GONZALES DE LA VEGA:

"OFFICE OF THE SECRETARY OF STATE AND
"GOVERNMENT DISPATCH, POLITICAL PREFECTURE
OF THE DEPARTMENT OF PUEBLA,
"Puebla, December 4, 1863, Section 1, No. 1137.

"Under this date I transcribe to the prefectures of this department your communication under date of 2d instant, in which you have been pleased to inform me that private letters and reports addressed to the regency by reliable persons agree in assuring that as soon as the empire is recognized by four or five principal departments of the interior His Illustrious and Royal Highness the Archduke Ferdinand Maximilian will commence his journey.

"Which I have the honor to say in reply.

"The political prefect,

"F. PARDO.

"To the SUB-SECRETARY OF STATE AND GOVERNMENT DISPATCH.

"MEXICO, December 9, 1863.

"True copy.

"JOSÉ MARIA GONZALEZ DE LA VEGA.

"Translated from the Periodico Oficial of December 15, 1863.

"GEO. T. DE FORD.

"Extracts from the defense of General Mejia.

"But what is that charge? Is it, by chance, that of treason to the nation? And for what is Mejia a traitor? Is it for having formed an opinion in favor of an empire? I assure you that does not constitute a crime. An empire is one of so many forms of government established in many nations of the globe.

"For having been of the opinion that the crown should devolve upon a foreign prince? Neither is that a crime. It is the right of the sovereignty of nations to confer the command upon whomsoever its august will may designate. History presents well-known facts corroborating this truth; and even at this moment our neighbors of Brazil find themselves governed by a member of the reigning family of Portugal—the house of Braganza—without having suffered any detriment in their independence.

"For having obeyed the vote of the *notables*? In the full extent of the word, Mr. Mejia has not acted wrong in this.

"In the art of government the principal thing is the idea, though it may have issued from the head of a slave. The pretorians of Rome sometimes gave a master to the world. The army has supplied innumerable masters; and under the republic scandalous pronunciamientos elevated General Santa Anna to power.

"Mr. Mejia adhered, it is true, to the vote of the *notables*. He believed that thus he obeyed public opinion, and therefore he declared himself its defender.

"In our contemporaneous history other notables likewise figure who gave Mexico a constitution and a government.

"Mr. Mejia gave his adhesion to the vote in question, but his adhesion was confirmed by that of a multitude of individuals. The capital of the republic was imperialist, the conservative party was imperialist, some of the liberals were imperialists. The empire was in fashion."

"Translated from the *Reseña Historica* of Juan de Dios Arias, p. 459.

"I do not find in the defense referred to any other vote except the above-mentioned vote of the notables.

"GEO. T. DE FORD."

Mr. Wadsworth, in the case of *John A. Baxter*

Baxter's Case. *et al. v. Mexico*, No. 116 (MS. Op. I. 134), March 13, 1871, said:

"In the case of *O. I. Jansen*, we investigated and decided the question whether the Maximilian empire, so-called, was a *de facto* government, without resting upon the conclusion (not definitely reached) that by the words of the treaty claims for injuries inflicted by the authorities of the so-called empire were excluded. If the parties intended to exclude such claims by the words of the convention, it could have only been because they were unwilling to admit that the pretended empire was ever a government *de facto*. Undoubtedly when a monarchical government has existed in a state, and is succeeded by a republic, the latter government will be responsible for the acts of the former. The state is the same, although the form of government is changed. Authorities of the monarchy in such a case will be described by the words 'authorities of the republic.' Having settled that the Maximilian régime in Mexico did not constitute a government *de facto*, and that the Government of the United States can not now lawfully urge such a pretension, we have no other choice left but to dismiss this claim."

Stückle's Case. "The commissioners, under date of May 22, 1871, have ordered this case to be laid before the umpire 'for his final award on the whole case.'

"Claimant F. W. Stückle, a naturalized citizen of the United States, agreed or contracted with a certain José Salazar Ilauregui, agent of the usurper Maximilian in Yucatan, for a certain amount of supplies for troops raised, as it is stated, to fight against the Indians, then making inroads upon and distressing the Yucatan people. A portion of the money due for these supplies has been paid, a portion remains unpaid, and this unpaid portion the United States asks the Republic of Mexico to pay for the benefit of Stückle.

"Yucatan was at that time occupied by French troops for and in the name of Maximilian, styling himself Emperor of Mexico and being acknowledged as such by a portion of the Mexican population. The chief arguments used in favor of Mexico not paying the sum claimed on account of Stückle are twofold, namely:

"1. That the claim is not founded in any act done by the authorities of Mexico (which is required, so it is maintained, by the convention of 4 July 1868 to make a claim valid); and that

"2. The claim is founded on a contract for a loan with an enemy of Mexico, or a rebel, or one that acted for a usurper openly at war with the Republic of Mexico.

"The arguments for the United States and in favor of Mexico paying the demanded sum for the benefit of the claimant are threefold:

"1. It was not a private contract between Stückle and Ilauregui; but the nonpayment of the money demanded for Stückle constitutes a wrong done to the property of claimant by an authority or the authorities of Mexico.

"2. That, although Yucatan was occupied at the time by the enemies of the republic, the money advanced by Stückle was to provide for volunteers raised to fight against barbarous Indians, not against the lawful authorities of Mexico. These troops, as it were, fought for civilized men at large, against butchering savages.

"3. Although Yucatan was occupied by a usurper, or troops that fought for him, the Mexican imperial government was, for the time being, the *de facto* government, no other government existing, or no other body of men possessing or wielding

public power, or authority, in those regions; and every fair engagement, nay, every laudable contract, made with the temporary or *de facto* government necessarily, and in the spirit of true justice, passes over from the *de facto* government to the restored lawful authority, with all its inhering obligations.

"To use claimant's own words: 'Although the Government of Mexico does not recognize the legality of debts contracted in Mexico by a government which to-day does not exist, the Government of the Mexican Republic is bound by right and equity to satisfy the claim of the debt in question, contracted with a foreigner (meaning with himself) and for a purpose which not only was not damaging to the government of the republic, but which on the contrary was connected with the public interest of the country and with the defense of the national territory.'

"In another passage the same paper (paper No. 1 of the case 901, *Stückle v. Mexico*) says: 'Consequently the sum claimed by the undersigned refers to a special object of public utility entirely deprived of a political interest.'

"These two passages contain the essence of the claimant's argument, namely, the republic of Mexico is bound to pay a debt contracted by a government 'which no longer exists' with a foreigner (a citizen of the United States, it ought to have been said), and contracted for the public interest of the country; that is to say, to fight the Yucatan Indians.

"There is no subject in the whole province of the law of nations which is more delicate, requires a more uncompromising earnestness and directness, clearer legal judgment, more jurial instincts, and a purer love of right than the subject of usurpation, *de facto* governments, and temporary conquests, nor is there one which has more attraction for some minds; but there is neither time nor necessity to discuss this great subject here.

"Men are so made that the divine law of interdependence shall keep them united in society, and there is no grander expression of a fundamental principle in jurisprudence than the old '*Ubi Societas Ibi Jus*.' Man must produce, appropriate, and exchange, and he is destined, obliged, and commanded to create and own individual property; the more distinctly so the further he succeeds in removing from the communistic state of the savage. Communism always flourishes most with the rudest and most savage tribes. Buying and selling, borrowing

and inheriting, administering justice, keeping schools, and sanitary measures must go on in a society, no matter what label the government may have. Bargains and contracts in that society can not stop, and those made under a government *de facto* or of a usurper must necessarily be respected and acknowledged, if there is nothing exceptional, by the lawful government when it assumes the old authority.

"Nothing of this sort, however, took place in the case of Stückle. His relation writes to him that a good deal of money might be made by shipping provisions to Yucatan for the troops to be raised by the occupying authorities; that is, by the 'imperial government.' Stückle went into the business with his eyes wide open. Probably he thought, as very many others did, that the Mexican Republic was doomed to perish. Whether he did so or not, however, does not affect the argument in this case. Stückle knew that he was going to contract with, and lend money to, a government which was set up by a power warring with Mexico and which was itself warring with the republic, and that in defiance of the laws of war. What he furnished was for a portion of the 'imperial' army, in open hostility with Mexico, and now to come and claim payment for unpaid sums from that very Mexico against which claimant had furnished many of those things which soldiers stand in need of seems to me very much as if the ghost of Erlanger, the German banker, naturalized in Paris, were to rise and demand payment of the loans he most obsequiously made to the so-called Southern Confederacy, because Jefferson Davis and his consorts were the government *de facto* in the Southern States of this country, and the United States dissolved that government and took upon itself *ipso facto* the obligations of the Southern Confederacy. No slur whatever is intended; no comparison between the two men is made. The umpire from the time when he was chief in the Archives Bureau knows the character of Erlanger, through his cringing letters to Davis; of Stückle he has no knowledge whatever, except that which appears from the case under consideration. I simply speak of the validity of engagements with an enemy or rebel when brought before the lawful government of the assailed belligerent against whom the loan was made.

"It is urged that Stückle furnished money and commodities for a *corps* destined to fight against ruthless Indians. This is possible, though we have no strong proof of the extent of that

war. But whether we have or not does not alter the law of the case. The things were furnished to a *corps* of armed men fighting under the usurper's flag, and contracted for with the authorities of a temporary government at war with that government which is now called upon to make payment to the United States on account of Stücker.

"This is very different from a case decided previously by the umpire, when he made the fact that money was lent to Mexico itself to pay her own troops fighting against the invasion a prominent element of his decision.

"The laws of war, and the whole law of nations, of which it is a branch, forbid taxing the Republic of Mexico with the payment of the claim made by the United States in behalf of Stücker. This point alone I now decide. It is amply sufficient to determine the case.

"My individual opinion is that it would be an evil day for America when the United States should be paid this claim for Stücker by Mexico. As umpire, I decide that the case of *Stücker v. Mexico*, marked No. 901, be dismissed without further discussion."

Lieber, umpire, July 19, 1871, *F. W. Stücker v. Mexico*, No. 901, convention of July 4, 1868, MS. Op. I. 433. Claims against Mexico growing out of the acts of the Maximilian authorities were dismissed by the commissioners in *Rodolfo Dressel v. Mexico*, No. 540; *American and Mexican Steamship Company v. Mexico*, No. 448; *George F. Knacks v. Mexico*, No. 455; *Henry Peeler v. Mexico*, No. 845. In the case of *Humphrey E. Woodhouse v. Mexico*, No. 595, the claim was dismissed by Sir Edward Thornton, on the ground that the injury alleged was committed by a person who was shown to have been in the service of the imperialists. (MS. Op. VI. 358.)

The Central and South American Telegraph
Congressionalists and Company, a corporation under the laws of the
Balmacedists in State of New York, laid, under a concession
Chile.

from the Government of Chile, a submarine cable from Valparaiso to Iquique, and from Iquique to Chorillos. It claimed damages from the Government of Chile on the following grounds:

1. That it was prevented by the Congressionalists from using its cable between Iquique and Chorillos (1) in January 1891, and (2) from May 31 to July 20 in the same year.

2. That it was required by the Balmaceda government on July 20, 1891, to restore, at considerable expense, direct communication between Valparaiso and Peru by joining, outside

of the territorial waters of Chile, the Valparaiso-Iquique and Iquique-Chorillos sections of the cable.

3. That by reason of this requirement of the Balmaceda government it lost its business between Iquique and points north from July 20, 1891, till the 22d of the following October, when connection with Iquique was reestablished at considerable expense.

4. That the Government of Chile had since October 22, 1891, withheld moneys due for the transmission of telegrams over its lines.

5. That money was due to it for messages transmitted for the Balmaceda government.

The whole amount of the claim, as stated in the memorial, was, including interest, \$163,858.55.

The ninth article of the company's concession from Chile contained the following provision: "The government reserves the right of suspending the service or use of the cable in case of danger to the security of the state."

The agent of Chile contended—

1. That the company had no standing before the commission, since by a Chilean law of August 28, 1886, in force when the concession was granted, concessionaries, such as the company, were to be "considered as if they had their domicil in the republic," and to "remain subject to the laws of the country, as if they were Chileans, for the decision of all the questions which may arise from the work for which the permission or concessions are granted."

2. That, so far as the acts complained of were committed by the provisional government established by the Congressionals at Iquique, whether it was considered as a mere insurgent government or as a *de facto* government, Chile was not responsible for such acts. (Citing Bluntschli, *Le Drot Int. Codifié*, art. 380; *Int. Law Digest*, II. sec. 223.)

3. That residents of a country subject to a *de facto* government, whether citizens or aliens, are bound to recognize and respect such government. (*Int. Law Dig. I. secs. 7, 69; Lawrence's Wheaton* (1863), 575; *Opinions of the Attorneys-General of the United States*, IX. 140.)

4. That the provisional government at Iquique could suspend the use of the cable under the ninth article of the concession to the same extent as the government of Balmaceda.

5. That if the acts of the provisional government at Iquique were not accepted as legal, it was because its authorities were not viewed as "authorities of Chile," in which case the commission would have no jurisdiction.

On the part of the United States it was contended—

1. That a state is bound to indemnify foreigners for its failure to perform its contracts, or to protect their property within its territory. (Phillimore, *Int. Law*, Vol. II. p. 8; Martens' *Droit des Gens*, liv. 3, chap. 3, 299; Wildman *Int. Law*, 193, 194; Woolsey *Int. Law*, 38-112; Report of Venezuelan Commission, p. 297; Vattel, book 2, chap. 8, sec. 104; Bluntschli, *Int. Law Codified*, sec. 386, also sec. 380; and Woolsey, *Int. Law*, sec. 61.)

2. That the Balmaceda government was, at the time at which it was sought to hold Chile responsible for its acts, the legal and recognized government of Chile, and that all of its dealings with the claimant bound the Republic of Chile; that it had been recognized as the *de facto* and *de jure* government by the United States and all other foreign states, and that no other government had at the time of the acts complained of been recognized, and that the existence of the civil war in no respect changed or impaired the status of the Balmaceda government so far as the citizens of the United States were concerned. (Citing *Kennett v. Chambers*, 14 How. 44; 1 Kent's *Commentaries*, 116; *De Wutz v. Hendricks*, 9 Moore, C. B. Reports, 586; *Yrissari v. Clement*, 2 Carr and P. 223; *Cheriot v. Foussat*, 3 Binney, 220, 252.)

3. That the claimants could only recognize the exercise of the right of the Balmaceda government to suspend the cable in time of war under the ninth article of the concession; and that the fact of the change of the sovereignty of Chile did not affect its contractual obligations. (Citing Kent's *Commentaries*, Vol. I. p. 28; Bluntschli, sec. 40; Wheaton's *Int. Law*, sec. 30; and also the case of *Chile v. Edwards et al.*, before Mr. Justice Kennedy, of England, reported in the *London Times* of December 21, 1893.)

The agent of the United States, as is stated in his report (Shield's Report, 16), further argued:

"On the point that a state is liable to indemnify injured parties for its omission to protect neutral aliens from wrongs by insurgents, citations were made from Wharton's *Int. Law*. sec. 223, pp. 576, 579, and 581; also reference was made to the treaty of September 10, 1857, between the United States and

New Granada, and the awards by the commission under that treaty in the Panama Railroad Company in the case of Fretz. (Caldera Case, 15 O. C. Repts. p. 546.) Reference was also made to the indemnity paid by China to the United States for damages done by the Taeping rebellion, and the indemnity paid to Italy by the United States on account of the New Orleans riots, and that paid by Chile to the United States on account of the crew of the *Baltimore*.

"The principle of international law contended for was that the rights and duties created by that law are reciprocal; that a state in acquiring the right of nonintervention in its affairs by foreign states assumes the reciprocal duty toward those states of protecting their citizens within its territory in their persons and property. (Citing Calvo, sec. 282.) And that the Republic of Chile is liable for the acts of the Congressionalists on the ground that they were insurgents against the recognized government of Chile, and that it was the duty of the republic toward foreign nations to protect the citizens of the latter from injury from a body of its citizens of that character; and that this principle applied whether the Congressionalists were mere insurgents, or whether they were a *de facto* government at the time of the injuries complained of. (Citing Calvo, sec. 66; Bluntschli, sec. 99; Wheaton's Int. Law, sec. 20; Calvo, Vol. I. sec. 70; Sir Henry Maine, Int. Law, p. 54; Wheaton's Int. Law, sec. 21; Calvo, Le Droit International, 1, 120, 131; Bluntschli, sec. 39; Wharton's Digest, sec. 85; Phillimore, Vol. II. c. 7, p. 126; Halleck, Int. Law, sec. 665; Wheaton's Int. Law, sec. 32; Wildman, 1-57; Vattel's Law of Nations, p. 639; Wheaton's Int. Law, sec. 7.) * * *

"It was also contended that the government intended by the ninth paragraph of the concession was the *de jure* government of Chile, a status which the Congressional government did not possess at the time of the injuries; and, second, that the proper construction of the said ninth clause is that the *de jure* government should have, by the very terms of the contract, the right to suspend the use of the cable, but that the exercise of this right shall be coupled with the duty of making compensation for such suspension. (Citing Wheaton's Int. Law, p. 373, Dana's edition; Hall on Rights and Duties of Neutrals, pp. 187, 188; Agent's Report of the American-British Claims Commission, pp. 52, 53, 54, and 55, and other cases.) Reference was also made to a Norwegian vessel laden with coal, which was beached by Balmaceda to prevent the ship from falling into the possession of the Congressionalists, for which the present Government of Chile indemnified the owners. Also to a German steamer laden with nitrate in the Tarapacá country against the order of the Balmacedist government, which subsequently came into the control of the Balmacedists and was detained, for which the present Government of Chile paid indemnity. Cited in a memorial of the minister of foreign affairs of Chile and presented to the National Congress in 1891."

A majority of the commissioners, Messrs. Claparède and Goode, rendered the following decision:

Decision of the Commission.

"The company claims damages for the interruption of its cable during the civil war between the government of President Balmaceda and the party now in power, then called 'Congressionalist party,' in the sums following (after correction of the memorial):

"1. For interruption of the cable between Iquique and Chorillos on the 17th and 18th of March 1891	\$1, 031. 70
"2. For loss by interruption of cable between Iquique and Valparaíso from May 31, 1891, to July 20, 1891	63, 420. 00
"3. For making connection between two sections at Iquique, as ordered by President Balmaceda.	4, 842. 99
"4. Expense of reconstruction of the cable at Iquique	6, 425. 20
"5. For interruption of the cable between Iquique and Chorillos from July 20, 1891, to October 22, 1891	29, 294. 11
"6. For money paid to use of company withheld as stated in paragraph 18 of the memorial	5, 850. 00
"7. For balance due for cablegrams as stated in memorial, paragraph 19	163. 59

"The commission, believing that the party of the Congressionalists had the character of a *de facto* government, possessing in the territory subject to its dominion the right to exercise jurisdiction according to the laws enacted and engagements accepted by and for the country, recognizes its right to regulate its relations with the claimant conformably to the general provisions of the supreme decree of February 28, 1887 (Exhibit 3), and more especially according to its Article IX. which reserves to the government the right of suspending the service of the cable in case of danger to the security of the state.

"Consequently, the majority of the commission declares groundless the claims of the company enumerated under items 1 and 2, based on those acts of the *de facto* government which the Government of Chile was authorized to do by the said article of the concession.

"As to the other claims, the majority of the commission is of the opinion that the amount of the expenses ordered or caused by President Balmaceda, and the consequences thereof, have to be recognized, and consequently orders that the following items be repaid to the claimant:

"a. Item 3, for making connections between the two sections at Iquique, as ordered by President Balmaceda	\$4, 842. 99
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- "b. Item 4, expenses of reconstruction of cable at Iquique..... \$6,425. 20
 "c. Item 5, for interruption of the cable between Iquique and Chorillos from July 20, 1891, to October 22, 1891..... 29, 294. 11

"The respondent government not having made any objection to item number 7, for balance due for cablegrams as stated in paragraph 19, the commission also orders that there be paid to claimant \$163.59.

"Consequently, the commission orders that the company receive in all the sum of \$40,725.89, United States gold coin, without interest.

"As to item 6, a claim for money received by Chile as agent of the claimant and not paid over to it (said money was received by the present Government of Chile), for \$5,850, the evidence being insufficient to enable us to reach a satisfactory conclusion as to the validity of this item, we decline to render any decision, but without prejudice to the claimant."

Mr. Gana, the Chilean commissioner, delivered the following dissenting opinion:

Mr. Gana's Dissenting Opinion.

"I have concurred with my honorable colleagues in the first and second items of the award in the Central and South American Telegraph Company, because, as has been shown, there existed a promise of the government of Balmaceda to the company to pay the costs which the operation of establishing direct communication between Valparaiso and Chorillos by cutting the cable at Iquique might occasion. I am sorry to dissent as regards the sixth item, which refers to the damages the company claims to have suffered through said operation depriving it of communication between Iquique and Chorillos from the 20th of July to the 22d of the following October.

"My dissent is based upon the following considerations: That, in international law, the *de facto* government which existed at Iquique exercised over the territory subject to its jurisdiction the same authority that the *de jure* and *de facto* government did over the rest of the republic.

"That by virtue of this authority and the right the government reserved to itself by decree of February 28, 1887, through which permission was granted to lay a cable between Chorillos and Valparaiso, touching at Iquique, the *de facto* government established in the latter city could legitimately suspend there, as it did, in fact, telegraphic communication between Iquique and Valparaiso.

"That the company, by the act of cutting the cable at Iquique to make the connection on the high seas and thus place Valparaiso in communication with Chorillos, suffered no damage whatever, barring the expense the operation demanded, but, on the contrary, secured positive advantages; for, if it be true that it was deprived of the communication between Iquique and Chorillos, in exchange, through said connection, it secured through communication between Valparaiso, a city of much greater importance than Iquique, and Chorillos, and could also utilize the connection with Buenos Ayres by the transandine line.

"That, as regards this item, the company has not been able to allege any promise whatever made by the government of Balmaceda, for, as appears from the proofs presented, the promise was limited to defraying the expense required by the cable connection on the high seas.

"In view of these considerations, I have not been able to persuade myself that the damage the company claims to have suffered is justified by the law or the facts."¹

July 1, 1812, the American schooner *William Yeaton*, which had been chartered by the United States Government to carry a cargo of flour as a gift "to the unfortunate inhabitants of the province of Venezuela," who had suffered by the earthquake of the 26th of the preceding March, arrived at La Guayra, consigned to the United States consul there. Toward the end of July, while the unloading of her cargo was incomplete, she was detained by "the Spanish army of pacification," which had regained possession of Caracas and La Guayra, under a capitulation signed at La Victoria July 25, 1812, by General Miranda. Subsequently, the schooner was sent to Puerto Cabello and condemned, but at the end of October her owner, whose name was Forrest, obtained her restoration. Immediately afterward the consul of the United States at La Guayra appointed surveyors, who reported that, while the vessel had not suffered injury by reason of her detention, there was justly due to her owner \$2,136 as demurrage (at the rate of \$24 a day) for her detention from August 1 to October 28 by the Spanish royalists. A claim was presented by Forrest against Spain to the commission under the treaty of 1819. This claim was disallowed, but the Congress of the United States in 1825 directed that the sum of \$2,136 be paid to him, on condition that he release the United States from all liability on account of the vessel. Subsequently Forrest made a claim against Venezuela for further indemnity. This claim having

¹ Mr. Shields, in a note to the award of the commission, says:

"Item 5 allowed by the majority for interruption of the cable between Iquique and Chorillos from July 20, 1891, at the time the cable was cut out at Iquique, to October 22, 1891, at the time the connection was restored, \$29,294.11, was caused by the cutting out of Iquique by Balmaceda's orders. As the company thus lost connection with Iquique, they could not get Iquique business north of Chorillos. The majority of the commission evidently considered that compensation for this loss was intended to be included within the agreement of Balmaceda to pay the expenses of opening communication with Valparaiso, and a guarantee against damages to the cable."

been laid before the United States and Venezuelan Commission under the convention of December 5, 1885, that tribunal, Mr. Andrade, the Venezuelan commissioner, delivering the opinion, rendered the following decision (*Joseph Forrest v. The United States of Venezuela*, No. 5):

“It is alleged that the *William Yeaton* suffered two detentions; one from her reaching La Guayra, the 1st of July, until the 1st of August, when she fell into the hands of the royalists, and the other from the 1st of August to the 28th of October, when she was returned by Spain; that the first one was owing to the negligence of the republican authorities of La Guayra in not hastening the discharge of the schooner as it was their duty to do, which was the immediate cause of her seizure and second detention, with all the consequences thereof; and that for the reasons expressed, Venezuela, within whose territorial waters the *William Yeaton* was seized, is to be held, in international justice as well as in conscience, liable to indemnity for the loss thereby occasioned.

“But in the first place, the fault now set to the account of Venezuela for her behavior in connection with the unloading of the *William Yeaton* is comparatively a new one. In the petition addressed by Joseph Forrest in 1822 to the Senate and House of Representatives requesting indemnification for this vessel chartered by the United States, it was said that immediately after her arrival at La Guayra the agent of the United States had been notified of it and urged to take the flour from aboard, but that so far from doing so he refused to receive it otherwise than in small quantities, day by day. And about the same time (29th of April) it was stated under oath by Dulaney Forrest, the successor of Travers in the command of the *William Yeaton* when the Spaniards seized her, what follows: ‘I think it was about a fortnight before Mr. Lowry would receive any part of the cargo, although constantly urged to do so by Captain Travers and myself. After the vessel began to discharge, it was in small quantities, and sometimes for many days not a barrel would be received, although Mr. Lowry would always promise that he would attend to it, and that the vessel should soon be unloaded.’ That is to say, that both the first and the second master of the ship considered Lowry exclusively blamable for the delay in discharging. Neither of the two expresses the least complaint or resentment for the behavior of Venezuela on that occasion. Neither to Lowry, so naturally interested in justifying his management as agent of the United States Government and consignee of the vessel and her cargo, did it occur to devolve the least share of responsibility on Venezuela; nor to the Secretary of State, John Quincy Adams, in his report to the Congress on Joseph Forrest’s petition; nor to William H. Rawle, of Philadelphia, in his written opinion with regard to Forrest’s

right to be compensated for the damage sustained in his property. And, be it remembered, they all wrote in 1822, ten years after the events, when no consideration either of a political or international respect bound them to observe in a matter of justice the slightest regard for Venezuela, who had already attained to her complete independence from Spain, and was an international person by act and right, capable to answer for her conduct. It is only at the beginning of June 1840, 28 years after the events, that the inculpation alluded to appears for the first time conceived against Venezuela, in a letter addressed under date of the 3d of the said month to John Forsyth, Secretary of State, by James H. Causten, in which the latter does but repeat, word for word, the charge of having changed the vessel into a storeship, etc., that Forrest had already laid frankly and directly upon Consul Lowry in his petition of 1822 to the Congress of the United States.

"In the second place, it is not just to impeach anybody without furnishing the proof of the fact imputed to him. The judge wants to know the truth in order that he may be able to righteously grant justice, and must necessarily bring it out by examining the proofs. It is not enough to say that the *William Yeaton* was converted by the local authorities into a storeship, and moored in the 'harbor;' it is, moreover, necessary to prove that the said authorities did really commit the wrong which they are accused of, and this appears not to be proved at all. If what Causten asserts in the name of his client about the middle of 1840, and much later Alexander Scott, had been true, Lowry would have given, at once, notice thereof to the interested parties, and these would certainly not have failed to complain of it in any of the several documents by which they ever endeavored to justify their claim, to wit: First, against Spain, and afterward against the United States—from Captain Travers's protest at La Guayra, on October 13, 1812, to Forrest's petition to Congress in 1822. In default of better justification to the contrary, the uninterrupted silence of the consignee and the captain of the vessel may be justly considered as satisfactory evidence that the authorities called by the law to assist in discharging her were innocent.

"In the third place, it is a principle of international law, well recognized by civilized nations, that governments are not ordinarily, at least, held to be responsible, pecuniarily, for the acts of their officers in the exercise of their public duties, a principle more than once supported by the opinion of the most prominent American juriconsults. In 1855 (May 27), answering to an argument of Mr. Osma, the minister of the Peruvian Republic in the United States, Hon. Caleb Cushing said:

"In the transaction of public affairs, there are two classes of officers—one employed in the collection of the revenue and the care of the public property, who represent the proprietary interest of the government, and another class who are the agents of society itself, and are appointed by the government

only in its relation of *parens patriæ*. For the acts of the former the government holds itself responsible in many cases, because their acts are performed for the immediate interest of the government; but for the acts of the latter no government holds itself pecuniarily responsible. It provides means to make them personally responsible, or to punish them for malfeasance in office, and in so doing it does all which the people have by their constitution and laws required of the government.'

"And in 1871 another Attorney-General of the United States, A. T. Akerman, on the case of alleged corruption of a municipal judge of Brazil, in authenticating and ratifying the report of a board of surveyors upon a damaged vessel, advised as follows:

"'Even if the charge of corruption were established, which does not appear to be the fact, I am of opinion that the Brazilian Government would not be responsible. The misconduct violated no treaty stipulations between Brazil and the United States. It did not benefit the public treasury of that country, but was in aid of a private interest.'

"Calvo sustains the same opinion:

"'Within the circle of jurisdictional limits', says he, 'all the agents of the authority are personally and solely responsible for their acts in the measure established by the internal public law of each state. When they fail to fulfill their duties, exceed their powers, or violate the law, they create, according to circumstances, in behalf of those whose rights they injure, a legal remedy in conformity with administrative or judicial procedure; but in relation to third parties, natives or aliens, the responsibility of the government that has appointed them is purely moral, and it could not become direct and effective but in the case of complicity or of manifest denial of justice.'

"So that, even if it had been proved, which is not the fact, that the authorities of La Guayra were negligent in affording to the *William Yeaton* all the means left by the law at their disposal for the speedy unloading of vessels, yet, in order that their fault might be morally imputable to Venezuela, it would be necessary to prove equally, according to the above-stated doctrine, that said authorities had acted in compliance with direct orders from the government, or that it, having been informed of the facts, had not taken the proper steps to arrest or prevent their consequences.

"In the fourth place, the aid and protection to which civilized nations are mutually bound by rigorous international duty are those of their respective laws and courts of justice. 'Aliens (see Bluntshli, Codified International Law) have a right to the protection of the laws and customs of the country for their persons, families, and property.' And further along, 'No state is obliged to grant aliens privileges or personal rights inconsistent with its own constitution or statutory law.'

"But even that duty, imperative as it is, ceases to be obligatory, following Calvo, as soon as war breaks out, 'because it

then collides on the one hand with the sovereign right of the belligerents, and on the other hand with a still more imperative duty—that of neutrality.’

“‘War,’ as Calvo defines it, ‘is the state of hostility, taking the place of the relations of good harmony between nation and nation, or between citizens belonging to different political parties, and the end of which is to obtain by force of arms what has not been possible by peaceful and amicable means.’

“Its effect is always to the extinction of the rights arising out of peace. Thus the nation which, during the state of war, continues to fulfill its duties towards the friendly and neutral ones, as if at peace, does more than it is bound to by international justice.

“When the *William Yeaton* arrived at La Guayra, Venezuela was in flagrant war with Spain, struggling for the defense of her last intrenchments, and on the eve of losing her independence; still no proof or evidence whatever has been produced against the custom officers or the port authorities of La Guayra, not even of involuntary omission of any of their official duties, in the case under discussion. To declare her obliged besides to protect foreign property against all the risks of war, when she was unable to defend her own citizens, nor even the supreme good of her independence and political sovereignty, would be to understand justice otherwise than it has been regularly understood in the international society as well as in that of the *equo bono*. No nation can be required to do for others what she has not been able to do for herself.

“‘States equally as individuals,’ turns Calvo to say, ‘owe to each other aid and protection; it is impossible to establish in this respect general and strict rules; but it may be assured that the state accomplishes its duty where it affords to others the relief it owes to itself.’

“Beyond that even the law of humanity does not bind.

“Shown that neither the law of nations nor that of humanity, neither the laws of peace nor those of war, do impose any liability upon Venezuela in the case of the *William Yeaton*, it is not easy to see how conscience could impose it. The act of conscience determining the individual duty is the conclusion of moral sense drawn from two premises or antecedent propositions, one general and the other particular, like those of a syllogism. Applied to our subject the general premise would be, for example: ‘The state fulfills its duty where it grants to foreign property the same protection it extends to national property,’ what has already been proved. The particular premise, equally proved already, would be: ‘Venezuela did protect the *William Yeaton* in the same degree she protected Venezuelan property.’ Conclusion: ‘Venezuela fulfilled her duty.’ Then, neither the dictate of conscience makes her responsible. Nor upon grounds of gratitude is Venezuela to be held obligated to the claimants. The *William Yeaton* was certainly the carrier of the United States’ donation to the

province of Venezuela, but under an affreightment contract and a pecuniary compensation freely agreed to between her owner and the United States. The people and government of the United States were the true and sole donators, and it is toward them that Venezuela exclusively assumed the obligation to compensate with affection and gratitude for the national act of gratuitous kindness which was the object of the *William Yeaton's* voyage.

"Our conclusion is, therefore, that this claim, which is for \$5,655.18, must be disallowed."

"Andrade:

National Responsibility for State Acts: Opinion of Mr. Andrade. "The Government of Venezuela granted in May 1849 to E. A. Turpin and Frederick Anthony Beelen, citizens of the United States of America, and to their associates and successors, an exclusive privilege to navigate the rivers Orinoco and Apure, for eighteen years, running from the date of the aforesaid concession.

"To work the said privilege, a corporation was legally organized in New York in October of the same year, 1849, under the name of 'The Orinoco Steam Navigation Company of New York.'

"It appears that this company went so far as to put four steamers in actual service, three of which, the *Meta*, the *Apure*, and the *Barinas*, were still running in 1856 and 1857, and only two of them, the *Apure* and the *Guayana*, from 1858 to 1861; only one, the *Apure*, existed about 1865.

"The *Apure* left Ciudad Bolivar on the 9th of October 1865 on one of her ordinary trips, carrying on board a very light cargo and a small number of passengers for Nutrias, the extreme point of her journey, and the intermediate ports. On her way through she touched at San Fernando, capital of the State of Apure, where, on the morning of the 17th, the passage fares agreed on having been paid, she took on board the president of the State, General Juan Bautista Garcia, and a small military force (about 9 officers and 50 men), to land them at a point on the upper Apure within his jurisdiction which General Garcia would opportunely designate. On the night of the 18th, the steamer being moored at the port of Apurito, one of her usual landing places, for which she carried some freight, she was suddenly attacked by a force of rebels against the government of General Garcia, who had been advised in advance of the presence of said general on board the steamer with an armed force.

"The origin and cause of the above-mentioned four claims are to be found in this regrettable event, since during the seven hours' fight of that night the captain of the steamer, John W. Hammer, and chief engineer, Julius de Brissot, whose wives' claims are for \$50,000 and \$30,000, respectively, were killed; Joseph Stackpole, another engineer, claiming \$15,000 indemnity, was wounded; and in consequence thereof The Orinoco Steam Navigation Company suffered damages which its secretary, Ralph Rawdon, estimates at \$100,000.¹ * * *

"Let the liability of Venezuela for these claims be now carefully examined from other points of view. Here is the reasoning of the claimants.

"General Garcia caused the conflict that occurred at Apurito on the night of October 18, 1865, by placing his officers and troops on board the steamer and requiring Captain Hammer to undertake a service for Venezuela, the performance of which he knew would place their lives in peril, and which was undertaken by Captain Hammer reluctantly, under protest, if not under military coercion; by requiring Captain Hammer to proceed to Apurito; by not leaving the steamer with his officers and men when informed by the spy that hostile forces were in the plaza; by sending a squad ashore from the steamer and when it was fired upon and routed, allowing it to take refuge in the steamer; by refusing to debark with his officers and men, and by making the steamer a shelter for himself and men. General Garcia was the president and chief executive of the State of Apure, one of the States of the Republic of Venezuela. The obligation rested upon Venezuela to protect the lives and property of the citizens of the United States. It was the duty of General Garcia, who was one of the civil as well as military officers of the republic, to see that this protection was afforded them. He not only failed to give them this protection, but required them under compulsion to perform a perilous service in behalf of Venezuela. Then Venezuela caused the conflict and is liable therefor. Though the cause could not be imputed to her directly, she should always be held subject to

¹ At this point Mr. Andrade entered into an examination of the citizenship of the widows and children of Hammer and De Brissot, maintaining that they were not citizens of the United States, a conclusion in which the other commissioners concurred. These claims were numbered 27 and 30. As to Stackpole and Rawdon, whose claims were Nos. 28 and 29, there was no question raised as to their citizenship.

responsibility according to the principle set down by Wharton, that—

“‘The sovereign is responsible to alien residents for injuries they receive on his territories from belligerent action, or from insurgents whom he could control or whom the claimant government has not recognized as belligerents.’

“General Garcia was in fact, as it appears, president of the State of Apure, of the Republic of Venezuela, and as such the natural chief of the military forces of that State; but it can not be concluded therefrom that he was a civil or military officer or agent of the government of the republic. Quite to the contrary. The federal constitution of 1864 provided:

“‘ART. 1. The provinces of Apure, Aragua, Barcelona, Barinas, Barquisimeto, Carabobo, Caracás, Cojedes, Cumaná, Guárico, Guayana, Maracaibo, Maturin, Mérida, Margarita, Portuguesa, Táchira, Trujillo, and Yaracuy, *are declared independent states*, and they unite themselves to form a free and sovereign nation under the name of the United States of Venezuela.’

“The State of Apure was, therefore, an autonomous state, and its government was independent of the Government of the United States of Venezuela. General Garcia was not an officer or agent of the republic, but of the public authority of the State of Apure, and hence, though he had really been the originator or efficient cause of the Apurito event, it would be contrary to sound logic to deduce therefrom the consequence that said event had been caused by Venezuela.

“The same thing may be said of the so-called compulsory service required from Captain Hammer by General Garcia; that it was not a service for Venezuela, but for the State of Apure. This distinction does not lack importance, because the international responsibility of governments for the acts of their officers, its extent and quantity, and the rules by which it is to be determined, vary according as the act or acts out of which the liability may arise have emanated from agents appointed by the government, and dependent upon it for their functions, or from officers not appointed by the government, or who are not under its immediate direction and control. In the first case, the acts of the official representative are one with those of the government under the authority of which he has acted, and are imputable to it. In the second case, the question of the imputability is more complex.

“The responsibility of governments, in general, for damages caused to foreigners, is founded on the ground that the state being a moral person endowed to a certain degree with the same capacity and liberty as are enjoyed by the citizens who compose it, is bound as such to account for its own acts when they cause some injury to another state, or to the citizens of another state. For the same reason it is held bound to indemnify the damages caused by the persons under its dependence, and for whom it is accountable.

“But in the state a double juridical person is to be recognized—the civil person, inasmuch as it is the possessor of its patrimony and has the capacity to administer it, and the political person, so far as it is a political, independent, and sovereign entity charged with the preservation of the public order and the protection of the citizens. Considered in the first aspect, its responsibility toward the foreigners damaged or injured by the acts of its officers is purely moral, and only in the case of complicity, or of manifest denial of justice, could it become international. In this aspect it is contemplated by Cushing, when, speaking of the two classes of officers employed in the administration of public affairs, he says:

“‘But for the acts of the latter, no government holds itself pecuniarily responsible. It provides means to make them personally responsible, or to punish them for malfeasance in office, and in so doing it does all which the people have by their constitution and laws required of the government.’

“And in the same aspect Calvo regards it when he writes:

“‘Within the circle of jurisdictional limits, all the agents of the authority are personally and solely responsible for their acts in the measure established by the internal public law of each state. When they fail to fulfil their duties, exceed their powers, or violate the law, they create according to circumstances, in behalf of those whose rights they injure, a legal remedy in conformity with administrative or judicial procedure; but in relation to third parties, natives or aliens, the responsibility of the government that has appointed them is purely moral, and it could not become direct and effective but in the case of complicity or of manifest denial of justice.’

“With regard to the political personality, the international responsibility of the state for the acts of its officers in the exercise of public authority is subject to clear and well-known rules. Such responsibility is admitted, but only in the case that upon an examination of the circumstances, the fact which has produced the damage to foreign interests may morally be

imputable to the state. Fiore and Calvo concur in subordinating it to four conditions, to wit:

“1. That the government may have known in due time to prevent it, the illegal act which its officer intended to commit, and did not prevent it.

“2. That it, having been enabled to revoke in time the act of its officer, did not revoke it.

“3. That the ignorance of the act intended by the officer may, by its circumstances, be judged as malicious or criminal.

“4. That having been advised of the facts, it had not pressed itself to blame the acts of its agent, nor to take the proper measures to prevent in future the repetition of the same faults.’

“Now, supposing for the sake of argument, that General Garcia had been an officer of the federal government, and his embarkation in the steamer *Apure* an illegal act, did the government know it in time to prevent him from committing it? Could the government know it? Could its ignorance be attributed to malice? Would it be just to impute it to the government? It seems sufficient to set down these questions in order to observe that they can not be solved otherwise than by the negative. The *Apure* arrived at San Fernando on the 16th of October, and on the 17th, at 6 o'clock a. m., left that port, having on board General Garcia with his officers and troops. Between San Fernando and Caracas there is a distance of over 200 miles by land (by water much greater), and at that epoch there was no other telegraphic line in Venezuela than the one from Caracas to La Guayra and Valencia. The same thing may be said regarding the event of *Apurito*. How could the Government of Caracas have known it before it was accomplished, if even after its consummation it took one month to come into possession of the first news about it, through the note of Mr. Wilson of November 13, 1865?

“As to the inactivity which is attributed to the government after it was informed of the occurrence, it is well to recall the diligence shown by General Arismendi, president of the State of Guayana, in his engagement to have the truth duly ascertained through a judicial inquiry by the court of first instance of Ciudad Bolivar, since November 9, the date of the arrival there of the steamer *Apure* with the most recent account thereof. The meeting of the consuls and other foreigners, held at that town on the 12th of November, passed a vote of thanks to His Excellency General José L. Arismendi, ‘for his prompt and energetic measures toward a thorough examination into the

details of this outrage: and if the pretended blamable action of the president of Apure is placed as a debt to the account of Venezuela, justice requires that the praiseworthy action of the president of Guayana be equally placed to her account as a credit.

~ Besides that examination, among the documents are to be found, as evidence of what was done by the Government of Venezuela to speedily obtain official information about the occurrence at Apurito, several notes exchanged, from November 16 to a later date, between the minister of foreign relations at Caracas, and those of the interior and justice, and of war and navy; a report from the military commander of the State of Apure to the minister of war and navy, of November 29; another from the national attorney at San Fernando to the minister of the interior and justice, dated January 9, 1866; another from the new president of the State of Apure, addressed also to the minister of the interior and justice, under date of January 10, 1866, and, finally, an investigation instituted on the 13th of the same month of January before the circuit court of Lower Apure by the national attorney in the State. This suffices to demonstrate that Venezuela did not neglect on that occasion to adopt the means and measures proportionate to the gravity of the case, and is sufficient to withdraw from her the charge of voluntary omission of diligence, which is brought to-day against her. Governments are not bound in such cases to show an extraordinary activity.

“ ‘It would be an excessive and unreasonable pretension to demand that a government, occupied as it ought to be in the fulfillment of its multiple functions and duties, should work in all times and circumstances with mechanical precision.’ (Fiore.)

“That was, furthermore, what the political institutions in force allowed her to do. The States of the Venezuelan Union were, as it has been said, independent and maintained in all its fullness the sovereignty not expressly delegated to the federal power. They possessed the exclusive right of civil and criminal legislation within their own territory, and their courts of justice were independent. Their officers of every category were held responsible only before their own jurisdiction. The government of the Union could not maintain therein any other resident officers vested with jurisdiction and authority than those of the State itself, except those of the treasury and of the national fortresses, parks, navy-yard, etc., who had

jurisdiction only over the affairs belonging to their respective offices, and within the precinct of the fortresses and barracks, being on all other matters subject to the general laws of the State in which they resided. Nor could it station in any State troops or military chiefs with command, even of the State itself, without the permission of the State. Nor could the federal executive interfere by force of arms in the domestic contentions of a State; the only thing permitted to it was the offer of its good offices with a view to bring about a peaceful solution. (Constitution of 1864.)

“However imperfect or inefficacious to protect the rights of foreigners that constitution may be judged to be to-day, it is not known of any foreign government having ever made the slightest remark to the Venezuelan Government in that regard, and it is presumed that those foreign citizens who, after its enactment, remained in Venezuela, carrying on their commercial business and navigation privileges, voluntarily submitted to it. All that could be demanded from the government of the republic was its loyal and faithful observance in relation to them.

“‘If a government had adopted, with perfect loyalty and good faith, all the measures at its disposal to obviate an inconvenience; if it had employed all the legal proceedings to prevent and punish him who had caused an injury to a friendly state, *it would not be just or equitable to declare it responsible for not having employed means incompatible with the spirit of the political institutions, or for having been unable to modify the imperfect system of laws which it found established.*’ (Fiore.)

Mr. Dalton, the United States consul at Ciudad Bolivar, was no doubt mistaken when, in his protest of November 21, 1865, he holds the Republic of Venezuela liable *for the disasters and murders attendant upon the attack of Apurito, for its neglect of its relations with the State of Apure, one of its constituent portions, inasmuch as the president of the said State of Apure, Juan B. Garcia, a general in the army of the republic, was in actual revolt against its supreme authority.* * * *

“General Arismendi was undoubtedly not less mistaken when, alluding to his position and that of General Garcia in his reply to the consuls at Ciudad Bolivar, he expressed his belief that according to the legal system of Venezuela the government of the Union alone could decide such cases, and that with regard to his public acts General Garcia had no other superior than the national executive.

"And the learned counsel for the United States before this commission falls into the same error to-day in asserting that the offenders, so called by him, were all under the jurisdiction and authority of the federal government of Venezuela, all officers in the service of the Venezuelan Republic.

"The truth is, that according to the constitutional law of Venezuela in 1865, General Garcia, the legal president of the State of Apure, was responsible only to the legislature of the said State, and that the federal government had not the legal power to punish him or even to treat him as a rebel, except by the law of war when it had subdued him by force. But it is not shown that he was in revolt at the time against the federal government. It may be that he did not want to recognize the national attorney appointed by that government for the State of Apure, on account, perhaps, of regarding it contrary to the right of independence of the State; but that was a question of law, not of war.

"At all events, within the limits of the exercise of public power, Venezuela seems to have done all that she was bound to do in behalf of her international duties toward the United States. Yet it is important to add that the merit of the evidence affords no ground for imputing to General Garcia any fault whatever.

"In view of the insurrection of Generals Sosa and Mendez, Garcia, in his capacity of president of the State, and in the interest of public order, had the right under the law of nations to detain the steamer *Apure* on her arrival at San Fernando, and to employ her for the transportation of troops and articles of war, without any other condition than previously to settle and pay the price for the service required, and without further responsibility than for the material damages suffered by the steamer on account of her detention, or of her departure from the regular and usual course of her voyage, or the loss of cargo, etc.

"In cases of civil troubles or foreign war, the interest of self-defense or security may impose upon a state the moral obligation of temporarily interfering with commercial transactions, of stopping the movement of merchant vessels, and even of seizing them for the transportation of troops and ammunition, or for any other military operation. State reason surpasses here private interest, whether national or foreign, and legitimates the adoption of these extreme means.

"The exercise of these two rights, especially the latter (the requisition of a merchant vessel for any public service), is

extremely delicate, and requires great regard for the private foreign interests that it sometimes affects. * * * On the other hand, by taking possession of her (the vessel) for a public use, by employing her in military operations, which necessarily are of a hostile nature, it destroys her neutrality, exposes her to risks and dangers of capture or detention, which equity demands that she be insured against, since she has not been able to avoid them. The rule universally recognized on this subject is, therefore, that any government which may be compelled by the circumstances to resort to such appropriation to public uses, is responsible not only for the material consequences to the vessel made the object thereof, but is also held bound before enforcing her requisition, to settle with the interested parties and pay the indemnity due for the service demanded.' (Calvo.)

"But General Garcia did not make use of that right, as it appears. The assertion that the service rendered by the steamer *Apure* was compulsory, has no foundation. The officers and crew say in their protest entered early in the morning of October 19, on the very spot of the combat:

"'On the 17th instant at 6 o'clock a. m., after Captain Hammer *had agreed* with the general-in-chief, Juan Bautista Garcia, president of the sovereign State of Apure, for the transportation of fifty soldiers and his officers, their passage and freight having been paid in advance, both more fair than the customary, as provided in the treaty with the national government, we started for the port of San Fernando.'

"And the foreign consuls residing at Ciudad Bolivar, in their manifesto of November 12, say:

"'At this place General Juan B. Garcia, the president of the State of Apure, *demand*ed transportation for himself, seven officers, and fifty-one soldiers, with the military material, to be taken at the usual rates of passage and freight, stipulated for in the charter.' * * *

"And Consul Dalton, in his letter to Ralph Rawdon, of November 25, writes:

"'She (the steamer) arrived at San Fernando, midway on the route up the river, where *she was applied to by the legal authorities* to carry some military forces, about 60 soldiers.'

"And the secretary-general of the executive of the State of Apure, in his certificate of January 18, 1866:

"'On the 16th of the same month (October 1865) the steamer arrived at San Fernando, and immediately General Garcia *contracted* with her captain, citizen John Hammer, for passage for himself, for myself, several officers, and fifty soldiers.'

"And the secretary of General Garcia, in his deposition before the circuit court of Lower Apure, January 1866:

" 'I know that President Juan B. Garcia, who acted as such about October 16 of last year, *contracted* on said date with the captain of the steamer *Apure*, Mr. John Hammer, for the passage of a force, with their officers.'

"And the president of the State of Apure, who succeeded General Garcia, in his note of January 10, 1866, addressed to the minister of the interior and justice:

" '(General Garcia, who was acting at the time as president of the State, *contracted* with the captain of the steamer, John Hammer, for passage for himself, several officers, and fifty soldiers.'

"No allusion is made in any of these references to the two protests which Mr. Wilson, minister resident of the United States, speaks of in his note of February 25, 1867, to Señor Seijas, nor to any other sign of opposition or reluctance, nor to the absence of Captain Hammer during the steamer's stay at San Fernando, and of which General Garcia is said to have taken advantage to place his troops on board. Probably such absence did not occur, as the steamer arrived there on the 16th and left again early on the 17th. Surely Captain Hammer was not two days refusing to grant the passage applied for by General Garcia, since the steamer did not remain even a whole day at San Fernando. All the probabilities are that such refusal did not exist. Were it not so, Salom, the secretary of the steamer, who received the money for the passage and ought to know all the circumstances of the affair, would have mentioned it in his protest of Apurito, expressly intended to protect the company against all responsibility, and to secure its right to be indemnified for the losses and damages suffered the preceding night. Were it not so, Mr. Dalton would have been careful enough to give prominence to that circumstance in his interrogatory to the witnesses before the court of first instance of Ciudad Bolivar, where he appeared so eager to find General Garcia guilty, and to justify the conduct of the officers of the steamer. Were it not so, finally, the same Mr. Dalton would have no doubt called that fact to the attention of Ralph Rawdon, in his letter of November 25, 1865, in which he simply says that the legal authorities of San Fernando had applied to the steamer, etc.

"The same thing may be said about the declaration, attributed to General Garcia, of not permitting the steamer to leave,

unless she took him with his officers and troops on board. Mr. Wilson's statement is, perhaps, the only foundation for such incident. Probably Captain Hammer had no motive to refuse transportation to General Garcia. He knew that the State was in revolt since some days before; he was cognizant of it before leaving Ciudad Bolivar, and, besides, that was public and notorious at San Fernando. But General Garcia was the legal president of the State, and the boats of the Orinoco Steam Navigation Company were, by article 10 of their charter, to serve at any time as transports to the government, and, in fact, they had been serving as such during the whole revolutionary period of Venezuela, from 1849 to 1863, the five years of the Federal war inclusive; not only without any prejudicial accident, but with large profits to the company; in the sole year 1860 the government of the republic had paid them for that service \$86,487. General Garcia was not going to encounter the enemy; the scanty number of his force was the best proof of his inoffensive design. He did not take passage for a determined point, but for some place in Upper Apure, within his jurisdiction, which he would designate later on; he had not the intention, perhaps, to land at any place whatever, but to remain in the river on board the skiffs he took with him at San Fernando, together with the other force that went to meet him in the steamer the night of the fight. His passage and that of his small expeditionary force would leave to the company a benefit of over \$300, without any danger. Why not accept it?

"In the arrival at Apurito, which perhaps is to be considered as the real occasion of the peril which the steamer met with on the night of the 18th October 1865, General Garcia does not seem to have had any participation; he had nothing to attend to there. Apurito was, like San Fernando, one of the ordinary ports of the steamers of the company on their regular course from Ciudad Bolivar to Nutrias, and the *Apure* called there this time, as usual, to land a portion of her cargo. In regard to this particular there is no doubt or contradiction. Where is General Garcia's fault?

"He is accused of not having permitted the steamer to be unfastened and held off, in order to prevent the attack, on learning that the enemy was in the town. This charge rests on no proof whatever; nor can the interest be perceived that General Garcia could have, in not taking advantage of that means to save himself, by saving the steamer, from the danger

to which they had been unexpectedly exposed; he had not left San Fernando under an aggressive attitude, and probably he was not prepared to fight against an enemy whose force and situation were unknown to him. Such a charge, but with stronger reason, perhaps, could be made against Captain Hammer, did it not appear, as it does appear, that he gave the order to cast off, and that if it was not complied with, *it was because the enemy did not permit it.*

“‘At any rate, there can be no doubt that the losses of life and property which occurred at Apurito might have been avoided if General Garcia had chosen to prevent them; for all the facts show that if he and his officers and men had behaved with the ordinary courage and discipline of soldiers, and had left the vessel, *as they should have done when they found that she was in danger*, or if he had permitted the steamer to be cast loose from the shore, when the attack began, *nothing serious* would have happened.

“‘Whatever view may be accepted of his action in taking this passenger steamer for the hazardous service in which he proposed to use her, it is unquestionable that his conduct, after she reached Apurito, was in violation of every duty he owed to the property and persons under his protection.’ (Brief of the counsel for the United States.)

“‘It has already been shown that General Garcia *did not take the steamer* by right of authority, as he could have done, *nor did he propose to use her in an extraordinary service*; but like any other passenger, took passage therein for a certain point in Upper Apure, near which she had to pass on her regular course to Nutrias. Transported on the way to Apurito, where the steamer had to call, he found himself, by accident, placed within the enemy’s camp.

“‘It is probable that if he had landed then with his guard, nothing serious would have happened to the steamer or her officers, for all the facts show that the attack was not directed against the vessel but against the president of the State and his military force that she had on board. Nevertheless, it would be contrary to the facts to contend that *nothing serious* would have also happened to General Garcia and his troop; the fate which the squad that he sent on shore met with, negatives such contention. Thus, what the claimants should have endeavored to prove was that, on such an occasion, the protection due by Venezuela to the citizens of the United States and their private property, imposed upon the president of the State of Apure the obligation to offer in sacrifice himself, his officers and men, and above all, the social interests

represented by them. Will it be necessary to recall that in the conflict of rights, the one of more important concern and of more universal order and more evident title, or in other words, the stronger one, is to be by natural reason preferred to the less important, of less universal order and less evident title, or to the weaker one, and that the social or public right, in other terms, the right of the state, is stronger than the individual, private right, or right of the citizen? Where is, therefore, the fault of General Garcia?

"At least it seems just to recognize that General Garcia's conduct at Apurito did not violate any duty of Venezuela's toward the United States. The right and duty of self-preservation and defense, as well as the laws of war, entitled him to continue occupying in that emergency the steamer, which a combination of casual circumstances had put under his martial law. His duties as the president of the State of Apure obliged him to act so, if he believed it necessary to protect the possession of his authority attacked and the welfare of the community confided to his care. The legal duties of persons in the position of General Garcia are strict and imperative; if they fail to do all that they are required by the circumstances to do, they incur solemn responsibility, legal and moral, and everybody can value the importance that the actual occupancy of the steamer ought to have had for him, were it only to prevent her from falling into the enemy's power. The defense of the party attacked is always just, because it is conformable to moral order, and gives a right to the adequate means for securing that end, and also to the spontaneous help of all those who are in a condition apt to furnish him assistance, because every man is bound to cooperate to the preservation of the others, and from this obligation springs the right to obtain his help. These are rules of natural justice imposing obedience, especially with respect to heads of government, whose loss is supposed ordinarily to produce disorder and confusion in the societies governed by them.

"It is true that the very right of defense, notwithstanding its perfect accordance with natural justice, is, however, limited to *necessity*. But General Garcia could not be justly charged with having exceeded that limit. On the contrary, by his moderation and prudence, he seems to have supplied a motive to be accused of want of courage and discipline. His action in sending to shore a squad as soon as he knew the impossibility of casting off from the port, does not prove that he had

changed his condition of the party attacked for that of aggressor. Sometimes the true aggressor is not he who attacks the first, but he who has put his adversary in the necessity of attacking to defend himself. This is doctrine of natural justice.

"Even admitting, then, the general rule of public law recognized in the message of the executive, General Falcon, presented to the Venezuelan Congress, February 26, 1867, that 'it is the *central power* that represents the interests of the federation in the great society of nations, to which *it alone is amenable for all the acts violating the principles of international law, which are committed by any state whatever*;' even admitting that, according to that rule "the United States might have the right to look to the federal government of Venezuela for redress for wrongs done to their citizens by the authorities of any State of the Venezuelan federation;" yet in the case of Apurito, the United States seems to have not that right, for there was not any wrong act of the State of Apure for which Venezuela could be amenable.

"As the losses of life and property which occurred at Apurito were the natural consequence of an act of war, in which the part of General Garcia was purely defensive, and the aggressors were not officers or troops either of the Government of Venezuela or of the State of Apure, but of a political party in a state of rebellion against the legal authority of the latter, it is evident that this case does not fall either in the division of acts of public officers, or in that of acts of private citizens, for which governments may, under certain circumstances, be held internationally responsible. According to the evidence submitted, this is clearly a case of losses and damages suffered by foreign citizens in times of internal troubles or civil wars. Is Venezuela amenable in such a case?

"Relying upon her own laws, certainly not. Since 1854 (6th of March) her Congress had enacted a law to the effect of defining her responsibility in such cases:

"ART. No foreigner has any action to claim of the government of the republic, by way of indemnity or redress, the damages and losses that their interests may suffer in consequence of political commotions, or any other cause, *when such damages and losses shall not have been committed by lawful authority.*'

"Some passages of diplomatic correspondence have been alleged by counsel for the claimants, in proof of the opinion

that the said law of Venezuela was enacted without any due sense of the obligations of the government of that republic to other governments, pursuant to public law and to treaties.

"With respect to treaties, it does not appear that Venezuela has ever recognized in her treaties with European or American nations any principle contrary to the one enforced in the law before quoted; at least in that of 1860 with the United States she did not. Far from it; in her treaty of recognition and amity of 1845 with Spain both parties accepted in principle the doctrine of the Venezuelan law of 1854, in reciprocally declaring that they would not make any claim for damages or losses caused by the war (Art. 11), and the same doctrine was afterward, in 1858, formally admitted in the treaties with Sardinia, and with the former Hanse towns.

"Pursuant, now, to public law, are governments responsible, or are they not, for the losses and damages resulting from such cause?

"This question has been discussed at length, and at the end solved in a negative sense.

"To admit in such cases the responsibility of governments, that is to say, the principle of indemnity, would be to create an exorbitant and lamentable privilege, essentially favorable to powerful states, and injurious to weak nations, and to establish an unjustifiable inequality betwixt natives and aliens. On the other hand, by sanctioning the doctrine which we impugn, a strong though not direct attempt would be made against one of the constitutive elements of the independence of nations, that of territorial jurisdiction; such is, in fact, the real scope, the true meaning of that so frequent resorting to the diplomatic course to solve questions which, by their nature and the circumstances in which they are produced, belong to the exclusive province of the ordinary tribunals.

"Summing up now our views on this subject, we feel compelled to conclude:

"1st. That the principle of indemnity and of diplomatic intervention in favor of foreigners, by reason of damages suffered in cases of civil war, *has not been, and is not, admitted by any nation of Europe or America.*

"2d. That the governments of the powerful nations exercising or imposing this pretended right against states, relatively weak, *commit an abuse of power and force that nothing could justify, and as contrary to their own legislations as to international usages and to political conveniences.*' (Calvo.)

"A nation which would not prevent its subjects from causing damages to foreigners would engage its responsibility, because, the natives being under its authority, it must look after them in order that they may not cause damages to others.

But such negligence does not render a nation responsible for the acts of those among its subjects who have put themselves in a state of insurrection and have broken their bonds of loyalty, or who are no longer within the limits of its territory. Under such circumstances, and whatever the character attributed to their acts and conduct may be, those citizens cease to be in fact under the jurisdiction of their government.' (Rutherford.)

"States are not bound to allow indemnities for losses and damages suffered by aliens or natives resulting from internal troubles or civil war.' (Bluntschli.)

"As to damages suffered in case of war or revolution, foreigners have no right to be indemnified by the state where they reside; that would be to demand for the persons residing in another country advantages which the natives do not enjoy. When a person establishes himself in a foreign state, he is bound to bear the consequences. The claim of England against Naples and Tuscany, in 1848, was rejected, and not only that, but the Russian Government, having been invited by the two Italian states to act as umpire, refused the arbitration on the ground that the English demand seemed to it so groundless that to accept the part of umpire would have been to admit doubts which did not exist. Just so in 1851, the United States refused to indemnify the Spaniards murdered by the mob at New Orleans, and did not grant reparation for damages, except to the Spanish consul, who had been insulted, and who on account of his official character was especially placed under the protection of the government.' (Heffter, Note G.)

"The aforesaid opinions are entirely in accordance with the law and practice observed by the various nations of Europe and by the United States in their mutual relations, and also with the Venezuelan law of 1854. Certainly not with the rule that they have pretended to impose upon the other American states in general, that aliens are more entitled to protection and have right to greater and stronger privileges than the natives of the country where they reside. But can the general principles of international law be changed according as to the places where they are to be applied? Can they be deprived in South America of the virtual justice which they possess in Europe and North America? Is the principle of exception just? To these questions Calvo answers as follows:

"This principle is intrinsically contrary to the law of the equality of nations and most disastrous in its practical consequences. In its absolute claim against the American states, it is not only noxious to the maintenance of relations of good harmony, but it is, above all, highly unjust, inasmuch as the European governments do not adopt it as the invariable rule of

conduct among themselves. Every law, in order to become acceptable and respectable, ought to rest on the basis of equality, to protect the weak as well as the strong; to defend the rights and interests of each one without discrimination; in one word, to weigh equitably upon all. The moral bonds which unite the peoples are of the same order, and imply an absolute character of solidarity. A state, therefore, could not claim among the other states a privileged situation which it would not be ready to grant them at its turn, nor claim for its subjects advantages superior to that which constitutes the common law of the inhabitants of the country.'

"And Bluntschli:

"'The maritime powers that have acted otherwise and forced the smaller states to allow indemnities have taken advantage of the superiority of their forces.'

"And Fiore:

"'Protection is illicit and unjustifiable where it has for its purpose to secure in favor of the citizens residing abroad a privileged position.

"'Strong and powerful governments must not take advantage of their superiority and exaggerate the duty of protection by exercising pressure upon weak governments, in order to compel them to favor their citizens and exempt them from certain obligations, or grant them privileges of any nature whatever.'

"And Cushing:

"'As to the exceptions to the general rule, they have grown up chiefly in Spanish America in consequence of the unsettled condition of the new American republics. Great Britain, France, and the United States have each occasionally assumed, in behalf of their subjects or citizens in those countries, rights of interference, which neither of us would tolerate at home; in some cases from necessity, in others with very questionable discretion or justification, so as greatly to aggravate the evils of misgovernment therein, as will plainly appear on a careful study of the internal condition of the Spanish American Republics.

"'It seems to me that considerations of expediency concur with all sound ideas of public law to indicate the propriety of a return to more reserve in all this matter, as between the Spanish American republics and the United States; *that is, to abstain from applying to them any rule of public law which we do not admit to have applied to us; to do only as we would be done by; and to consult their well-being and cultivate their friendship by adhering to the impartial assertion, whether in claim or in rejection of claim, of the established rules of the international jurisprudence of Christendom.*'

"In view of so numerous and creditable opinions, the conclusion *that the principle of the nonresponsibility of states for the losses and damages suffered by foreigners in times of internal trouble or civil wars*, is the true principle of international law, applicable to Venezuela in the case of the Apurito conflict, seems wholly warranted by truth and justice. International relations can not properly exist but between sovereign and sovereign; that is, between individuals of the same species, equal in independence. Before the law of nations all nations are equal, and if the wish of the powerful ones to cultivate relations of justice with the weak is sincere, and if the time and thought and labor which they devote to foster relations of friendship and commerce with them is with a view to valuable returns, they must behave toward them as they behave toward each other.

"Summarizing, with regard to all the points of view from which this case has been considered, the claimants have failed to establish their right to be indemnified for the alleged losses and damages suffered by them in consequence of that regrettable conflict; and while this inference is true, in general, as to all of them, it seems to be so still more, in particular, with respect to Ralph Rawdon, as representative of 'The Orinoco Steam Navigation Company.'

"Firstly, because the tarrying of the steamer at Apurito, on her way to Nutrias, which may be regarded as the proximate cause of the said conflict, was in the interest of the company.

"Secondly, because according to the charter of the company 'the officers and troops of the government and articles of cargo of whatever kind they may be, belonging to the government, shall likewise be transported in said steamers at reasonable prices for passage and freight, to be agreed upon with the competent authorities.' Whatever the influence of the presence of General Garcia and his officers and troops on board may have been in bringing about the conflict, this was a peril to which the company had voluntarily subjected itself, as per article 10 of its charter. As to the doubt, whether such obligation was extendible or not to the transportation of officers and troops belonging to the governments of the States, the fact of Captain Hammer having agreed with General Garcia upon his passage and that of his officers and men on terms conformable to said obligation, seems to have resolved it in favor of Venezuela. If it is not so, that question should have been determined by the authorities and according to the laws of

Venezuela, in compliance with article 12 of the said charter, and should have never been the subject of an international claim.

"Consequently, I am of the opinion that these four claims of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole, and Narcisa de Hammer, should be decided against the claimants.

"In deference, however, to the judgment of my colleagues, I will sign an allowance for \$5,000 each in cases No. 28 and No. 29, in addition to the amounts the claimants have already received therein."

"Mr. Little: * * * The evidence does
Opinion of Mr. Little. not show nor history chronicle that there was a state of war in Venezuela at the time of this disaster. The occurrence can not be viewed, therefore, from that standpoint. The ultimate responsibility of Venezuela for these wrongs is in nowise dependent upon her form of government, or the domestic distribution of her powers. For redress of injuries done her citizens, the United States must look to Venezuela, and not to any of her political subdivisions.

"The question, then, is: Wherein and how was Venezuela derelict in duty, if at all, in respect of this tragedy? The theory that General Garcia unlawfully or unwarrantably boarded the *Apure* with his troops, took military control of the boat, precipitated the attack at Apurito, and held the noncombatants on the vessel in the fight, is not only not supported by the evidence, but against its decided weight. If these claims depended upon the establishment of anything like such a state of fact they would have to be dismissed, for the facts and circumstances point quite to the contrary.

"Garcia's embarkation was lawful and without coercion. The attack at Apurito was a surprise to him as much as to the master of the vessel. The simple truth seems to be that he disembarked his little squad of militia in the dark in an ambush of conspirators to hunt down and suppress whom, not improbably, he had started, and got this far on his trip up the river, though he is spoken of as being on a tour of observation. They bided their time, waited till the vessel was fastened, to prevent his escape, and then, on the appearance of his force, opened fire. The confusion and demoralization of his troops under the circumstances is not strange, or attributable to any fault of his. The criminals were the conspirators upon the shore.

"Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could reasonably be required in that behalf, she is to be held blameless; otherwise not. Without entering upon a discussion of the investigation instituted and conducted by her, it seems there was fault in not causing the leaders, at least, of this lawless band to be arrested. It was notorious who they were. It does not seem that any attempt was made before any local authority to bring them or any of the band to justice. Had there been a well-directed effort of that kind, or had the government's investigation disclosed their innocence, and failed to discover those actually guilty, its responsibility would perhaps have ended, assuming the investigation, as I do, was a fair and just one.

"But neither of these things appears to have occurred. It is true the evidence is not full and clear on this point. There is consequently some doubt about it. On the whole, however, considering the heinous character of the offense, it may fairly be said that Venezuela here fell short of her entire duty. And such may perhaps be inferred to have been the view, from acts and declarations, of her executive and Congress. But her failure was not flagrant, and the allowance should be tempered with the doubt.

"The damage to the vessel was not great. The consequential damages claimed by the company are not satisfactorily shown, if indeed they are not too remote. It is difficult to believe that this company, which had endured the storms of civil war for fifteen years after its formation and entrance on business, was driven from the Orinoco by this one calamity, tragic and appalling as it was. Stackpole's injury was not disabling or severe.

"The allowances should not, however, in such a case, be confined to actual losses. The violated majesty of the law and regard for human life should have consideration. Remembering that the sum of \$12,000 has already been paid the widows to whom we can grant no relief, and who, of course, were the greatest sufferers, we have concluded to allow \$5,000 without interest in each of the two cases in addition to what has already been received. The entry may therefore be for \$20,000 in case No. 28, and \$7,250 in case No. 29, less what has been received under the former treaty."

Opinion of Mr. Find-
lay.

"Mr. Findlay: * * * After reading the record and carefully considering the arguments, which have been very full and exhaustive, on both sides, it does not seem to me that any case has been made out against Venezuela, except that she did not go as far as she ought in bringing the offenders to justice. She surely had no means of knowing or anticipating such a murderous outbreak as that which occurred at Apurito. As I understand the testimony, General Garcia and his detachment of troops on board the *Apure* were entirely unprepared to meet the assault; and whatever may have been their expectations as to trouble somewhere on the route, certainly do not appear to have apprehended any difficulty at this particular point. The attack was in the nature of an ambuscade and complete surprise. It would be wholly unwarranted, therefore, to hold Venezuela responsible for not anticipating and preventing an outbreak, of which the persons most interested in knowing and the very actors on the spot had no knowledge. A state, however, is liable for wrongs inflicted upon the citizens of another state in any case where the offender is permitted to go at large without being called to account or punished for his offense, or some honest endeavor made for his arrest and punishment.

"I can not accept the theory of war as affording an excuse for Venezuela in this case. Of course, if war existed, it would not be worth while to inquire further, for in such a state there is but one law recognized, and that is the law of force, meliorated and modified somewhat in actual practice by the more refined and humaner instincts of modern times; but still, in its ugliest moods, the assertion of a power which recognizes no right superior to the doing and the appropriating of whatever is necessary to success. Had such a condition of belligerency existed, it could not be claimed that the attack upon the *Apure*, having on board a battalion of the enemy, was not justified by the laws of war, although civilian passengers happened to be on board at the same time, and the assault partook of the nature of an ambuscade, and was made under cover of the night; but where is the evidence that a state of war existed?

"As I read the record, General Garcia, then president of *Apure*, started out from San Fernando with a small body of troops on a tour of observation. He only had fifty men in all, and with such a force it is apparent that the resistance which he expected to overcome, whatever it was, could not have been

2. PERSONS ENGAGED IN INSURRECTION OR REVOLUTION.

Successful Revolutionists. "Captain George Hughes was master of the American brig *John*, owned by Aaron Legget,

of New York, and employed in a lawful trade between the United States and Mexico. In the month of July 1832, while the brig was proceeding up the river ———, upon a voyage in every respect legal, she was boarded by a large body of Mexican soldiers, then in possession of a steamer also the property of Legget, but which had been forcibly seized by a portion of the troops under the command of Santa Anna to aid in effecting the revolution then in progress. Captain Hughes was treated with extreme cruelty by the soldiers, and after being severely beaten and wounded was taken on board the steamer and carried to Tabasco as a prisoner, where he was confined in prison several weeks. He was finally released through the interposition of the commander of the American schooner *Shark* and embarked on board that vessel for the United States, and died on the passage. There is good reason to believe that the death of Captain Hughes was caused by the wounds which he received when his vessel was boarded and the hardships and privations to which he was exposed during his imprisonment. The soldiers, in addition to the violence committed upon the person of Captain Hughes, plundered the vessel of a considerable amount of property which belonged to him.

"The attack upon the vessel and the subsequent harsh and cruel treatment of Captain Hughes appear to have been without excuse, or even a pretext. It was the mere wanton exercise of force without any other object than the gratification of the most malignant passions. The wrongs were committed under such circumstances as clearly made the Government of Mexico responsible for a just indemnity."

Memorial of Mary Hughes, administratrix of George Hughes: Opinion of Messrs. Evans, Smith, and Paine, commissioners, February 18, 1850, under the act of Congress of March 3, 1849.

Unsuccessful Revolutionists. "The claimant presents" a claim "for loss of goods in the hands of an agent in the interior of Mexico. It appears from a deposition of the agent that the goods were pillaged by a party of soldiers who were engaged in an insurrectionary movement against the government. The outbreak appears to have been sudden and

was very soon quelled by the government troops, but before it was suppressed some acts of violence and pillage were committed, among which was that by which the claimant's goods were lost. In the opinion of the board, Mexico was not responsible for the loss, and the claim is therefore disallowed."

Memorial of Daniel N. Pope: Opinion of Messrs. Evans, Smith, and Paine, commissioners, April 7, 1851; act of Congress of March 3, 1849.

This was a claim against the Mexican Government for losses caused by the burning of **The Burning of Zacualtipan.** Zacualtipan, April 7, 1859. Two days before, the town had been taken possession of by the Liberal forces and the assault upon it was under the command of Don Filipe Blanco. The claimant's house, in which his goods were stored, was burned, being right between the contending forces and exposed to the fire of both. The commission, Mr. Wadsworth delivering the opinion, said that it seemed to be a loss in the ordinary course of war, which would not give rise to a claim, as was held by Mr. Marcy and Lord Palmerston in the case of the bombardment of Greytown. They also rejected the claim on the ground that Filipe Blanco's forces, which did the attacking, were not the authorities of Mexico in 1859, since they belonged to the government of Miramon, which was not the *de facto* government of Mexico at the time (as decided in Cuculla's case, No. 779), as on that day the United States, through its minister, Mr. McLane, recognized the government under the constitution of 1857 with President Juarez at its head. Concluding his opinion, Mr. Wadsworth said:

"There could be but one sovereign power in the same political community at the same time. The United States having determined for itself, and according to the well-sustained fact, in what Mexican authorities this sovereignty resided, and maintaining to this day political and amicable relations with it as the only government in Mexico, can not now claim that another government existed in that country. If such inconsistent positions moreover were allowable, we have decided that the Zuloaga and Miramon pretensions in Mexico never reached the sovereignty nor constituted the government *de facto*; their movement being always only an attempt to displace the constitutional government, which ultimately and signally failed. (See opinion in Cuculla's case.) The claim is accordingly dismissed."

Christian Herman Schultz v. Mexico, No. 415, July 26, 1871, convention of July 4, 1868, MS. Op. I. 543.

Miller's Case: Opinion of Dr. Lieber. In 1866 General Canales, having made himself governor of the State of Tamaulipas, levied, at a moment of great confusion, a forced

loan, which was "raised" "in the shape of a pillage," in which Rafael M. Miller, a citizen of the United States, temporarily settled at Matamoras, "lost a certain amount of merchandise" for which he claimed the value. His claim was resisted on the ground, among others, that his loss was the consequence of his exposure to the "fortunes of war," and that the officer who exacted the "forced loan" or pillaged the town was not a Mexican authority. The following decision was rendered:

"As to fortunes of war, I can not discern any. There was at this time an unfortunately rapid succession of different parties in power, more or less connected with violence, and it would have been impossible for an individual to adhere formally to one or the other party, nay even to know who was the legitimate ruler. The great principle settled long ago in England regarding governments *de facto* and *de jure*, concerning the individual citizen or inhabitant, comes here into play. The state or civil society or government, or whatever it be called, is a continuity, and succeeding administrations, or officers or rulers, receive and transmit the obligations of the preceding one. The regent of France, succeeding Louis XIV., was very desirous of making the enormous debts contracted by the latter personal and ending with the King's death, but he could not succeed, and Louis XVIII. still paid a pension to the sister of Robespierre, granted to her by the convention representing France then as Louis XVIII. represented France later. Who can decide whether the military officers exacting the forced loan were officers of the Mexican Government, and what or who was at the time the government? A consideration strengthened by the fact that Canales was received some time after by the government, which, as it might be urged, thus adopted his obligations, for no one will deny that there was an obligation to repay a foreigner the value of the property taken away by violence. I think that Miller is entitled to an award. This is very different, be it observed by the way, from claims which may be urged in consequence of wrongs sustained in a territorial civil war, or a civil war carried on by two parties, acknowledging each other, so far as military humanity goes, as belligerents."

Lieber, umpire, August 2, 1871, *Rafael M. Miller v. Mexico*, No. 490, convention of July 4, 1868, MS. Op. I. 599.

Eigendorff's Case: Mexico! The soldiers of the republic fought, it seems, a regular street battle within the town of Matamoras. They were not soldiers of the republic fighting against other Mexican soldiers, having

joined an enemy, as might have been the case when soldiers of the republic fought against the French and those Mexicans who had joined the usurper Maximilian. Both parties were 'liberals,' and one party, at least, must needs have represented the republic; nay, for the private individual, dwelling in Matamoras, both were Mexican authorities. The commodities in the house in which Eigendorff, together with a certain Baer, carried on his business, were destroyed or damaged by the fight. The soldiers—we do not learn even whether those of Cortina, or the opposite party, or both—used it as a place of defense, and robbed a large portion of the merchandise. In both the meanings of *injury to person or property* by the authorities of Mexico Eigendorff suffered; that is to say, whether by direct action, the robbing of the goods, or by indirect action, the fighting against one another and thereby injuring the house and the merchandise contained in it."

Lieber, umpire, November 7, 1871, *Franz Eigendorff v. Mexico*, No. 581, convention of July 4, 1868, MS. Op. II. 255. An award was made in favor of the claimant for \$5,581.85.

"The claim is grounded upon the charge
Vesseron's Case: that on the 23rd of September 1866 the store
Opinion of Sir Edward Thornton. belonging to J. B. Vesseron in the city of
 Matamoras was robbed of property to a considerable amount by Mexican armed soldiers belonging to the Government of Mexico, and it is alleged that this government is consequently responsible for the losses suffered by J. B. Vesseron. After a careful examination of the voluminous papers connected with this case and with that of '*Raphael M. Miller v. Mexico*,' No. 490, the umpire has come to the following conclusions:

"It appears that at the time in question there was a conflict between two portions of the Mexican forces in Matamoras, both of which claimed to be recognizing and supporting the Mexican Government. The umpire, however, is of opinion that one of the two parties must have been in rebellion. It is not made clear to which party the armed soldiers who robbed Vesseron's store belonged, whether to that of Canales or to that of Hinojosa. That the store was robbed is evident. But it is nowhere proved that these soldiers were under the command of an officer or that there was an officer present, or, indeed, that they were anything more than marauders and plunderers, taking advantage of the disturbance which was going

on. The absence of any such proof strongly leads to the inference that there was no officer in command of those soldiers or present during the pillage; and as it appears that a fight was going on in another part of the town, it was probably out of the power of either of the commanders of the contending forces to put a stop to the plundering of Vesseron's store. As a matter of generosity and right feeling the Mexican Government might and perhaps ought to grant compensation for losses suffered by robberies committed by its own armed soldiers; but the umpire is of opinion that the commission acting under the convention of July 4, 1868, can not hold the Mexican Government responsible for losses occasioned by plundering soldiers, nor consider them as arising from injuries to person or property by authorities of the Mexican Republic. The umpire therefore awards that the above-mentioned claims be disallowed."

Thornton, umpire, March 20, 1875, *H. B. Vesseron v. Mexico*, No. 525. convention of July 4, 1868, MS. Op. IV. 613.

In the case of *Franklin Cummings v. Mexico*, *Cummings's Case*. No. 963, before the commission under the convention of July 4, 1868, a claim was made for the value of certain goods destroyed in the store of one Erhard, in Matamoras, during the siege of the town by Carvajal. Mr. Zamacona, the Mexican commissioner, objected to the claim on the ground (1) that the acts complained of were committed by a "revolutionary" officer, and (2) that the claim was "incompatible with the generally received principles of international law," which had "just received further confirmation in the projected law submitted by Mr. Lawrence, fixing the rules for the admission of claims for injuries experienced during the civil war in this republic" [the United States].

Mr. Wadsworth, the American commissioner, said:

"I hold the Mexican Government responsible for the violent destruction of property at Matamoras by Carvajal in this case, because that government has never made any reasonable efforts to suppress the disorders which have been so frequent, almost continuous, in that city, and conducted by high military chiefs holding high rank and authority in the Mexican service. It was not *war* that Carvajal, Cortina, Canales, and the rest conducted in that abandoned city, but armed lawlessness. The government has exercised no restraint over these chiefs and their forces, and inflicts no punishment on them for their

repeated crimes. I must therefore hold to responsibility even for the burning of property in the course of Carvajal's attack."

Sir Edward Thornton, as umpire, April 10, 1875 (MS. Op. IV. 633), held:

"It is alleged that Erhard's store, together with the goods in question, was burnt during the siege of Matamoras by Carvajal, but there is no evidence as to the precise date of the fire, whether the fire was accidental or how or by whose act it originated. If Carvajal's forces lighted it and they were rebels the Mexican Government was not responsible for the loss. If this fire was caused by shells or such other missiles during hostilities, the government could not be responsible, even if its own forces had directed the missiles. It has been stated by the defense, and never refuted, that an armistice was granted in order to enable merchants and others to remove their property to places of safety. The owners of the goods in question might have availed themselves of the opportunity. The umpire does not think that the Mexican Government is called to pay compensation in this case."

In the case of *Margaret M. Crothers v. Mexico*,
 Crother's Case. No. 410, a claim similar to the preceding one was made. From the evidence for the defense, which was not refuted, it appeared that the greater part of the damage was done by the besiegers and revolutionists under Carvajal, and that if any was done by the besieged it was in necessary defense of the town against the besiegers, from whose acts the natives suffered as much as claimant. It was argued that liability for the payment of a certain portion of the damages was acknowledged by the appointment of a commission to assess them. But, said the umpire, Sir Edward Thornton, it must be remembered that this commission was appointed by the city authorities, and that perhaps it was a matter of policy on their part to take that means of showing how much mischief had been committed by the revolutionists. But the measure was disavowed by the Mexican Government; nor was there anything more than hearsay evidence that any of the sufferers received any part of the sums assigned to them. The umpire said he did not conceive that the assignment of certain sums to the claimant by the Matamoras commission was any reason why the mixed commission should decide upon the responsibility of the Mexican Government for its payment, without investigating the grounds upon which the Matamoras commission came to its decision. He therefore awarded that the claim be dismissed.

A claim for imprisonment by General Canales at Matamoras was opposed by the Mexican agent on the ground that General Canales was at the time in rebellion against the Mexican Government. This assertion not being refuted by the claimant, the umpire held that the Mexican Government could not be made responsible for Canales's acts.

Thornton, umpire, *Joseph Walsh v. Mexico*, No. 383, convention of July 4, 1868, MS. Op. III. 366, IV. 40. Similar decisions in respect of injuries by persons engaged in "rebellion" or "revolution" were made by Sir Edward Thornton in *Benjamin Burn v. Mexico*, No. 794; *Jane A. Frazier v. Mexico*, No. 751; *Adolph Blumenkron v. Mexico*, Nos. 329 and 795.

"In the case of '*Benjamin H. Wyman v. Mexico*,' No. 911, the claim arises out of the destruction or damage of property alleged to have belonged to the claimant by armed forces under the command, respectively, of General Martinez and Governor Domingo Rubi. * * * Supposing that there is no doubt of the claimant's being the owner of the property, it is clear that if the evidence be true, the destruction of or damage to the property was caused, if not wholly committed, by General Martinez, who took up arms to prevent Domingo Rubi from being elected governor of the State. It can not be supposed that this was done by order or the authority of the Mexican Government. It is not even shown that the force under Martinez's command was composed of troops belonging to the Mexican Government. On the contrary, it is clear that the acts of General Martinez were acts of rebellion, and the witnesses themselves admit that it was 'not a war or revolution of a national character, but was a war purely of a local character,' etc., and that 'neither party were acting in a national capacity or by national authority at that time.' If, therefore, the declarations of the claimant as to his losses be strictly true, it would undoubtedly be one of those misfortunes which, deplorable as they may be, occur in times of revolution and intestine disturbances, but which can not be laid to the charge of the Mexican Government; neither would it be justifiable to condemn that government to compensate the claimant for losses arising out of the rebellious misdeeds of General Martinez against which Governor Rubi was obliged to defend himself; nor does it appear that during this defense the latter did any wanton mischief to the property of the claimant. The umpire

is therefore of opinion that the Mexican Government can not be held responsible for the losses alleged to have been suffered by the claimant."

Thornton, umpire, July 6, 1876, convention of July 4, 1868, MS. Op. VI. 487.

"The umpire is inclined to believe that the claimant had a certain amount of property, and that this property, which he seems to have increased during his residence at Santo Tomas, was robbed and destroyed. * * * But who was it that robbed and destroyed the property of the claimant at Santo Tomas? This point is not at all proved. The claimant's own witnesses almost without exception declare that the destruction was committed by 'rebels' or 'revolutionists,' or that it was the consequence of the revolution; and he himself, in paper 35, states that 'the animals of the revolutionists were turned into his field and succeeded in completely destroying his orchard,' etc. The claimant and his witnesses seem to have considered Castro and Esparza as Mexican authorities, and those who opposed these authorities and who destroyed claimant's property as revolutionists. The witnesses for the defense, on the contrary, speak of Esparza as the revolutionist. The claimant complains that his property was destroyed by one party, and that he was made to serve as a soldier by the other under the order of Esparza. The Mexican Government could in no case be held responsible for the acts of revolutionists, and could not therefore be called upon to compensate in both these cases. But, whoever were the persons who destroyed the property, they are insufficiently designated, for no names are given, and the mere appellation of 'revolutionist' would show that the Mexican Government is not responsible for the losses suffered by the claimant. The umpire can not upon mere conjecture condemn the Mexican Government to pay compensation. It may also be observed that Castro, who seems to have been the principal Mexican authority in that part of the republic and was so considered by the claimant, had been particularly friendly to him, had made him a grant of land, and was about to make him a further grant when he was assassinated. It appears that in consequence of an order issued by Esparza to send to his assistance the men of arms (los hombres de armas) of Santo Tomas, the claimant was obliged to join Esparza's forces. That the Alcalde should

have considered the claimant a 'man of arms' would lead one to suppose that he was enrolled in the national guard; but, whether this was so or not, although the claimant was ordered to join Esparza's force, there is no proof that he did not remain with it afterward of his own free will. The umpire considers that there is no evidence to show that injuries were inflicted upon the claimant by Mexican authorities, and therefore awards that the claim be dismissed."

Thornton, umpire, July 17, 1875, *Juan Manuel Silva v. Mexico*, No. 92, convention of July 4, 1868, MS. Op. VII. 363.

In the case of the heirs of *Hugh Divine v. Case of Hugh Divine. Mexico*, No. 553, a claim was made for the burning of a house and its contents in Matamoras during the taking of that place by General Carvajal in 1851. The city had been in possession of General Avalos, military commander of the State of Tamaulipas, and General Carvajal had put himself at the head of a movement to displace his authority. Carvajal besieged the city and at length assaulted it. In the course of the assault the house in question was destroyed, though the consul of the United States, at the risk of his life, placed himself between the combatants, and, displaying the American flag, besought them to spare the property.

Mr. Ashton, agent of the United States, in a brief in support of the claim, stated that General Carvajal, having been defeated in Tamaulipas, was pardoned under a general amnesty and restored to his civil rights, was afterward commissioned a brigadier-general and made civil and military governor of Tamaulipas and other States, was sent in 1864 to the United States as a commissioner with extraordinary powers, and was appointed and continued to be a major-general in the Mexican army. Under these circumstances, "and in view of the uniform policy which the Mexican nation has seen fit to pursue ever since 1821 with regard to the class of men of which Carvajal is a type," Mr. Ashton maintained that the Mexican nation was bound to make good the loss of the property in question, the circumstances of whose destruction rendered it "a national affront." He adverted to the guaranty of "special protection" in Article XIV. of the treaty between the United States and Mexico of 1831, and to the commentary upon it by Lawrence in his note 59 to Wheaton. Referring to the case of Don Pacifico, Mr. Ashton said that the course of Lord Palmerston in that matter had been much criticised, but

that if the Greek Government had pardoned the men who broke into and plundered the house, and placed them in high position, his course would have been sustained by a large majority in both houses of Parliament. He contended that the claim of the heirs of Hugh Divine was good as against Mexico even on the doctrines maintained by Lord Palmerston's opponents. Mr. Ashton also referred to the action of the British Government in exacting indemnity from Greece in the attack of Greek brigands on Mr. Lloyd and other persons; and to the instructions of Mr. Seward in the case of Captain Hammer.¹

The umpire, Sir Edward Thornton, after referring to a question of citizenship, said:

"But the question of citizenship is of little importance; for the umpire considers that the claim is untenable against the Mexican Government. It is alleged by the claimants themselves that the destruction of the property on account of which the claim is made was due to the acts of rebels, and for this reason alone the umpire is of opinion that the Mexican Government can not be called upon to make compensation for the damage done. It is also noteworthy that a great part of the force under Carvajal, the leader of the rebels, was recruited from the United States, and it is shown by the defense that had it not been for the presence of the foreign element, it is probable that an arrangement would have been come to between the opposing parties, and that there would have been neither bloodshed nor destruction of property.

"It is urged that the Mexican Government granted an amnesty to Carvajal and, therefore, made itself responsible for his acts. Other governments, including that of the United States, have pardoned rebels, but they have not on this account engaged to reimburse to private individuals the losses caused by those rebels.

"For the above reasons the Mexican Government can not, in the umpire's opinion, be called upon to compensate the claimants for the losses they have suffered, and he therefore awards that the claim be dismissed."

The claimants alleged in their memorial that **Cuban Insurgents.** on August 29, 1870, their plantation in Cuba was attacked by a band of insurgents calling themselves members of the army of the republic of Cuba. At that time a party of Spanish soldiers occupied the plantation, which they had taken possession of, as the memorial alleged, partly for strategic purposes and partly for the purpose of

¹ Dip. Cor. 1866, part 3, pp. 431-437; id. 1867, 11.

protecting the property against the insurgents. For the latter purpose, said the memorial, the number of soldiers was insufficient, while their presence attracted and probably caused the insurgent attack.

The advocate for Spain demurred to the claim on the ground that the memorial alleged "no case of wrong or injury by the authorities of Spain," but only pretended and alleged "wrongs and injuries by bodies of insurgents in arms against the authorities of Spain and endeavoring to overthrow the government thereof in the Island of Cuba."

The arbitrators sustained the demurrer and dismissed the claim.

Emma McGrady and Augustus Wilson v. Spain. No. 59, Span. Com. (1871), April 25, 1874.

It was held that the claimant could not recover damages for the destruction of property by insurgents. There was some testimony that the destruction was committed by the Spanish forces. In a petition presented by the claimant to the Spanish authorities in November 1871 it was alleged that the property was destroyed by insurgents. In this conflict of testimony the arbitrators held that they must act upon the presumption that exists in favor of the party who defends.

Miguel Zaldivar v. Spain, No. 127, Span. Com. (1871), December 26, 1882.

"In the case of John H. Hanna, No. 2, the memorial alleged in effect that the claimant was the owner of 819 bales of cotton, situated within the rebel States of Louisiana and Mississippi, and that 'without fault of petitioner, against his consent, and by force and arms, said cotton was destroyed by rebels in arms against the Government of the United States prior to the year 1863.' By the schedules annexed to his memorial and made a part of the same, it appeared that the cotton in question was destroyed by orders of the authorities of the Confederate States and of the rebel State of Louisiana, for the purpose of preventing the same from falling into the hands of the Federal forces.

"A demurrer to the memorial was interposed on behalf of the United States.

"On the argument of the demurrer it was contended by Her Majesty's counsel on behalf of the claimant, that the acts of destruction alleged in the memorial appearing to have been deliberately committed under the orders of the commander of the forces

of the Confederate States, and with the concurrent authority of the governor of the State of Louisiana and commander of the troops of that State, reclamation must lie on behalf of the British Government, in the interest of the claimant as a subject of that government, against the United States as representing and including the State of Louisiana, as well as all the other States forming the so-called Confederate States; that the persons engaged in these acts of destruction were not liable, either civilly or criminally, either for reparation or punishment in respect of those acts, they having been committed in the course of military operations under the authority of the existing government, whether lawful or usurped.

“That for the wrongful acts of the several States in respect to foreign nations or their subjects, reclamation could be made only against the United States, to the government of which, by its constitution, was reserved the power of making treaties, declaring war, and making peace, and all international powers generally, the same being denied to the individual States; that no foreign nation could negotiate with or make demand upon individual States in respect of such acts, but could deal only with the Government of the United States; that in case of wrongs committed by any State upon foreign nations, in regard to which that State, if wholly independent and not a member of the Federal Union, would be liable to reclamation, and to be called to account in the mode practiced between nations—by treaty or by war—these remedies against such State being denied to foreign powers by the Constitution of the United States, the liability for reparation devolved upon the United States, and the federal government must be held to answer as well for the acts of the authorities of its several constituent States as for those of the federal government.

“That the so-called secession of the State of Louisiana and the other States forming the so-called Confederate States did not extinguish or suspend the liability of the United States for wrongful acts committed by said States.

“That by the treaties of 1794, 1815, and 1827, the United States had stipulated with Great Britain for the protection of her subjects in the State of Louisiana, as well as in all other territory of the United States; that the United States not having allowed the claim of Louisiana to be released from her constitutional obligations and restrictions, but having held her to her constitutional obligations, and having insisted that their political relations with foreign powers were in no wise

affected by the insurrection in the Southern States, and that the Government of the United States was rightfully supreme in Louisiana and the other States in rebellion, and having finally maintained its authority over those States, its liability to Great Britain for violation of these treaties by those respective States remained precisely as if there had been no insurrection or civil war.

"Her Majesty's counsel further contended that, as a principle of international law, if the rightful government of a country be displaced and the usurping government becomes liable for wrongs done, such liability remains, and devolves on the rightful government when restored; that this principle equally applied when the usurpation was only partial; that the restored and loyal government of Louisiana was liable for wrongs done by the insurrectionary government of the same State; and that it was only by the provisions of the Constitution of the United States that the State of Louisiana was prevented from being compelled to discharge that liability toward foreign governments, and that on this ground the Government of the United States must be held responsible for the acts of the State of Louisiana.

"He cited in support of these propositions the treaties of 1815 and 1827 between the United States and Great Britain. (8 Stat. at L. p. 228, art. 1; id. 361, art. 1); Phillimore, vol. 1, pp. 36, 94, 139; Wheaton, p. 77; Constitution of the United States, art. 1, sec. 10; Works of Daniel Webster, vol. 3, p. 321; id. vol. 6, pp. 209, 253, 265; U. S. Att. Gen. Op. vol. 1, p. 392; *The United States v. Palmer*, 3 Wheat. Sup. Ct. R. 210; *The Collector v. Day*, 11 id. 113, 124 to 126; *The Prize Cases*, 2 Black, 635; the treaty between the United States and Great Britain of August 9, 1842 (8 Stat. at L. 575, art. 5); and the acts of Congress of December 22, 1869 (16 Stat. at L. 59, 60), and of April 20, 1871 (17 id. 13 to 15).)

Argument for the
Defense.

"The argument on behalf of the United States was summed up as follows:

"First. That whatever may be the relations of the separate States of the Union to the Government of the United States, it is manifest that no responsibility can attach to the United States for the destruction of the claimant's property under color of the authority of the State of Louisiana, because its destruction was not authorized by any officials representing or authorized to represent or act for the State of

Louisiana under the Constitution and laws of the United States. There can be no legitimate officers of a State to constitute its government, except such as have taken an oath to support the Constitution of the United States. All others are usurpers and pretenders. But, further, a State of the Union has no political existence which can be or has been recognized by Great Britain, except as a part of the United States, in subordination to the national government. The rebels, who, by usurpation, undertook to act for the State of Louisiana, declared their action to be in behalf of the State, which they claimed as a component part of another and hostile nation.

"Secondly. The destruction of the claimant's cotton was done under the order of the commander of a military force engaged in hostilities against the United States, and whose acts Great Britain had recognized as those of a lawful belligerent, having all the rights of war against the United States that any foreign invader could have had. The men professing to act as the local authorities, in concurring in the order of destruction acted as the assistants and allies of the hostile and belligerent power, and subject to its control. It is as absurd to hold the United States responsible in the case of Hanna as it would be to hold France responsible for the destruction of the property of a British subject in the part of France held by the German armies in the late war, on the ground that a French official at the head of some *arrondissement* or *commune*, might have joined in the order of the German forces for its being done, he having been put in office or retained there by the German forces for the very purpose, and having first renounced his allegiance to France and taken an oath of allegiance to Germany.

Decision of the Commission. "The commission unanimously sustained the demurrer in the following award:

"The claim is made for the loss sustained by the destruction of cotton belonging to the claimant by men who are described by the claimant as rebels in arms against the Government of the United States.

"The commissioners are of opinion that the United States can not be held liable for injuries caused by the acts of rebels over whom they could exercise no control, and which acts they had no power to prevent.

"Upon this ground, and without giving any opinion upon the other points raised in the case, which will be considered hereafter in other cases, the claim of John Holmes Hanna is therefore disallowed."

"This was among the earliest of the decisions of the commission, and it is understood that in consequence of it a large number of claims of similar character awaiting presentation were never presented to the commission."

Am. and Br. Claims Commission, treaty of May 8, 1871, Hale's Report, 56. See, also, Howard's Report, 57, 512, 524.

Mr. Frazer, the United States commissioner, read the following separate opinion:

"This is a claim for the destruction of 819 bales of cotton belonging to the claimant by rebels in arms against the United States. The property was destroyed in Louisiana and Mississippi in 1862 by the Confederate forces with the concurrence of the rebel authorities of Louisiana, one of the Confederate States so called. Her Britannic Majesty had recognized the so-called Confederate States as a belligerent and the contest of arms then prevailing as a public war. After such recognition by the sovereign, the subject of such sovereign can not, in his character as such subject, aver that the fact was not so. The act of his government in that regard is conclusive upon him.

"Aside from this recognition by Her Majesty, it is public history of which this commission will take notice without averment or proof, that the Confederate forces were engaged at the time in a formidable rebellion against the Government of the United States. It may not be important to the question in hand, therefore, that Her Majesty had taken the action already stated.

"It should be further observed that the particular 'State of Louisiana,' which concurred and participated in the destruction of the claimant's property was a rebel organization, existing and acting as much in hostility to the Government of the United States as was the Confederate States, so called. It was in form and fact a creature unknown to the Constitution of the United States, and acting in hostility to it. It was an instrumentality of the rebellion. Its agency, therefore, in the spoliation of this cotton can not be likened to the act of a State of the American Union claiming to exist under the Constitution; and any argument tending to show that under international law the national government is liable to answer for wrongs committed by such a State upon the subjects of a foreign power, can have no application to the matter now under consideration. The question presented is simply whether the Government of the United States is liable to answer to a neutral for the acts of those in rebellion against it under the circumstances stated, who never succeeded in establishing a government. It is not deemed necessary in this case to inquire whether the claimant, having a commercial domicile in Louisiana at the time, is to be deemed a 'subject of Her Britannic Majesty' in the sense of Article XII. of the treaty which creates this commission. That question is argued by counsel, but it is thought better to meet the question above stated for the reason that the case will thereby be determined more distinctly upon its merits.

"The statement of the question would seem to render it unnecessary to discuss it. It is not the case of a government established *de facto*, displacing the government *de jure*. But it is the case merely of an unsuc-

cessful effort in that direction, which, for the time being, interrupted the course of lawful government without the fault of the latter.

"Its acts were lawless and criminal, and could result in no liability on the part of the Government of the United States."

Cases of Laurie and Others. "The cases of Laurie, Son & Co., No. 321; Samuel Irvin & Co., No. 322, and Valentine O'Brien O'Connor, No. 404, likewise arose out of property destroyed by the rebels; but in each of them it was attempted on the part of the claimants to take the case out of the decision in Hanna's case.

"In each of the cases it was alleged that the claimant was the owner of tobacco stored in the State of Virginia at the breaking out of the rebellion; that early in the year 1861 the ports of Virginia were blockaded under the proclamation of the President of the United States, and before the claimants could remove their property by land the Congress of the United States, by act of 13th July 1861, prohibited the transportation of merchandise from Virginia into the loyal States, except under license and permission of the President, and in pursuance of rules to be prescribed by the Secretary of the Treasury; and that under the rules prescribed the claimants were unable to remove the tobacco. In the cases of Laurie, Son & Co. and Irvin & Co. it was alleged that the tobacco remained stored in Richmond until the burning of that city by the rebels on the 3d April 1865. In the case of O'Connor it was further alleged that in April 1865 claimant sent a vessel from Ireland destined for Richmond, for the purpose of carrying away his tobacco, which vessel arrived at Hampton Roads in June 1865, but was warned off by a public armed vessel of the United States and compelled to return to Dublin without the tobacco. In this case it was further alleged that a part of the tobacco was destroyed by the conflagration kindled by order of the Confederate authorities on the 3d April 1865; that another portion was destroyed by an accidental fire in March 1863, but which occurred in consequence of the disturbed condition of affairs then existing in Richmond; that another portion was seized for taxes levied by the Confederate government, and another portion used and destroyed by the authorities of the Confederate States for experimental purposes; and it was alleged that all these losses of Mr. O'Connor were solely in consequence of the failure of the United States to maintain and enforce their authority in the State of Virginia, and to suppress the civil and military disorders then existing there.

"A demurrer was interposed on behalf of the United States in each of the three cases.

"Her Majesty's counsel filed an argument in Nos. 321 and 322, in which he contended that the memorials showed a case where, by the acts of the United States, the claimants were prevented from removing their tobacco from the seat of war, where it was exposed to danger; and that but for such prohibition they would have removed and saved it; but that they were compelled to leave it in the hostile country where it ultimately perished from one of the dangers incident to the war; that the acts of the United States alleged in the memorial, by which the claimants were prevented from removing their tobacco, were not lawful acts under international law.

"That, by the statute of 13th July 1861 (12 Stats. at L.) commercial intercourse between the States in rebellion and the loyal States was prohibited, subject only to the license and permission of the President 'in such articles, and for such time and by such persons as he in his discretion may think most conducive to the public interest, and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury;' that by the regulations issued by the Secretary of the Treasury under this act a tax was imposed upon such permits, and a special tax upon property to be brought out under them, and it was provided that such permits should only be granted to loyal citizens of the United States.

"That this act and the subsequent legislation of the United States did not provide for blockade or nonintercourse *jure belli*, but were acts regulating intercourse by municipal statute between different sections of the territory of the United States; that these statutes worked injustice to the claimants, and deprived them of privileges to which they were entitled by the treaty between the United States and Great Britain; that the loss of the property in question was caused by them, and therefore was a legitimate subject of international reclamation before the commission.

"That, considering the prohibition in the light of a belligerent act, the United States were bound, in analogy to maritime blockade, to allow a reasonable time for the claimants to bring out their property; and, in further analogy to the law of maritime blockade, that, as a belligerent can not blockade

a port against neutrals while he allows his own or his enemy's merchant vessels privilege of ingress and egress for the purposes of trade, the United States can not rightfully permit their own citizens to trade with the insurgents under permits, while prohibiting trade to neutral aliens and others without permits.

"He cited the letter of Mr. Cass, Secretary of State, to Mr. Mason, United States minister to France, in June 1859, reported in Dana's Wheaton, 672, *n.*; 1 Kent's Com. 146; The Grey Jacket, 5 Wall. 342; The William Bagaley, *id.* 408; The United States *v.* Lane, 8 Wall. 185; The Francisca, 10 Moore's P. C. R. 87; The Ouachita Cotton, 6 Wall. 531; Mitchell *v.* Harmony, 13 How. 115.

"The commission unanimously, and without hearing argument for the United States, sustained the respective demurrers, and disallowed the claims.

"In the case of James Stewart, No. 339, it
Stewart's Case. was alleged that the claimant, having purchased certain cotton situated upon the Mississippi River, at Dead Mans Bend, below Natchez, sent a steamboat to remove the cotton, but that the steamboat was improperly forbidden to land by the captain of a gunboat than cruising opposite to the place where the cotton was stored; that the claimant was thus prevented from removing his cotton, which was soon afterward burned by rebel scouts.

"Various questions of fact arose in this case as to the title of the claimant; but it was maintained on the part of the United States that, upon the facts alleged, no reclamation could lie against the United States; that the discretion of the commanding officer of the gunboat as to permitting or not permitting vessels to land, even for the removal of property for which permits from the civil authorities were held, was absolute; and that the alleged act of the officer, in prohibiting the steamboat from approaching the land and removing the property, was within the scope of his authority, and in the exercise of his duty; that the subsequent destruction of the property by the rebels was not a necessary or natural consequence of any wrongful act of the United States or any officer of the United States, and that no liability existed against the United States in respect of the transaction.

"The claim was disallowed, all the commissioners agreeing."

Am. and Br. Claims Com. treaty of May 8, 1871, Hale's Report, 58. See also, Howard's Report, 62.

In the case of *A. E. Campbell & Co. v. The United States*, No. 290 (Howard's Report, 64) a claim was made

"for the value of a cargo of sugar belonging to the memorialists, British merchants residing in London, England, and consigned to them from Trinidad de Cuba on board the Federal brig *John Welsh* bound for Falmouth, England. Said brig was captured on the 6th day of July 1861 by the Confederate privateer *Jeff Davis*, and sent into Charleston, South Carolina, with a prize crew on board. The brig was condemned, but the memorialists alleged that the neutral character of the cargo was recognized, and after having been sold the net proceeds were held by the Confederate authorities to be refunded to the memorialists.

"They also claimed that on the taking of Charleston the United States Government had seized the Confederate treasury and all Confederate property therein, and shortly afterward seized and took possession of all property whatsoever or wheresoever belonging to or in the possession, custody, or control of the said Confederate States, including the proceeds of the said cargo of sugar, for the value of which they demanded compensation.

"The United States agent demurred to the memorial on the following grounds:

"1. That the United States were not liable for the acts of the Confederate government or its privateer, *Jeff Davis*, in the capture of the said brig, *John Welsh*.

"2. That the United States were not liable to the said claimants by reason of the capture of the Confederate treasury, and all Confederate property therein, or of any and all of the said property of the said Confederate States.

"3. That the said memorial showed no act of the United States, as committed by its authority, against the personal property of the said claimants, and showed no title in the said claimants to any property seized or taken possession of by the United States.

"Her Majesty's counsel admitted that the grounds of the demurrer were correct in a general sense, and merely pointed out to the commissioners that it would be possible for the claimants to make out a case of their property being taken by the United States, if by proof brought by them they could show that the proceeds of their sugar were kept separate and distinct from the funds of the Confederacy, and marked and noted as theirs, and thus remaining in specie, were captured.

"That in such case they could recover, and that, however remote the chance of their making it was, they should be permitted to do so if they could.

"The commissioners overruled the demurrer, but the claimants never offered any further evidence, and the claim was finally disallowed."

"It appears that Benjamin G. Shaw was the owner of the American bark *Florida*, under command of Captain Charles H. Brown, and that this vessel was chartered by the Republic of Chile to convey

about seventy prisoners, together with Chilean officers and soldiers, to the penal colony at Sandy Point, in the Straits of Magellan. The Government of Chile agreed to pay the sum of \$1,600 for the transportation of the convicts and their guards. On the morning of November 27, 1851, Captain Brown prepared to disembark the prisoners and sent a boat with six men ashore to see the governor of the colony, Muñoz Gamero. Immediately after landing, the men were seized and made prisoners by the convicts on shore, who had, before the arrival of the vessel, revolted and were in the possession of the colony. These convicts seized the vessel, made prisoners of Shaw, Brown, and others and thrust them into prison. Subsequently Shaw, with several others, was shot. On the 2d of January 1852, one Cambiaso, the leader of the revolted convicts, compelled Brown, under threat of death, to navigate the vessel, and ordered him to sail westward. Subsequently Captain Brown, with some of the American sailors, succeeded in obtaining control of the vessel and a large amount of treasure that Cambiaso had taken from an English vessel, the *Eliza Cornish*, and placed on board of the *Florida*. Brown then sailed for Valparaiso, and on the 14th of February 1852 anchored his vessel in the harbor of San Carlos, Chiloe, where the prisoners were turned over to the Chilean authorities.

"On the 23d day of February, Captain Brown, having arrived at Valparaiso, abandoned his vessel to the Chilean authorities, as is alleged, but subsequently, as stated, he sold her for money to pay the expenses that had been incurred. It is alleged, further, that the treasure carried by the *Florida*, and which had been taken from the British vessel *Eliza Cornish*, was seized in the port of San Carlos by a British steamer.

"The question is, Is the Government of Chile to be held answerable for the acts complained of, committed by persons who were in rebellion against the authority of the Government of Chile and had killed the governor and garrison at Sandy Point? All the authorities on international law are a unit as regards the principle that an injury done by one of the subjects of a nation is not to be considered as done by the nation itself. (Vattel II. 73.)

"Calvo (Dictionnaire, Responsabilité, II. 172) expresses himself in the same sense and sustains the principle that a government is answerable for the offense committed in its territory only when the claimant government can furnish the proof that the other government was able to prevent the act which

caused the damage, but intentionally neglected to do so * * *
 que l'Etat devait ou pouvait l'empêcher et a volontairement
 negligé de le faire,.

~ Also Martens · Volkerrecht, I. 428; is of the same opinion.

“But also in case a government fails to prevent its citizens or subjects from causing damage to citizens of foreign countries, in which case a government would be answerable, Rutherford Confere Calvo, Droit International, sec. 363) avers that even such a failure does not make the nation answerable for the acts committed by those of its subjects in rebellion and who have broken off their relation of allegiance. In such cases, and the case of the convicts on Sandy Point is in line therewith, those citizens cease in part to be under the jurisdiction of their government.

“In the case of the *Florida* the memorialist admits that a rebellion against the Chilean Government had taken place, and had been successful; that the Chilean Government and also the Chilean citizens suffered great damage in consequence of said rebellion, as the governor and the garrison at Sandy Point had been killed by the convicts. At the time these events occurred the Chilean Government had no power to prevent, in the interest of the bark *Florida*, the consequences of a rebellion entirely unknown to it, and did, therefore, in no way fail to perform its international duties for the protection of foreign citizens residing in Chile or landing at Sandy Point.

“Therefore the Chilean Government can not be held responsible for acts committed by revolted convicts, and the demurrer of the respondent government should be, and is, sustained.”

Frederick H. Loret et al. v. Chile, No. 43, United States and Chilean Claims Commission, convention of August 7, 1892.

3. ACTS OF SOLDIERS.

“The schooner *Topaz*, a vessel belonging to Case of the “*Topaz*.” citizens of the United States, was, in the month of January 1832, while in the prosecution of a lawful voyage, at a place called Redfish Bar, near Anahuac, within the territory of Mexico. While lying there she was taken possession of by General Teran, an officer of rank and consideration in the Mexican service, and ten or twelve other officers under his orders, and was required by them to proceed to Matamoras, which she did, with the Mexican officers on board. She was required by them to take on board a hundred

and ten or twelve Mexican soldiers and eight or ten women and transport them, with the officers above referred to, with the exception of General Teran, to Galveston in Texas, and in the month of February set sail for that place. For the service thus required of the vessel a compensation of \$800 was promised to be paid at the end of the voyage.

"While thus upon the passage, having been out about forty-eight hours, the Mexicans on board, in the night time, rescued the vessel from the control of the master and crew, murdered the master and mate, ordered the course of the vessel to be changed and brought her again to Redfish Bar. The crew were taken thence to Anahuac and there imprisoned on the pretense of having themselves committed the murder of the captain. A considerable sum of money and other articles on board were seized by the Mexicans and appropriated to their own purposes. The vessel was never restored. The charges against the crew were never substantiated and appear to have been wholly without foundation.

"These facts, in the opinion of the board, constitute a just claim against the Government of Mexico for the injuries sustained. The acts of murder and violence which were perpetrated were the acts of Mexican officers and soldiers subject to the control of the government, and not of private marauders or pirates, who are wholly amenable for similar aggressions. The vessel was placed at the disposal of the murderers and plunderers, by whom the deeds of violence were done, by the orders of an officer of high rank and station, and in the discharge of the supposed duties to his own government."

Memorial of John Wilkins, executor of Samuel Lowder, and of Samuel Thurston, administrator of Henry Ryder: Opinion of Messrs. Evans, Smith, and Paine, commissioners, act of Congress of March 3, 1849.

Case of Terry & Angus. "The claimants above named were citizens of the United States, domiciled in Mexico at the commencement of the late war between that country and the United States. They prosecuted the business of carriage makers as partners at Puebla. Angus resided at Puebla, and superintended the partnership business, and Terry resided at San Rafael. After the commencement of hostilities Angus continued to prosecute the business of the firm, relying upon the protection of the Mexican authorities, guaranteed by the treaty of 1831 between Mexico and the United States. As an additional security for his

protection, on the 9th February 1847 Angus obtained from the secretary of state of the Mexican Republic, by order of the vice-president, a special letter of protection recognizing him as a citizen of the United States, and authorizing him 'to remain and trade in the territory of the republic during the present year.' In the month of September 1847 the city of Puebla was occupied by the army of the United States under the command of General Scott, then on his march to the City of Mexico. Upon the march being resumed Colonel Childs was left in command of Puebla with a detachment of the army. Very soon afterward the city was invested by a large Mexican force, chiefly guerrillas, under the command of General Rea. Colonel Childs was compelled to retire, with the force under his command, to a point in the city called San José, where he was closely besieged for a period of twenty-eight days, when he was relieved by the arrival of a reenforcement. During the siege the whole city, with the exception of the point occupied by Colonel Childs, was under the control of the Mexican troops. While the city was thus commanded by General Rea, the house occupied by Angus was entered by a body of Mexican soldiers and the entire property of the firm of Terry & Angus, consisting of their tools, stock in trade, and work finished and unfinished, was carried off or destroyed. Their business was thus broken up.

"There is good reason to believe that this outrage was perpetrated by the order of General Rea. One of the witnesses testifies that during the evening, before the house was attacked, a Mexican soldier demanded of him the keys of the house, which were then in his possession (he being in the employ of Angus), and stated that he had been sent by General Rea to demand them. The keys were delivered upon this demand, and very soon afterward the house was entered and the property was destroyed. Two days, the witnesses allege, were consumed by the soldiers in the work of pillage and destruction. The same witness testifies that after the property had been destroyed, he called on General Rea and requested him to give a certificate that the troops under his command had destroyed the property. General Rea requested him to call again and promised to give the certificate, but after calling several times he failed to obtain it. But in the absence of any direct testimony upon this point, the length of time employed in destroying the property, the publicity with which

it was effected, the cumbrous character of the property destroyed, and the fact that the work of destruction was accomplished by soldiers under his command, lead irresistibly to the conclusion that, if not done by the direct order of General Rea, it was at least done with his knowledge and acquiescence.

"The destruction of the property of the claimants, under these circumstances, in the opinion of the board, constituted a valid claim for indemnity against the Mexican Republic. The member of the firm in whose possession the property was found, and who was the superintendent of the partnership business, enjoyed the double guaranty of security afforded by the treaty of 1831 between Mexico and the United States and the special letter of protection issued to him by the Mexican Government after the commencement of the war. So far as the evidence discloses he had done nothing which could be construed into a violation of the neutrality which his position required. The destruction of the property was neither accidental nor a consequence of the military operations which the Mexican forces adopted to recover the possession of the city. That part of the city in which the property was located was wholly in the possession of the Mexican troops, and it does not appear that its destruction could in any manner facilitate their efforts to dispossess Colonel Childs of the part which was occupied by him. In fact, no other motive for this act of violence appears than hostility to the claimants as American citizens."

Opinion of Messrs. Evans, Smith, and Paine, commissioners, March 31, 1851, under the act of Congress of March 3, 1849.

"The claimant alleges that his goods and
Hayden's Case. corn 'were confiscated and made spoils to the rapacity of Mexican spoliation.' No description of the 'Mexican troops,' by whom it is alleged this outrage was perpetrated, is given. The claimant does not state whether they were a part of the Mexican army, what were their numbers, nor by whom they were commanded. * * * One witness, a Mr. Duvall, states that Hayden 'was a prisoner in custody of the troops commanded by General Urrea.' * * * The claimant is entitled to an award only upon the assumption that his property was taken or destroyed by persons for whose conduct the Mexican Government was responsible. If they were taken by order of an officer in command of a detachment of the army for the public service, such a responsibility would doubtless have attached. * * * The

'Mexican troops' by whom the goods were taken, for all that appears to the contrary, may have been a body of marauding soldiers, under the command of no regular officer, for purposes of plunder. * * * The board is compelled to decide that the proofs do not make out a valid claim."

Memorial of John Hayden: Opinion of Messrs, Evans, Smith, and Paine, commissioners, April 1, 1851; act of Congress of March 3, 1849.

"The claimant was traveling along a wild road on the Isthmus of Tehuantepec, when three men, 'soldiers,' he said, came suddenly out of the woods and one of them struck at him, disabling his hand, etc. We can not make anything of this but a private affair, a robbery or attempted assassination with which the authorities had nothing to do. We have refused to hold the United States responsible in much such a case, and we have not gone the length of holding either government liable on such a showing."

Wadsworth, commissioner, delivering the opinion of the commission, *Stanley M. Parker v. Mexico*, No. 818, convention of July 4, 1868.

"There is a painful effort in this memorial to make out a case. The party was robbed of all he had in 1859 by 'some soldiers under a sergeant.' He does not tell us whom these soldiers belonged to, how much he had, or what it was worth. The nearest he came to being hurt was once upon a time when he was stopped by two soldiers, who demanded his money. As he had no money the soldiers did not get it, and being very angry *they shot a dog*. For all these cruelties he wants \$60,000 in gold, with interest at 2½ per cent per month, the lowest rate in the city of Tehuantepec, 'amongst merchants and safe parties.' But we can not see our way to make this allowance. The claim is now dismissed."

Wadsworth, commissioner, delivering the opinion of the commission, *Thomas Carlock v. Mexico*, No. 930, convention of July 4, 1868, MS. Op. III. 77.

In numerous cases before the commission under the convention between the United States and Mexico of July 4, 1868, it was held by Sir Edward Thornton, as umpire, that the government was not liable for the acts of individual soldiers or of bodies of straggling or marauding soldiers not under the

command of an officer. Thus, in the case of *John Denis v. Mexico*, No. 291, MS. Op. VII. 405, he said:

“Neither is it shown that the loss which he [the claimant] suffered was caused by anything more than a robbery committed by lawless soldiers who were not under the control of any officer or authority. Under such circumstances the Mexican Government can not be held responsible for damages.”

The same rule was applied by him in *Angée Villareal v. The United States*, No. 732, MS. Op. VI. 318; *Agapito Longoria v. The United States*, No. 515; *Pragedes Oribe v. The United States*, No. 525; *Joseph S. Kemm v. Mexico*, No. 602, MS. Op. VI. 364. In the case of *W. C. Tripler*, No. 144, Sir Edward Thornton said:

“It is not clearly shown by whom the acts were committed, or that they were done by order or in presence of an officer or officers, and if the robbery and destruction were committed by soldiers only, without the order or presence of an officer, the umpire does not consider that the Mexican Government can be expected or called upon to make compensation for such acts. It is one of the unfortunate consequences of choosing to live in a country where revolutions and disturbances are so frequent.”

In the case of *William Culberson v. Mexico*, No. 615, MS. Op. V. 253, Mr. Wadsworth, the United States commissioner, while concurring with the Mexican commissioner in dismissing the claim, referred to an item in it for the destruction of property by the troops of General Corona, saying:

“But why should I pick out this small item and trouble the umpire with this case, when his labors are most and must yet be more enormous, and when I know he will dismiss it, because claimant only proves that ‘Mexican soldiers’ or ‘government soldiers’ took his horses, without showing that an officer was with them. The umpire requires the proof of the presence of an officer.”

On the other hand, where troops or armed forces were acting under the command of an officer, claims for the illegal taking or destruction of property were allowed by Sir Edward Thornton—*e. g.*, *Frederick A. Newton v. Mexico*, No. 154, MS. Op. VII. 386, for the robbery of property by Republican troops under Colonel Rijos; *A. F. Lanfranco v. Mexico*, No. 781, for the looting of a store at Tehuantepec by Mexican armed men under the command of the *gefe politico* of the place.

A claim was made for the destruction of mining property in Arizona by marauders from Mexico. It was held that governments are not responsible for incursions of thieves and robbers into their neighbors' territory unless complicity or connivance be shown or failure to restrain such acts after having had notice of them in time to prevent them. The marauders in question were not "Mexican authorities;" and no proof had been offered to show that the authorities instigated the raid or connived at it or had any notice of it in time to restrain it.

Charles D. Porter v. Mexico, No. 830, convention of July 4, 1868, MS. Op. VII. 46; *S. P., Santa Rita Company v. Mexico*, No. 831, MS. Op. VII. 70.

Case of Dunbar & Belknap. "The claimant alleges and the defense denies that the trading post belonging to Dunbar & Belknap was within the United States territory. * * * It seems clear to the umpire that the Mexican soldiers, being under the command of officers, plundered and destroyed the property existing at the post, and although it is not so clear that they set fire to the buildings, there is no doubt that they at least left them without protection. Believing, as the umpire does, that the post was within United States territory, he considered that Colonel Gabilondo had no right to send there an armed Mexican force. It had no right to be there nor to have prisoner Jesus M. Ainsa, and thus leave the post abandoned and at the mercy of the Indians. If the post was in Mexican territory, the property ought to have been taken in charge of and protected by Mexican authorities until the owners could have provided for its safety. The umpire therefore considers that the Mexican Government is responsible for the losses suffered."

Thornton, umpire, April 17, 1875, *Dunbar & Belknap v. Mexico*, No. 185, convention of July 4, 1868.

The claimant asked damages for various acts of violence at the hands of certain persons who wore, at least in part, the uniform of the Spanish volunteers in Cuba. When they committed the acts in question, they were not acting under the command of any officer, or engaged in any military duty. It was contended in behalf of the claimant that they were in fact Spanish volunteers, and as such were authorities of Spain, within the meaning of the agreement of February 12, 1871. The advocate for

Foster's Case.

Spain argued that the interpretation contended for would make every private act of every volunteer in the Spanish service the act of the authorities of Spain. The commission dismissed the claim.

Case of Thomas K. Foster, No. 36, Span. Com. (1871), May 9, 1874.

The memorialist presented a claim, as widow of Bonaventure Vidal and as administratrix of his estate, for the appropriation of a quantity of growing vegetables, valued at \$5,885. The deceased was a gardener, engaged in raising vegetables for the New Orleans market. The evidence showed that the losses sustained by Vidal were due to unauthorized acts of pillage by soldiers of the United States army.

It was claimed by counsel for the memorialist that the Government of the United States was liable for the acts of the troops, whether specific authority could be shown or not.

On the part of the United States it was maintained that the government was not liable unless the authority for the taking was clearly proved.

The claim was disallowed by a majority of the commission, Baron de Arinos and Commissioner Aldis, who said:

"In this case we are not able to find the facts proved as claimed by the memorialist. The claim does not arise from acts committed by the civil or military authorities of the United States, and the acts committed must be considered as mere acts of pillage."

It was understood that the majority of the commission held that specific authority for the taking must be shown, or that it must appear that the articles taken were appropriated to the use of the army, and were such as were necessary for its support.

Vidal v. United States, No. 24, Bontwell's Report, 147, commission under the convention between the United States and France of January 15, 1880.

Louis Castelain and Marie Castelain, his wife, citizens of France, were residing in August 1864 near Cairo, Alexander County, Illinois. Castelain was engaged in the sale of groceries and small wares, and his stock included a supply of spirituous liquors. On the evening of April 21, 1864, a small number of soldiers belonging to the United States army went to his house for the purpose of obtaining, by purchase or otherwise, a quantity of liquor.

Castelain, who had been warned that the sale of liquor to soldiers was contrary to the regulations of the army, refused to furnish it, and the soldiers then attacked him and his wife, seriously injuring them. A military commission, appointed to investigate the affair, reported as follows:

"The commission were of opinion that the outrages were committed by United States soldiers; that they have failed to discover what soldiers were guilty of the crime, or what officers shielded them from punishment; that they find from the evidence adduced that Castelain did not sell liquor to the soldiers; that Captain Dugger, the provost-marshal, was to blame for not taking more prompt and effective measures to identify the offenders and bring them to punishment."

Upon this report, and the recommendation of Major-General Halleck, Captain Dugger was dismissed from the service.

It was claimed by counsel for the Castelains that this action on the part of the United States fixed its liability for the injuries to their persons and property.

On the part of the United States it was admitted that the claimants were sufferers from a gross and unjustifiable outrage; but it was contended that the injuries were not the result of any act of the civil or military authorities of the United States, and that, whatever might be the equitable claims of the family to sympathy and compensation, the commission had no jurisdiction under the convention to make an award in their behalf.

The claim was disallowed by the unanimous vote of the commission, which said:

"This was a cruel and malicious attack upon the claimants, probably by some soldiers, from motives of personal revenge.

"We do not find any act committed by the authorities creating a responsibility on the part of the United States.

"We regret that we are not allowed to indulge in sentiments of pity or to extend charity to persons so cruelly injured."

Louis Castelain and Marie Castelain, his wife, v. United States, No. 353, Boutwell's Report, 131, commission under the convention between the United States and France of January 15, 1880.

The claimant demanded compensation for a quantity of cotton destroyed by the United States forces in April 1864. The proofs showed that after an engagement between the United States forces and the Confederates, and the retreat of the latter, the troops of the United States, upon their return, burned a ginhouse in which the cotton of the claimant was stored.

It was contended by counsel for the United States that the

evidence failed to show that authority was given by the officers in command for the destruction of the cotton, and that it was a wanton act on the part of the soldiers for which the government should not be made responsible.

The commission held that this was a "peculiar and exceptional case," and in making an allowance stated the grounds of their action:

"1. The cotton gin in which the cotton was stored was not burnt in battle or as a necessary and lawful military act. It had not furnished a shelter from which the Confederates had fired or might thereafter fire upon the United States forces.

"The United States forces had driven the Confederates about three miles beyond the ginhouse, and were marching back to their camp, not pursued by the Confederates, when the building was set fire to.

"2. The burning was not ordered by authority in order to destroy the cotton, and so cripple the resources of the Confederates. At that time and place all the avenues to market were in the hands of the United States forces, so that the Confederates could not avail themselves of this cotton. Hence the Confederates were then burning the cotton in that region, and the United States authorities were trying to save it and transport it to market. This case does not come within the line of any of the decisions of the British and American Claims Commission, referred to in Mr. Hale's report, in which claims for losses by the destruction of cotton were rejected.

"The evidence shows that the burning was a wanton act of the soldiers in the excitement of the moment, as they were marching back to their camp from a successful battle with the Confederates. It was without any justifiable excuse, in violation of order and discipline, and committed when marching back to camp, under the command and in the presence of their officers, who by the usual and ordinary enforcement of military discipline might and could and should have prevented it, but who do not appear to have used any means whatever to prevent it.

"In such a case we think that an allowance should be made."

Jean Jeannaud v. United States, No. 204, Bontwell's Report, 132, commission under the convention between the United States and France of January 15, 1880.

Claimant, a citizen of the United States,
Dodge's Case. averred that on April 21, 1881, a body of Chilean soldiers broke into the house in which he was staying at Miraflores, Peru, and inflicted upon him severe physical injuries; that they then took away money and other personal property belonging to him, and that General Lynch, of the Chilean army, afterward offered to pay him

\$300 in full satisfaction of all claims which he might have against Chile.

The agent of Chile demurred to the memorial and contended that the claimant should be obliged to amend it by specifying the rank of the persons who committed the alleged outrages and the names of the officers under whose authority they were acting.

The commission rendered the following decision :

"The defendant government claims that it ought not to be required to answer the memorial unless the claimant shall first so amend his memorial as to specify the rank of the persons committing the alleged outrages, the authority under which they acted, and the names of the civil and military persons under whose orders the guilty soldiers were serving.

"According to Rule III. c, of the rules of the commission for the settlement of claims under the convention of August 7, 1892, the memorial shall state, if known to the claimant, the name, rank, and employment of the persons committing the acts complained of. In this case it appears from the memorial that the persons who committed these acts were soldiers whose names and rank were unknown to the memorialist. As the provisions of Article III. c, of the rules do not make the naming of the persons who committed the acts complained of a *conditio sine qua non* for the basis of the claim, we are of opinion that the memorial is sufficiently specific under the rules referred to, and that the demurrer should be overruled. It is so ordered."

William W. C. Dodge v. Chile, No. 40, United States and Chilean Claims Commission, convention of August 7, 1892. See Shield's Report, 172.

The same decision was rendered in the case of *Frederick H. Selway v. Chile*, No. 17.

4. UNLAWFUL KILLING BY SOLDIERS.

"According to this convention one of the conditions *sine qua non* is that the wrong complained of, and for which complainant claims damages, must have been committed by an authority of the government (of course as authority) against which an award is claimed. This, however, does not appear to have been the case. All we can learn with any distinctiveness from the whole case on the docket is this:

"In the night of September the 3d or 4th, in 1862, H. A. Dorris, a citizen of the United States, having fled from the State of Texas in consequence of the then existing rebellion, was killed in Matamoras by Mexican soldiers. There had been a fandango

and much drinking in the plaza of Matamoras; gambling in the adjacent places forming an additional element of vicious and criminal excitement. A German of the name of Stus stabbed some Mexican soldiers, believing himself to be or actually being robbed by them. A bloody broil ensued and soldiers, it appears, rushed to the house where John Stus, who had killed the soldier or soldiers, lived, together with other foreigners, and among them H. A. Dorris, the son of the complainant. The house was entered by the soldiery and several Americans were arrested. Some, however, fled. Dorris was not heard of after this affair. No corpse was recognized as his. There is no evidence, that I can see, showing that these soldiers acted otherwise than enraged individuals. The whole evidence in this case is what I would call scanty, were scanty a law term. Nor is there any satisfactory testimony of Dorris being killed by Mexican authority that can be discovered by the umpire. He may have been killed; he very likely was killed, and, if so, probably by soldiers in uniform; but his murder would be an individual crime nevertheless. If the Mexican Government has done nothing in the way of criminal prosecution in this case, it would not thereby fall within the defining limits of our commission. The law of nations acknowledges the right of a government to insist on the penal prosecution of offenders having committed crimes against its own citizens or subjects living in the country of the criminals, and the law of nations admits of the right of resorting to reprisals and retorsion in cases of persevering denial of justice, though it must be admitted that a readiness to resort to such means is growing fainter with every advance of international good will. All such cases, however, belong to the authorities directing the international conduct of the two governments. They are proper cases for the department of foreign affairs, or with us for the Department of State, which includes the direction of foreign affairs. Such cases have nothing whatever to do with our commission. The charter of our international commission, if I may be permitted to use the term, says in so many distinct words that the commission shall occupy itself with cases only in which the complainant can show that he was a citizen of the country from which he claims, and that the wrong complained of was done to complainant by the authority or some authority of the country against which he complains and therefore claims damages. It is by no means shown that this has been done in the case

under consideration, and 'Anderson Dorris v. Mexico' must be dismissed."

Lieber, umpire, November 17, 1871, *Anderson Dorris v. Mexico*, No. 685, convention of July 4, 1868, MS. Op. II. 311.

January 7, 1866, the town of Tehuantepec
Webster's Case. was attacked by Mexican troops under the command of General Figueroa of the Mexican republican army. Claimant and other foreigners took refuge in a house, the property of a British subject, which had been used by the American consul, who was then in the United States, and which had the American flag raised over it at the time. The house was attacked and claimant was severely wounded by one of the soldiers, though unarmed and not resisting. He subsequently died, and the present claim was brought by his administrator. The umpire, Sir Edward Thornton, awarded \$10,000, saying:

"There is no doubt that the soldier who wounded Webster was under the immediate command of a Mexican officer, that the act was authorized by the officer, and that the Mexican Government is therefore responsible for it. It is stated by some of the witnesses that the house in which Webster was at the time was invaded and occupied for the purpose of flanking the enemy. This may have been a necessity of war, but the wounding of Webster was not so. If the house was broken into merely for the sake of plundering, the act of wounding Webster was a wanton outrage, but was countenanced by an officer, so that the government became liable for it."

Theodore Webster's Adm. v. Mexico, No. 810; convention of July 4, 1868, MS. Op. III. 328.

"In the case of 'Mildred Standish v. Mexico,' No. 385, the claim arises out of the killing of the claimant's husband, as is alleged by Mexican troops as he was peaceably traveling from Monterey to Matamoras, in the Republic of Mexico. It seems to the umpire to be well proved that the said husband, by name Austin M. Standish, was at the time a naturalized citizen of the United States. The testimony as to the killing is conflicting, but after a careful examination of all the evidence in this important case the umpire is forced into the conviction that Standish, Parsons, Conrow, and their servant, 'Dutch Bill,' were traveling alone and were not accompanied by any escort of imperialist troops, as has been suggested by the agent of Mexico, and that they were attacked and killed by Mexican soldiers acting under the orders of Mexican officers.

The indications are very strong that it was Colonel Sandez who gave the order for the attack upon the travelers in question; but whether it was he who gave it or not, the umpire is convinced that the acts were committed by the order of a Mexican officer or Mexican officers. It is not at all impossible that this officer or these officers were under the impression that the party belonged to the imperialist forces, and therefore the acts may not have been criminal, except so far as they were due to the failure previously to discover the real character of the party attacked. But these acts having been committed, whether with evil intention or not, by Mexican soldiers under the direction of Mexican officers, the umpire is of opinion that the families of the victims ought to be compensated by the Mexican Government for the loss which they have sustained. It is shown that Standish was able to earn about \$2,500 per annum by his profession; as he was young, these earnings would probably have increased rather than diminished in after years. The umpire is of opinion that Standish's family should receive such a compensation as would at an annual interest of 6 per cent insure them nearly \$2,500, besides the value of whatever Standish may have had with him at the time of his being killed. There is some uncertainty with regard to this amount, but the umpire believes from the evidence and from the nature of the case that, including money, horse, equipments, and fire-arms, the value must have reached at least \$1,500. The umpire therefore awards that there be paid on account of the above-mentioned claim the sum of forty thousand Mexican gold dollars (\$40,000) without interest, and the further sum of fifteen hundred Mexican gold dollars (\$1,500) with interest at 6 per cent per annum from the 15th of August 1865 to the date of the final award of the commission."

Thornton, umpire, March 12, 1875, convention of July 4, 1868, MS. Op. IV. 607. In the case of *Mary Ann Conrow v. Mexico*, No. 392, MS. Op. IV. 609, Sir Edward Thornton allowed for the death of Aaron H. Conrow \$50,000 in Mexican gold, without interest, and \$300 with interest. "The gains of Conrow as a lawyer were," said Sir Edward Thornton, "greater than those of Standish, and therefore the compensation for his loss should be also higher. On the other hand, there is no proof that Conrow had money with him to a large amount, although he must have had some for his traveling expenses. The witness John B. Clark states that each of the party had a horse and equipments and personal baggage to the value of about \$200; to this may be added cash for traveling expenses, \$100." In the case of *Parsons (S. Kearney Parsons v. Mexico*, No. 397) Sir Edward Thornton awarded \$50,000 in Mexican gold, without interest, for the killing, and \$500 with interest for loss of effects. He also stated that after

having gone over the grounds of the case again with great care, he saw no reason for modifying his previously expressed opinion in these cases. He admitted the possibility, though not the probability, that the Mexican officers who directed the attack upon the American travelers might have been ignorant of their character. But he said that they had the means of informing themselves as to who the travelers were, and were not excusable for failing to do so. (MS. Op. IV. 508, VII. 429.)

In the case of *J. M. Anciara, attorney for Sabinas Hidalgo and numerous claimants, v. The United States, No. Villa Aldama Cases*. 374, *bis*, etc., MS. Op. VI. 67, claims were made for injuries inflicted upon certain inhabitants of the village of Sabinas Hidalgo, in the State of Nueva Leon, on the morning of July 17, 1848. The opinion of the commission was delivered by Mr. Wadsworth, the United States commissioner, who stated that on the evening of July 16, 1848, one G. K. Lewis, lately a captain in Major Chevallie's battalion of Texas cavalry, followed by a band of about 57 mounted men of his company, entered the village and were kindly received: that on next morning Lewis and his band proceeded to rob the village of money, jewelry, and other articles of value; that they killed four of the inhabitants, hung the judge of the village up at his own door, and dragged about respectable people, pushed them with their guns, and committed other outrages upon them till they surrendered all their property; that the marauders then left and went to Villa Aldama and there repeated the scenes of violence, though they omitted to murder anybody; that news of the outrage reached the governor of the State at Monterey on the 18th day of July, when he immediately sent information of the transaction to the officer in command of the American forces near that city, who appeared to have taken no steps to rectify the wrong which had been committed; and that the robbers were never arrested or punished, nor was the plunder taken from them and restored. At the time of these outrages, continued Mr. Wadsworth, peace existed. The fact that Lewis and his company were in Mexico still with arms seemed to have been accounted for by the fact that the Texas and Arkansas troops, volunteers, were marched to Carmargo, where the company of Lewis was mustered out of service with the rest on the 30th of June, and paid off on the 4th of July. At that time the volunteers were disorderly and gave the officer in command trouble and anxiety. Mr. Wadsworth said that he could find no excuse for the act of turning loose on Mexican ground these insubordinate troops. They had their arms, and

there could be no pretense that they ever surrendered them, since the report from the War Department of the United States showed that no return of arms was ever made by this company. Mr. Wadsworth held that the treaty of peace was violated by this turning loose of the volunteers from Texas and Arkansas on Mexican soil; that the United States were bound to take their armed forces out of Mexico, and were not at liberty to discharge them in that country, especially in view of its helpless condition, it having just been conquered. On these grounds an award was made in favor of the claimants.

Convention between the United States and Mexico of July 4, 1868. In the case of *Mariano de los Santos v. The United States*, No. 359, and cases No. 359 B., etc., Villa Aldama cases, the umpire, Sir Edward Thornton, dismissed the claims for want of proof of the Mexican citizenship of the claimants.

Juan F. Portuondo, a naturalized citizen of
Portuondo's Case. the United States, of Spanish origin, was, together with certain other persons, arrested in the town of Santiago de Cuba on February 10, 1870, by order of the military authorities, on a charge of complicity in the prevailing insurrection. He was conducted to a place about twelve miles distant, where by Catalan volunteers, under the command of Lieutenant-Colonel Boet, in the service of Spain, he was shot, without trial. It was said that he was shot while making an attempt to escape. His son, José F. Portuondo, presented a claim against Spain to the commission under the agreement between the United States and Spain of February 12, 1871, for \$100,000 for the killing of his father. The umpire, Baron Blanc, on May 31, 1879, held: (1) That the killing of Portuondo by Spanish soldiers had "not been justified on the part of Spain by any proof of treasonable acts of the deceased;" (2) that the Spanish authorities had failed to produce evidence of "the alleged attempt of the deceased to escape from arrest;" (3) that, "in the sentence of the superior military tribunal acquitting the authors of the execution, no such attempt" was charged, "nor any other act specified or asserted to have been proved as could have deprived the deceased * * * of the protection of the United States," while the deceased was "shown by unimpeached testimony to have been constantly anxious to avoid any connection with the insurrection." On these grounds Baron Blanc awarded the sum of \$60,000.

Case of *José M. Portuondo*, No. 65, Span. Com. (1871), May 31, 1879.

5. ACTS OF CIVIL AUTHORITIES.

“This claim is for the value of the schooner *Rebecca* and cargo, alleged to have been lost at Case of the “*Rebecca*.” Puebla Viejo by the illegal proceedings of the judge of that place. * * * It appears that the said schooner, with a cargo valued in New Orleans at \$7,677, being the joint property of Zacharie and Turner, set sail about the 4th April 1822 bound for Tampico and Vera Cruz; that in due time she arrived at Puebla Viejo and entered her cargo. Selling by permission a small portion to defray expenses, she cleared with the residue to return to New Orleans. Before the vessel crossed the bar of Tampico she was seized by the custom-house officers of that port and charged with fraud, and proceedings were commenced against the vessel and cargo before the judge at Puebla Viejo. The supercargo, consignee, and captain, thinking it would be best for the interest of the owners, agreed that the vessel and cargo should be sold and the proceeds deposited in court, subject to a final sentence or decree. The decision of the cause, for some reason or other, was put off and protracted until in the end the judge, having been accused of treason, made his escape, taking with him, as is alleged, all the money deposited and all the records of the case. Can the party claim against the Government of Mexico under these circumstances? * * *

“It not only does not appear that the Mexican Government had the slightest agency in causing or suffering the wrong complained of to be done to the claimant, but on the contrary it appears that all knowledge of the wrong was sedulously kept by the agents of the parties interested from the knowledge of that government. [The commissioners here proceed to show that an agent of the claimants, after conference with the United States consul, decided not to bring the matter to the notice of the Mexican Government lest the proceeds of the sale of the vessel and cargo should be ordered to be paid into the national treasury, but to make ‘the best arrangements they could with the judge before whom the case was brought;’ that a report of this transaction was made to the owners and for aught that appeared approved by them; that no step was taken by the claimant in the matter till 1844, when a search was made for the records of the trial at Puebla Viejo; that this search resulted in nothing save the finding an entry on the custom-house register which, besides showing

the arrival of the vessel, the entry of her cargo, the sale of a part by permission, and the exportation of the remainder, stated that after the vessel had cleared 'fraud was discovered and the vessel and cargo were confiscated.']

"Thus it appears that a certain claim arising upon an alleged gross and illegal act was kept entirely out of the view of the Mexican Government by the claimant, and no notice of it brought to the knowledge of his own government for upwards of twenty-two years.

"Upon what grounds can Mexico be held responsible for this fraud or misconduct on the part of one of her judges? It seems to us that if liability for all acts of its judicial officers should attach to the nation, it can only be on the ground that the government receives the benefit of or sanctions such acts. In the case before us neither of these probabilities arise. Before judgment no part of the money accruing from the sale of claimant's property can be presumed to have gone into the national treasury, and since, by consent of the claimant, the Government of Mexico remained unadvised of the act of the judge, no presumption can properly arise that the government sanctioned his act.

"The charge of fraud against the vessel, judging from the statements of the agents of the claimant, was not wholly without foundation."

Opinion of Messrs. Evans, Smith, and Paine, commissioners, March 21, 1851, under the act of Congress of March 3, 1849.

William S. Parrott, a citizen of the United States, who resided for several years in the City of Mexico as a merchant, presented a claim to the mixed commission under the convention between the United States and Mexico of April 11, 1839, for losses growing out of litigation in the Mexican courts. Soon after his claim was filed, he furnished to the board a list of documents which contained, as he alleged, important evidence to prove his claim, and which, as he further alleged, were in the possession and under the control of the Mexican Government, together with a request that a requisition for the documents should be made on that government in conformity with the provisions of the fourth article of the convention. The requisition was made, but in answer to it less than half of the documents specified were transmitted to the board. The consideration of the claim was postponed until a short time before the close of the commission, but as the documents were not

received, it was finally taken up for discussion, when the Mexican commissioners rejected all the items except one for a forced loan of \$1,000, and proposed to submit the case to the umpire. The American members refused so to submit the case, for the reason that the failure of the Mexican Government to furnish the requisite evidence left the case in such a condition that it could not be disposed of upon its merits.

The claim was afterward presented to the commissioners under the act of Congress of March 3, 1849, with some additional evidence which had been taken. So far as it was based upon the action of the judicial tribunals of Mexico the commissioners observed that it grew out of a series of suits in relation to two distinct transactions. Three suits were instituted by Parrott to recover the value of a lot of tobacco and paper which had been deposited with him as security for a loan of \$20,000, but which was forcibly taken from his possession by creditors of the depositors who set up a prior lien upon it. There was an entire absence of testimony, however, as to the final disposition of these suits. The claimant left Mexico in 1839, and apparently had not been there since. It also appeared by the correspondence of the United States consul at the City of Mexico with his government that before the claimant left Mexico he made an assignment to his creditors in that country which embraced not only his property, but all his credits and claims, except such claims as he might have against the Government of Mexico. The board therefore decided that no valid claim was shown for anything connected with the suits for the tobacco and paper.

The claimant held a large landed estate in Coahuila, called the Hornos estate, which was extensive and valuable, and upon which he had a large amount of personal property. In 1837 proceedings were instituted before a Mexican judge by certain citizens of the country, claiming to be creditors of the claimant, with a view to procure the sequestration of his property. These proceedings were followed by others of a similar character, which finally resulted in depriving him of all his property on the estate. The United States consul then at the City of Mexico deposed that the processes granted against the property were "in direct violation of the laws of Mexico, without any citation, notification, or conciliation, all of which are required by those laws and the practice of the Mexican courts as essential preliminaries." The American members of the

mixed commission, in a report to the Department of State in relation to this claim, said:

"The abuse of judicial functions and the perversions of the laws have been such, as the undersigned believe, in relation to proceedings in which the claimant was interested, as to have produced great wrong and a denial of justice, for which upon the principles of justice and by the operation of the treaty between the United States and the Republic of Mexico he is entitled, in case his allegations are proved, to be indemnified by the Mexican Government for his losses consequent thereon."

The entire history, said the commissioners under the act of 1849, of the proceedings instituted against the claimant's property, so far as it could be ascertained from the evidence before them, indicated a disposition to effect his ruin under color of legal proceedings. During their pendency, repeated applications were made to the supreme government of Mexico by the claimant, and also by the United States consul at the City of Mexico in his behalf, for the protection of the laws and the fulfillment of its treaty obligations. The principal difficulty in deciding upon the claim arose from the deficiency of evidence. Although there was a large mass of testimony on file, the various steps taken in the several proceedings were not, said the commissioners, sufficiently proved to enable them to judge to what extent the laws were disregarded and the claimant's rights violated. It was evident, however, that this deficiency in the testimony was owing to no fault on the part of the claimant. But enough was shown by the deposition of Mr. Jones, taken in connection with the consular correspondence and the records on file, to prove that the rights to which the claimant was entitled as an American citizen under the treaty of 1831 were grossly violated; that the government, although frequently notified of the violation of his rights, refused to interfere for his protection; that the government admitted its responsibility for losses resulting from these causes; and that the claimant did sustain very serious losses. "These facts, we think," said the commissioners, "constitute a valid claim for indemnity." They therefore decided that for the losses sustained by the claimant in consequence of the irregular and illegal proceedings against the Hornos estate, his claim was valid.

They also allowed the claim of \$1,000 for the forced loan of 1836.

“With regard to the case of the ‘Heirs of Donoughho’s Case. *Cyrus M. Donoughho v. Mexico*,’ No. 703, the umpire has carefully perused the voluminous papers connected with this case, and with Nos. 729, 730, and 731, all of which are founded upon the same occurrences. The circumstances seem to be as follows: An American mining company, incorporated at San Francisco, purchased the mines of Rosario and Carmen, in the mining district of Candelero, in Mexico, and sent there agents and employees for the purpose of working those mines. These persons established themselves in that district, and most of them seem to have lived together in the principal house belonging to the establishment. The superintendent was Alexander H. Dixon, and amongst others employed there were John Hoffman, George Buxton, James Collins, and Cyrus M. Donoughho. Antonio Gutierrez, a Mexican, who had been employed as a carpenter of the company, had a wife named Marina Orojeo, of whom he was extremely jealous and whom he treated with great cruelty. On the 16th of July 1864 the wife fled to the home of the mining company and put herself under the protection of Mrs. Hoffman, who was also a Mexican. Gutierrez, who was jealous of Mr. Dixon, appealed to Don José Maria Salazar, an inferior judge of Candelero, requesting him to order that his wife should be delivered up to him, and threatening that if he did not do so he would, with the assistance of friends, take her himself by force from the home. Salazar sent a written order both to Marina Orojeo and to Mrs. Hoffman that they should immediately present themselves to him. It appears that the communication arrived at the house at about half-past eight in the evening, when it was already dark. Mrs. Hoffman answered in writing, and pointed out the danger and inconvenience of going at that late hour to the judge’s home, which was distant about two miles over a rugged and mountainous road. Salazar immediately proceeded to collect a number of men, with a view to their going to the company’s house for the purpose of taking Gutierrez’s wife by force. Before these men, however, were ready, a friend, Don Maximo Arriola, proceeded to the home, pointed out to Dixon and Hoffman the preparations which were being made, and urged that the woman should be given up. Arriola did not, however, persuade them to put the woman out of the home. Shortly after he left it he met Salazar with the force which he had raised,

and advised him to write another order to Hoffman. His companions, however, did not allow him to do so, but insisted upon going on. Still, Salazar preceded them and had an interview with Dixon, Hoffman, and Marina. No agreement, however, was come to, and Salazar returned to what he called his *posse comitatus* and, having placed them under the command of one Fermimo Alarid, desired them to proceed to the home and take the woman out by force. They did so and a conflict ensued, in which Dixon and Buxton were wounded and Donoughho was killed. Salazar himself was not present during the conflict, but kept at some distance and took no part in it.

"Several of the Americans were then imprisoned and kept separate from each other, on the charge that they had resisted the authorities, and were the authors of the disaster which had been the result of the above-mentioned conflict. Their trial was continued for several months, but was never actually concluded. The umpire is of opinion that there is no proof whatever that Dixon had illicit relations with the woman Marina Orojea, as was charged; he considers that it was natural that in consequence of the treatment she suffered from her husband she should have left him, and that no fault can be found with Dixon or Hoffman because she was allowed the protection of Mrs. Hoffman and of the house in which she lived. When an order came from Salazar that she should at once proceed to his house, it being then a late hour in the evening, it is not surprising that Hoffman should have remonstrated against the order. The letter in which he did so is not produced, although it is almost the only documentary evidence which Salazar might have exhibited to prove Hoffman's alleged refusal to deliver up the woman. But there does not appear to have been any such refusal, but only a representation as to the difficulty of her going at that hour to Salazar's house. Neither Dixon nor Hoffman seems to have refused to let her go if she chose to do so; but Gutierrez's desire, as well as that of Salazar subsequently, seems to have been that they should turn her out of the house, which they declined to do, although they made no objection to her being taken by either Arriola or Salazar.

"The composition and the conduct of the so-called *posse* seems to the umpire to have been most unjustifiable, and that Salazar should not have accompanied them was unpardonable. It is not surprising that the Americans, knowing beforehand

the class of persons who composed the *posse*, should have taken up the few arms they had with them. The attack made upon the house was not the orderly proceeding of authorities, but the riotous behavior of a mob, and after a careful examination of the voluminous but extremely contradictory evidence of the affair, the umpire is of opinion that the disastrous consequences of that night were entirely due to the improper conduct of the authorities on the occasion. Looking at the way in which the Americans were treated during the so-called trial which subsequently took place, and at the partiality shown toward Salazar and Alarid, while Dixon and his companions were treated with the greatest rigor and severity, it can not be supposed that the claimants in the above-mentioned claim would have been able to obtain justice in any action for damages which they might have instituted against Salazar. The murder of Donoughho was, in the opinion of the umpire, an injury done to citizens of the United States by authorities of the Mexican Republic as contemplated by the convention of July 4, 1868, for which injury the Mexican Government is responsible. The umpire therefore awards that there be paid by the Mexican Government on account of the above-mentioned claim the sum of \$12,000, Mexican gold, with an annual interest of 6 per cent from July 17, 1864, to the date of the final award."

Thornton, umpire, April 1, 1876, *Heirs of Cyrus W. Donoughho v. Mexico*, No. 703, convention of July 4, 1868, MS. Op. VI. 399.

In the case of *Alexander H. Dixon v. Mexico*, No. 730, MS. Op. VI. 408, growing out of the same affair, Sir Edward Thornton awarded the claimant \$10,000 in Mexican gold, without interest, for wounds inflicted on him, for his long imprisonment, and for expenses incurred during that time. In making this award Sir Edward Thornton said: "The claimant contributed; though perhaps in but a slight degree, to the catastrophe which took place on July 16, 1864; for it appears in the evidence that he made use of intemperate language toward Salazar, from which he certainly ought to have abstained toward an authority, and there can be little doubt that Salazar was irritated by his language. This fact must be taken into consideration in assessing the damages. It is clear that the claimant incurred some expenses, but there is not sufficient proof of the amount of these expenses."

Sir Edward Thornton also made an award in favor of George Buxton. (*George Buxton v. Mexico*, No. 731, MS. Op. VI. 409.) He said: "The claimant in the case seems to have incurred no blame whatever in the affair of the 16th July 1864, but on the contrary had attempted to conciliate and pacify the assailants. It appears that it was almost immediately after this attempt that he received the wound which made him a cripple for life

and the consequences of which have permanently affected his health. The compensation ought therefore in this case to be higher in comparison, as the umpire thinks, than in that of Alexander H. Dixon. But there is no claim made for expenses, as in the case of Dixon. The umpire therefore awards that there be paid by the Mexican Government on account of the above-mentioned claim the sum of \$8,000 Mexican gold, with interest."

Rosario and Carmen Mining Company's Claim. A claim for damages growing out of the same transaction as in the preceding case was made by the mining company.¹ This claim Sir Edward Thornton dismissed on the following grounds:

"The umpire has already said in a previous case, No. 703, that he considered that the conduct of Alcalde Salazar, and the mode which he adopted to take the woman, Marina Orojeo, by force from the company's establishment, were unjustifiable and, as he believes, contrary to law. They were distinguished by an indiscretion and a violence which were unworthy of the name of justice, and quite unnecessary. It was certainly indiscreet, to say the least of it, on the part of Salazar to choose the night for such an operation, to select a man like Geronimo Alarid, a known enemy of Dixon, to command the force, and not to be present himself to restrain the violence of such an excited body of men, and prevent the commission of murder upon a man who was endeavoring to escape and had fallen in running away.

"But the violence was not directed against the company. Its object was to get possession of the woman Marina Orojeo, and to force the Americans to give her up; and if malice was partly the motive of the attack, that malice was directed against Dixon, and almost against him alone. There does not seem to have been any general antipathy to the company on the part of the authorities or the people. Nor does the umpire consider that Dixon himself was prevented from so far providing for the interests of the company by naming someone to look after the property and to superintend the working of the mine, until the directors at San Francisco should have been apprised of what had taken place, and should have sent other employees to replace those who had been imprisoned. There is no evidence to show that these persons would have been interfered with either as regarded the protection of the property or the continuance of the working of the mines. It is said that the colored man, Potter, who was at first put in charge of the establishment, was murdered; but there is no sufficient proof of the fact, and still less that the murder was committed by or at least at the instigation of the authorities. It is further stated that another person was put in charge of the establishment, but was frightened away from it. There is,

¹ *Rosario and Carmen Mining Company v. Mexico*, No. 729, MS. Op. VI. 405.

however, no sufficient proof of this assertion, nor of the robbery of ore, nor the destruction of the machinery. In the mean time the directors at San Francisco seem to have taken no measures whatever for the safety of the property or the continuance of the working of the mines. The company can therefore hardly complain of the robbery or destruction of property which they so utterly neglected.

"With regard to the destruction of the machinery, the umpire would refer to the letter of Judge Apolonio Saing of November 27, 1871, to the United States consul at Mazatlan (Paper Z), in which he states, amongst other things, that the witnesses had testified that the company had imported and placed at the mines a great deal of iron machinery, 'all of which is still to be seen, though abandoned and deteriorated.' (The translator has rendered the Spanish 'en deterioro' by the English word 'destroyed.' But deterioration is not destruction. The former may arise from neglect, as in this case, whilst the latter implies violence.) These witnesses testified in 1871, and it is clear that if, after seven years' abandonment and neglect, the machinery was still there, though deteriorated, it might with common care have been preserved and used. The umpire is of opinion that the Mexican Government can not be held responsible for the losses arising out of this neglect and abandonment of the mines above mentioned, and therefore awards that the claim be dismissed."

"The memorialist sets forth that he and
Benaley's Cases. one Edward Kelly, both citizens of the United States, were proprietors and equal owners of a circus with which they were traveling in the Republic of Mexico in 1844; that on the 18th of July of that year they were at the village of Dolores or Hidalgo, in the department of Guanajuato, having made arrangements for a performance at San Miguel de Allende on the following Sunday; that when about to depart from that place the first alcalde of the village, by force of arms and against their urgent remonstrances, took from them nine mules and two servants, and detained them a considerable time; that in consequence of this seizure of their property they were detained four days, at an expense of about \$600, and their proposed performance at San Miguel was frustrated. The memorialist claims for the damages sustained by him in consequence of this, as he alleges, illegal violation of his rights.

"There is no allegation that the acts complained of were perpetrated by any officer or persons in the employment or under the control of the Mexican Government, or for whose

proceedings that government was or ought to be responsible. The injury sustained by the memorialist, as set forth by him, was inflicted by a municipal officer of the village of Dolores, against whom redress might have been had before the judicial tribunals of the country. In the opinion of the board the memorial does not set forth a valid claim against the Republic of Mexico; and it is accordingly rejected."

Case of John Bensley: Opinion of Messrs. Evans, Smith, and Paine, commissioners, February 20, 1850, under the act of Congress of March 3, 1849.

Bensley presented another claim in which he alleged that he was a half-owner of the North American Circus Company, which was performing in Mexico in 1842, and that on the 7th of March in that year a boy attached to the company, and indentured to him as an apprentice, was seized and taken by force in the department of Gunaxuato, by order of Don José de la Rivera, constitutional alcalde of the place; that the boy was restored on the next day, but was again seized on the 17th of March at Silas, in the same department, by the prefect of that place, by virtue of an *exhorto* from the authorities of Y—, and was taken entirely from the company. The boy was a "beautiful and skillful rider, and in consequence of his seizure and the loss of his services, the company sustained great loss and injury." The commissioners under the act of Congress of March 3, 1849, to whom the claim was preferred, said:

"The board is unable to see anything in the facts thus stated * * * for which the Government of Mexico could be justly held responsible. It does not appear upon what ground the seizure of the boy was made nor whether it was made in conformity with any law of Mexico. But, whether justifiable or otherwise, the acts complained of were committed by a municipal officer of the department for whose conduct the government of Mexico can not be held responsible unless done by its authority. It would be an extraordinary position to assume under the law of nations that a government is liable to afford an indemnity for every injury which may result from the illegal or irregular acts of any of its subordinate municipal officers. For injuries thus committed the party must find his redress by a prosecution against the individual by whom the wrong was done, and while the tribunals of justice are kept open to afford this redress, an indemnity can not be demanded from the government. For all that appears in this case, the courts of Mexico were open to the claimant and to them he should have appealed."

Governor of a State: Bensley presented to the same commissioners a claim growing out of the seizure of another boy, indentured to him as an apprentice, and also a performer in the circus, at San Luis Potosi in 1844. It was alleged that when the circus was about to leave that city, the governor of the State sent a request to Bensley that he would permit the boy to visit him, as he wished to see him before he left the city. The boy, with the consent of Bensley, went to the governor's house, when he was "detained by force and not allowed to return." The commissioners said:

"The seizure of this boy was the subject of correspondence between Mr. Shannon, minister of the United States in Mexico, and the minister of foreign relations of that government in 1844. Mr. Shannon demanded the interposition of the Mexican Government in behalf of the claimant. This was refused upon the ground alleged by the minister of foreign relations that the Mexican Government was not responsible for the acts of the governor of San Luis Potosi, and that the application for redress should be made to the judicial tribunals of the country, which were open to him. The detention of the boy appears to have been a wanton trespass committed by the governor, under no color of official proceedings, and without any connection with his official duties. For the damages resulting from this unauthorized act he was individually responsible to the claimant, and it does not appear that ample redress might not have been obtained by a resort to the judicial tribunals of the country. Had the courts of Mexico been closed to the claimant and justice denied him, that might have constituted a ground for a claim of indemnity against the Government of Mexico. No such case, however, is presented. No appeal was made by the claimant to the courts and no denial of justice has been proved. Under these circumstances the board can not regard the Government of Mexico as liable to a claim for indemnity on account of the wanton or malicious trespass of the person holding the office of governor of one of the States constituting the confederacy. It might with the same propriety be claimed that the government was liable for every trespass committed by a private citizen."

Jones's Case. John C. Jones, an American trader in the Hawaiian Islands, as well as United States consul there, in July 1833 purchased the American brig *Loriot*, and sent her with an assorted cargo of merchandize to the coast of California. She arrived in September at Monterey, where her papers were examined by the custom-house officers and approved, and after payment of duties upon her cargo she proceeded to San Francisco. On her arrival at that port permission was given by the proper

authorities to dispose of her cargo, and the sale of it was immediately begun. Several days afterward, when a portion of the cargo had been disposed of, the captain of the port with an armed force seized the vessel and cargo and imprisoned Alpheus B. Thompson, the supercargo. The cargo, together with the sails and stores of the vessel, was taken on shore and placed in the custody of Mexican officers, and the whole was detained for a period of forty days, when they were released without a trial, and the master was permitted to reship the cargo and leave the port. The cargo and stores suffered considerable loss from thefts and rough handling during the time they were under the control of the Mexican officers, and the sails and rigging of the vessel were injured. The master was compelled to pay the charges of unloading and reshipping the cargo. The seizure of the vessel appeared to have been made by the order of General José Trigueroa, governor of California, on a charge that Thompson, the supercargo, had been at some previous time illegally engaged in catching otters upon the coast. This charge was shown to be false, but it was held that that could, if true, have furnished "no justification for the act. Its falsity only rendered the wrong more apparent." The claims preferred by Jones were held to be valid claims against the Republic of Mexico.

Decision of Messrs. Evans, Smith, and Paine, commissioners, January 20, 1851, under the act of Congress of March 3, 1849. An award was also made in favor of Alpheus B. Thompson "for his seizure and unjust imprisonment."

Collector of Customs: "In the case of Sheldon Lewis, No. 287, the
 Lewis's Case. claimant alleged that in March 1863 he was the owner of the bark *Matilda A. Lewis*, on which vessel was laden in that month a quantity of fowls destined for Havana; that the officers of the United States refused to permit the vessel to leave with the fowls, and took possession of them; that subsequently the consignee of the fowls in Havana brought suit against the vessel in the United States district court for the southern district of New York for the value of the fowls, and recovered judgment for \$1,100, for which amount, with the additional sum of \$600 costs expended by him, the claimant claimed an award.

"It appeared from the evidence that by order of the Secretary of the Treasury of 19th May 1863 officers of the custom-houses of the United States were directed to refuse clearances for the exportation of 'horses, mules, and live stock,' and to

cause the detention of all animals attempted to be so exported. That the fowls in question had been shipped by one Glas upon the vessel for Havana; that the customs officers in New York construed the order of the Secretary of the Treasury as covering fowls, refused to grant clearance for them, and ordered them to be relanded. The fowls were relanded and delivered to the shipper, and the charterer of the vessel having produced to Glas one of the triplicate bills of lading, Glas signed a memorandum on same, annulling the bill of lading. Meantime Glas had procured from the agent of the consignees at New York an advance of \$700 on one of the triplicate bills of lading for the fowls. This fact was not disclosed to the charterer when the bill of lading was canceled by Glas. The consignee subsequently brought suit against the vessel and recovered on the ground of his advance made to Glas upon the bill of lading, and that the surrender of the fowls by the charterer to Glas, and the canceling of the bill of lading by Glas did not prejudice his rights, and that the order prohibiting the exportation of live stock was unlawful, and that if lawful it was not intended to include fowls. (See report of the case *Desvernine v. The Bark Matilda A. Lewis*, 5 Blatchford's C. C. R. 520 to 523.) In a like case, subsequently brought to the notice of the Secretary of the Treasury, and involving the construction of the order of 19th May 1863, the Secretary held that the order did not cover poultry.

"On the part of the United States it was contended that the construction placed by the custom-house officers upon the order of the Secretary of the Treasury was evidently an unjust and forced construction; that if application had been made at once to the Secretary of the Treasury the decision of the customs officers at New York would have been overruled, and that the United States were not responsible for the error of judgment of such subordinate officers till proper resort was had to some responsible and chief officer of the government, whose decision upon the question might bind the government. Also, that if the United States were liable for the wrongful acts of the customs officers, the claimant was in no position to maintain this claim; that the charterer of his vessel had wrongfully allowed the fowls to be returned to Glas, the shipper, on his cancellation of one of the bills of lading, without calling in the others, upon one of which the advance of the consignees had already been made; that the owner of the vessel had there-

fore been made liable solely by the default of his charterer, by whose acts certainly the United States could not be prejudiced.

"The commission made an award in favor of the claimant for \$1,849; Mr. Commissioner Frazer dissenting."

Am. and British Claims Commission, treaty of May 8, 1871, Art. XII., Hale's Report, 162.

City Guards: Wilson's Case. Joseph N. Wilson, a citizen of the United States, alleged that on April 17, 1845, while

he was on his way from Puebla, Mexico, to the United States, he arrived at the city of Vera Cruz, when one of the guards at the gate, besides demanding his passport, which he exhibited, also "demanded to see his money;" that in compliance with this demand he handed his money to the guard, who carried it into a room and counted it and then informed him that if he would return the next morning he would let him know whether he could get it back; that he returned the next morning to get the money, but was told that it had been divided amongst the guards and spent and could not be returned; and that he then sought the intervention of the American consul, who was, however, unable to procure the return of the money. On these facts the following decision was rendered:

"The board can not perceive on what ground this claim can be placed so as to assume the character of a wrong or injury done to the claimant by the Government of Mexico. The claimant voluntarily, or at least without compulsion, gave his money to one of the guards who had a curiosity to see how much money the claimant had, and having got hold of it he divided it among his comrades. This was but a cheat practiced on the claimant, for which the public is no more responsible than if the cheat had been practiced in a game at cards, or in any other manner. The only redress of the claimant was through the courts of Mexico, and having failed to avail himself of this mode of redress, he is left without a remedy."

Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 23, 1850, act of Congress of March 3, 1849.

Pilots: Case of the "Horatio." October 5, 1851, the American brig *Horatio*, laden with a cargo for Philadelphia, obtained a clearance at the custom-house at Maracaibo and dropped down the river to the fort of San Carlos, where it was necessary to discharge the river pilot and take on board what was called a bar pilot, as well as to get the vessel's sea-pass countersigned by the commandant of the fort. For these

purposes the mate was sent ashore. He obtained the counter-signature of the sea pass, but returned without the bar pilot, owing to the fact that he had had some kind of a personal altercation with him. Next day the "head pilot" came out to the brig in company with another pilot, but refused to take her to sea unless the mate should be put ashore, presumably on account of the altercation of the previous day. The master replied that he had no right to put the mate ashore, and that if the authorities wanted him they should come and take him. He also declared to the head pilot that if he refused to take the vessel to sea he would make his own soundings and take her to sea without a pilot. When the head pilot left, the pilot who accompanied him remained on board, and the next day, as the master stated, "made an ineffectual but not a real and earnest effort to take the vessel over the bar." Day after day, so the master alleged, a pilot came on board and repeated this farce, other vessels in the mean time going to sea, till October 15, when, no pilot at all having appeared for four days, he took soundings with a view to sail on the 16th without a pilot. On that day, however, a pilot came on board, and, as usual, headed the vessel for the bar, but soon hove to in obedience to a signal from the shore. The vessel was then arrested under a Spanish ordinance of 1793, which by a resolution of May 3, 1843, was declared to be in force, and by which soundings "within the internal chaunels of any arsenal ports or others connected with the defenses of the place," except by special permission, were prohibited on penalty that the vessel should be embargoed, and that those on board should be "prosecuted by the captain of the port, if nationals, or by the governor, if foreigners, according to the malice of the fact." The master of the *Horatio*, after the seizure of the brig, returned in another vessel to Maracaibo, placed himself under the protection of the United States consul, and entered a protest. It seems that the governor afterward offered to release the vessel on the master's giving security to pay the penalty which might be imposed for the breach of the soundings law. The master refused to make any arrangement in which the responsibility of Venezuela for the seizure was not recognized. On November 19, however, the governor, being satisfied that the offense of the master was not malicious, and that he had been sufficiently punished by the detention of the brig, ordered her to be released. But it was then discovered that she was unsea-

worthy, owing to the ravages of worms in the port, and a survey having been held she was sold for \$1,461.15, her cargo having been transferred to another vessel. On these facts the following claim was made:

Claimed as a total loss	\$10,000.00
Freight charges by <i>Irina</i>	2,628.71
Expenses of transferring freight, crew's wages, etc.	3,421.32
	<hr/>
	16,050.03
Credit by cash, sale of brig	1,461.15
	<hr/>
	14,588.88
Interest from the 1st of November 1851 to 1st of September 1890	33,992.09
	<hr/>
Total	48,580.97

Opinion. The commission, Mr. Findlay delivering the opinion, rendered the following decision:

"Although not separated and specifically counted on in the petition, there would seem to be two distinct grounds for this claim, and this twofold character is referred to in the brief filed by the counsel for the United States. These grounds in the order of time are, first, that Venezuela is responsible for the failure of her pilots to take the brig to sea, and secondly, that she is responsible for the arrest and detention of the vessel, for the violation of the soundings law, and for all the consequential damage which ensued, because the subsequent release of the vessel carries with it an admission that there was no probable cause for her seizure in the first instance.

"As to the first ground of complaint, accepting the captain's version of the story, it is obvious that the pilots, out of revenge for the conduct of the mate toward their companion, had determined to harass the master of the ship for the part they claimed he took in shielding his officer by refusing to send him ashore, and it is equally obvious that Captain Morrill had made up his mind on the very day that the controversy came to a head to make himself independent of the pilots and, if necessary, to proceed to sea without their aid. * * * Now, let us suppose, and there is certainly, on the captain's statement, a very violent presumption in favor of the hypothesis, that the head pilot, having heard the threat of the captain as to the soundings, and being resolved on revenge, saw his opportunity in this very threat, and determined to make the most of it. * * * The captain, ignorant of the law, falls into the snare, makes his soundings, is reported at once, and his vessel is seized. Upon the assumption that this is what occurred, would the captain have any claim against Venezuela, assuming also that she is fully responsible for the action of her pilots, as a body of officials licensed by the government? It seems to us

that before such responsibility could be justly established, the captain ought to show that as soon as he discovered that the pilots were playing false with him he lodged a complaint with the proper authority and insisted upon his right to be taken to sea by the officers appointed for that purpose. * * *

It must be borne in mind that the captain or his representatives are now seeking to hold not the *pilots* but *Venezuela* responsible for this dereliction of duty. It is possible on the case stated that an action might lie against the association of pilots, if one existed, such as we are familiar with in some of the States; but the relief sought here is against *Venezuela*, and on the plainest principles of justice we think that the authorities of that country should have been appealed to, for the purpose of compelling the pilots to do their duty, as a necessary condition precedent to any action against the government.

* * * There is not the slightest evidence in the record that we can discover which shows any malice or bad feeling toward the captain by the authorities of *Venezuela*. If some subordinate agents of hers, for personal grievances of their own, conceived a dislike for him, and determined to convert a breach of their official duty toward the government into the means of punishing him and gratifying their private malice, there is no principle we can conceive of on which the government could be held responsible for a wrong done to it as well as to him, unless in some way it is connected with that wrong by authorization or adoption.

"On the whole, then, we conclude on this first ground of claim that the claimants, on their own statement, have failed to make out a case against *Venezuela*.

"As to the second head of liability, it was contended that the old Spanish ordinance or port regulation concerning soundings was not in force in *Venezuela*; or, if a part of her code, had become obsolete by reason of long disuse. Again, it was claimed that a provision in the ordinance, requiring that it should be posted in conspicuous places, so as to give notice to seafaring men, had not been complied with, and as evidence of this, the testimony of masters of vessels was adduced, showing, in the instance of one of them, that he had made over a hundred voyages to *Maracaibo*, and had never heard of the law; but, on the contrary, that soundings such as Captain *Morrill* made were by no means infrequent, and had been suffered to pass with impunity. In addition, the captain alleged that as matter of fact, the field of his operations was not within the prohibited bounds, but was confined to an exterior channel or entrance where such soundings could innocently be made. Whether the captain knew the law or not, can afford him no defense for its violation if such a law existed. Neither foreigner nor native can plead ignorance of the law as an excuse for its violation. This is a fundamental principle absolutely essential for the maintenance of social order, which tolerates no exception, and from the consequences of which there is no

escape. It is to be observed, however, that whatever may have been the captain's information as to this specific ordinance, he was well aware that the usual and customary mode of taking vessels to sea was to secure the services of a pilot, and that he was making a departure from this well-established rule when he determined to proceed without one. On the very day the order was received for the detention of his vessel, the 16th of October, she was in charge of a pilot, who was then proceeding with her across the bar, and there is nothing in the record to show that he would not have accomplished the passage if he had not been stopped by the order, except the previous conduct of the pilots in refusing or failing to do their duty. When, in response to the threat made by the head pilot, on the 6th, the captain rejoined with a counter threat that if he was denied the customary pilotage he would discharge that duty for himself, there is evidence, we think, in this declaration of a settled purpose, under certain conditions, to accomplish his object regardless of the law.

"The fact, conceding that it is a fact, that the law had not been published as required, would afford good ground for the exercise of executive clemency in saving him from the infliction of the penalty, but can afford no excuse for the breach of the law itself. Whether there was such a law in force in Venezuela at the time appears to us sufficiently clear from the record. There is a translation of the ordinance, which is declared by the executive authorities to have been in force, and also a translation of the same ordinance furnished us by the learned counsel for the United States, besides the translation appended to this opinion. There is no evidence before us that such was not the law, and it could hardly be expected that we should find against the existence of a statute or municipal regulation of another country by our own unaided researches, in the teeth of an express avowal by the executive of that country that such a regulation existed, which was partially enforced in this very case, and the enforcement of which has given rise to this controversy. As to the fact alleged by the captain—that the examination made by him was not within the prohibited bounds—we can only say that we do not consider that fact proved, and that besides it appears, from this ordinance, that while soundings were permissible on outside bars, or bars of entrance—and the public anchoring ground for merchant vessels (which may be accepted as the *locus in quo* of the captain's operations)—this could only be done on the terms before quoted; that is, by the permit of the captain of the port, prescribing the boundaries of the examination.

"There is no pretense that the captain complied with this regulation, his defense being that he was ignorant of the ordinance altogether.

"For these reasons we do not think that the claimants can lawfully enforce their claim for damages against Venezuela on this second head of liability. To hold otherwise would be, in

effect, to assert as a principle of international law that the citizens of one country injuriously affected by the enforcement of the municipal regulations of another, had good cause for reclamation in the absence of any proof whatever that the offending country had wantonly or maliciously abused its power, a doctrine at war with all authority and practice, and the very statement of which carries with it its own refutation. It was insisted, however, that Venezuela was concluded, on this question of good faith, or probable cause for arresting and detaining the vessel, and in proof of this proposition it was seriously urged that her subsequent release without conditions was a conclusive admission of the illegality of the seizure in the first instance. To this proposition we can not assent, as it would be a conversion of the clemency of the government into an instrument for its own punishment, and, if accepted as a precedent for the government of cases in the future, would compel the prosecution of every case of seizure for the technical violation of laws to a final decree, either for fine or confiscation, with all the costs and delays which such a litigation would involve to innocent claimants, as the only means by which the government could escape ultimate responsibility. * * *

"We feel constrained to make one or two observations more before concluding. The brig is claimed as a total loss, and the claim is made against Venezuela as the cause of this loss. The evidence very clearly shows, and, indeed, the admission in the case is, that the entire damage was caused by the sea worms. The arrest and detention of the vessel constitutes the *nexu*s or bond of connection between this injury and Venezuela, the argument being that if the vessel had not been unjustifiably detained the worms could not have committed their depredations. But is it not very clear that the brig came into the harbor in a defenseless condition, and was a fit victim for the attack of these pests? Her copper was chafed, and in some places broken, and the sheathing was so imperfect that her hull was perforated and honeycombed by the worms. She arrived out on the 27th of September and sailed on the 5th of October following. Here were, say, seven or eight days for the worms to operate in before there was any detention of the vessel by anyone. The pilots trifled with her for eleven days more, making nineteen days in all, before she was seized by the commandant on the 16th of October. She was finally released on the 19th of November. By what rule of apportionment could we ascertain the amount of damage done by the worms during these two periods of time? * * * At the same time it may be observed that we might not be very nice or critical in inquiring into this point if there was any evidence before us to show that the vessel had been arrested wantonly or maliciously and without justifiable cause. That is the turning point in the case. * * *

"There is another observation to be made which concerns the manner in which this claim has been presented. It appears that Captain Morrill, on his return from Maracaibo in the win-

ter of 1852, drew up a memorial setting forth the facts of his case, accompanied by his affidavit and the deposition of certain witnesses, and that these papers were forwarded to Washington, presumably to the State Department, and were afterward lost. In anticipation of an accident of this kind copies were carefully made and retained, and it is these copies, together with the correspondence of the United States consul, and with what appear to be certain originals which ought to have gone with the Washington package, which were submitted to the commission at Caracas, and constitute the evidence now submitted to us, on which our award is asked. We have looked through the correspondence of the State Department as far as the index would enable us, and we can not discover that this claim was ever presented by this Department to the government at Caracas, or, indeed, any mention of it, although it appears that reclamation was made on account of another vessel called the *Horatio* about a year before. While, therefore, we do not forget the language of the treaty, which, in the second article, provides for the consideration of claims presented *either* to the Government of the United States *or its legation at Caracas*, and might consider this as one falling within the terms of the latter provision, yet still we can not escape the force of the circumstance that, as far as the evidence before us is concerned, it does not appear that the United States ever adopted the complaint of Captain Morrill, although it does seem that he presented his complaint in due form to that government. The original papers were lost after being put in the mail for Washington, but whether they were lost in the course of transmission or after they reached their destination does not appear. * * * But no effort appears to have been made to secure the good offices of the government at Washington, except the abortive attempt to send on the papers in 1852, and after this failed nothing more is heard of the claim until the alleged copies, some fifteen or sixteen years afterward, along with the original protest, survey, etc., are submitted to the commission at Caracas. This failure on the part of the claimant to prosecute his claim with diligence, and the apparent refusal of his government to undertake the prosecution of it for him when the matter was recent, assuming that the papers passed under its cognizance, are both circumstances which can not be ignored in the consideration of the case as it comes before us, and on the whole, without allowing ourselves to be prejudiced by the adverse action of the former commission, we will sign an order rejecting the claim and dismissing the petition."

6. MOBS.

"The claimant and his firm, at some period prior to the 2nd of December 1828, sold and delivered through the firm of Bourdel and Lagueruene to certain retail merchants (citizens of Mexico) a quantity of merchandise. Subsequent to such sale and

delivery, to wit, on or about the 7th of December 1828 and during the revolution in Mexico called 'La Acordada,' when the revolutionary forces had carried the outer defenses of the capital, the rabble joined the soldiery who had defended the city, broke into the 'Parian,' and robbed and sacked the retail stores kept there. By this act of violence the merchants to whom the claimant's goods had been sold were ruined and such goods as the vendees had on hand were carried off by the mob. It is alleged by the memorialist that he and his firm had, by operation of the commercial law of Mexico, a specific lien upon the goods carried off, and that they were in the hands of the vendees security for the payment of the purchase money. It is proved that by the commercial law of Mexico the vendor is empowered to take back goods sold to vendee in the event of the vendee's failure to pay the purchase money. * * *

"The violence which the claimant says occasioned his loss was done, not by the authority or assent of the Mexican Government, but by a lawless mob, and were all other objections to the claimant's right removed it is difficult to conceive how the Mexican Government can be held liable for the consequences of the violence committed. Mobs and rioters are enemies of the public peace, and it is the duty of all peaceable citizens to assist in putting them down. It is the duty of a government to pass laws to punish individuals who commit acts of violence, but the government is not responsible for those acts. For personal injuries and injuries done to the property of an individual by a mob the laws are open for redress, and to such means of redress persons must look, and not to the government. It is not pretended that the government of Mexico refused redress through her laws.

"It is also to be observed that in the goods robbed the claimant had no property or right of property. The lien which the law created did not attach until the vendee should fail, and it is alleged that the destruction of the goods caused such failure. It therefore follows that when the vendor's lien might have attached there was nothing upon which it could operate. In no aspect in which the board has been able to view this case can they conclude that Mexico is in any way liable."

Memorial of *P. A. Laguerue*: Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 31, 1851, under the act of Congress of March 3, 1849.¹

¹ In the case of Nicolas Ricardi, a citizen of the United States, who kept a retail store in the same building and whose goods were destroyed on the same occasion and in the same manner as those above referred to, the

During the excitement created in San Francisco, California, by the news of the assassination of President Lincoln, a mob, on the day following the night of the assassination, attacked several newspaper establishments. Among these was the office of Etienne Derbec, a citizen of France, who edited and published a newspaper in French and in Spanish, the French edition being called *L'Echo du Pacifique* and the Spanish *El Echo del Pacifico*. The cause of the mob's hostility to Derbec was not clearly disclosed, but it seemed to be due to an impression that he had been unfriendly to the cause of the Union, or had been in favor of the occupation of Mexico by Maximilian, or had entertained on both subjects views contrary to the general sentiment in San Francisco. For the protection of Derbec and his property his office was taken possession of by United States troops, under the command of Major-General McDowell. They retained possession of the premises till May 4, 1865, when the place was restored to Derbec. The types were then in confusion, and the property had been injured and wasted in various ways. In his testimony before the commission Derbec stated that the mob made no entry into the premises, but that the injury to his property was caused by the neglect and misconduct of the United States officers and soldiers while they had possession.

It appeared from the papers before the commission that on March 27, 1868, the legislature of California enacted that whenever any real or personal property should be or should have been destroyed in consequence of a mob or riot, the city or county in which such property was situate should be liable to the owner in an action for damages; and it further appeared that Derbec brought suit under this act against the city of San Francisco. In this suit he claimed damages (1) for the destruction of his property, and (2) for the destruction of his industry,

commissioners, on April 15, 1851, made an award for their loss. In so deciding the commissioners seem to have proceeded on a special ground. This ground, which is the only one they expressed for their award, was: "There is some reason to suppose that Mexico admitted her responsibility to indemnify those who lost goods by the outrage before alluded to, though the evidence on this point is by no means conclusive. Under this uncertainty, however, it may be more in accordance with equity to allow the claimant the benefit of such doubt." In the case of Laguerenne this ground would not have availed, as the claimant had no property in the particular goods, which belonged to Mexican citizens.

measured by the value of his subscription list, and for loss of profits. The court refused to admit evidence as to the value of the subscription list, or as to the loss of profits, and instructed the jury that recovery must be limited to the value of the property destroyed. The jury rendered a verdict for \$7,500. In his bill of complaint, which was under oath, Derbec stated that the persons composing the mob "forced themselves into the premises and printing establishment of said plaintiff. * * * injured, scattered about, mixed up, and destroyed all the types, * * * and also injured and destroyed much of the printing materials."

In his memorial before the commission Derbec claimed only for "the loss consequent upon the destruction of his business as proprietor and publisher of the two newspapers, \$60,000." For the value of the property destroyed he made no claim, having received full compensation therefor by the verdict of the jury.

On these facts counsel for the United States contended that the government was not liable, and upon three grounds: (1) That it appeared from the testimony given by Derbec in the proceedings under the statute of California that the destruction of his property was by the mob; (2) that he had received compensation for the loss of property, and that his claim was of the class that had been disposed of judicially, and was therefore excluded from the jurisdiction of the commission by the second article of the convention; and (3) that the government of the United States, if liable for the value of the property destroyed, would not be liable for the good will of the business in which Derbec was engaged at the time of the destruction.

The claim was disallowed by the judgment of Baron de Arinos and Commissioner Aldis; and, as the reasons for the decision were not assigned, counsel for the French Government made an application to the commission "to state the grounds of the disallowance of the claim." This request was answered as follows:

"I. International commissions do not usually give the reasons for their decisions, except when the decision stands upon some principle of law which they think ought to be made known.

"Most of the cases submitted involve only questions of fact, in which the commissioners weigh the evidence, consider the circumstances, the credibility of witnesses, and so decide upon the claim.

"We reserve to ourselves in the most ample manner the right exercised by all international commissions of deciding for ourselves whether to give reasons or not for our decisions, and in the exercise of the right shall regard what is due to the governments, the claimants, and to the proper dispatch of the business of the commission.

"II. In this case Mr. Derbec says that he is charged with perjury, and wishes to know the grounds of our decision, so as to ascertain whether the decision sustains that accusation.

"We rejected his claim upon the ground that the acts were committed by a mob in a riot, and not by the authorities of the United States.

"In his suit against the city of San Francisco he swore that a mob entered his printing establishment and 'defaced, injured, scattered about, mixed up, and destroyed his types and much of the printing materials, and that in consequence of said malicious act of said mob his newspapers ceased to exist, and the valuable contract with Mr. Murphy for printing paper was lost to him.' (See pp. 164 and 165 of the record.)

"We thought the evidence and all the probabilities sustained and established the same facts.

"This was a question of fact, not of law; it depended upon the evidence, and, therefore, we deemed it unnecessary to give our reasons."

Etienne Derbec v. United States, No. 339, Boutwell's Report, commission under the convention between the United States and France of January 15, 1880.

7. DUTY OF PROTECTION.

James Johnson, a citizen of the United States, represented that on December 30, 1839, he was established in business in the Republic of Mexico, engaged in running a line of stages from the City of Mexico to the cities of Puebla and Toluca; that he "received a tolerably fair share of public patronage, until the revolution of 1831, headed and encouraged by Santa Anna and Paredes and others, against the President Bustamente, in consequence of which, and the danger of running stages through the country at that period, when rapine and plunder was the cry," he was compelled to "abandon his business;" that the revolution "lasted nearly thirty-seven days, when Bustamente was deposed and Santa Anna declared President," the effect of which was to cause him a loss of \$50 a day, or \$1,750. As the direct cause of the failure of his stage line, Johnson in his memorial alleged that General Santa Anna, being interested with another person in running a line of stages

on the same route, with a view to put down all competition in the business employed robbers and banditti to plunder the coaches and passengers of memorialist's line, so that they were repeatedly stopped and robbed, the harnesses cut, and various other injuries inflicted upon them. He alleged that it was believed and was a matter of common report that these bands of highwaymen "were in the pay of the Mexican Republic," and this seemed to be the ground on which his claim rested. The commissioners said:

"So grave a charge against the government of any country should be maintained by the most unquestionable proof. It should be alleged as a distinct fact and ground of reclamation and proved by evidence of the clearest character. The board find no sufficient ground for the allegation in this case. It is well known that during the frequent periods of civil commotion with which Mexico has been afflicted, violence, robbery, and crime of every description have fearfully abounded. At such times of turbulence and disorder the laws are powerless to protect individual rights, and property and life are at the disposal of the most profligate and abandoned. In many of the dispatches from the minister and consuls of the United States in Mexico this state of things is described; and the difficulty of transmitting letters through under the safe conduct of the government is stated. But it is nowhere suggested, so far as the board has the means of examining the public documents, that the Government of Mexico tolerated these scenes of disorder, much less that they set them on foot, or kept the scourges of their country in its pay. It is undoubtedly true that the memorialist sustained great losses by undertaking the business he was concerned in in Mexico; but they do not appear to have been occasioned by any act of the government, or for which the government was responsible."

Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 16, 1851, act of Congress of March 3, 1849.

"Another item of the demand in this case
Bowley's Case. is for \$6,950, alleged value of goods forcibly taken from the house and store of the claimant at San Juan del Sur by a band of marauders on the night of November 7, 1856. The troops of Costa Rica had that day arrived before the town, but occupied it only the next morning. They are not charged with that robbery, but are called to pay damages because had they entered the town immediately on the evening of their arrival and exercised a good police during the night that crime would not have been committed. As a matter of course, the police of a town

belongs to the local authorities, and they alone are responsible for neglect of that duty. A military occupant may claim to exercise the police, but no responsibility can be conceived to fall upon him before he makes such a claim and enters upon such a duty. General Cañas, who commanded the Costa-ricans, immediately upon entering that town gave orders to punish the authors of that crime and protect the person and property of citizens of the United States. It was all that could be reasonably expected of him."

Bertinatti, umpire, December 31, 1862, *George H. Bowley & Co. v. Costa Rica*, No. 8, convention between the United States and Costa Rica of July 2, 1860.

Injuries received in a private quarrel afford
Moliere's Case. no ground for a claim for damages against the government.

M. Bartholdi, umpire, case of *Pedro Moliere v. Spain*, No. 4; U. S. and Span. Com. October 25, 1875.

Claimant, a citizen of the United States,
Miller's Case. residing in El Paso, Texas, becoming alarmed for his safety by reason of adhering to the Government of the United States in the civil war then raging, removed to El Paso del Norte, Mexico. In the same year he was seized in the latter place by Confederate soldiers, under the leadership of the sheriff of El Paso County, Texas, and confined in a guardhouse on the American side of the river, where he was treated with great indignity. The evidence did not furnish any details of the seizure and deportation of the claimant from Mexico, but it was sought to make a claim on the Mexican Government for the injury suffered on her soil. The commissioners, Mr. Wadsworth delivering their opinion, rejected the claim for the following reasons:

"A citizen of the United States entering the territory of Mexico is bound to respect and obey the laws of that country, and so long as he does this, at least, he is entitled to protection to his person and property from the authorities of Mexico. He is entitled not only to freedom from injury but to the execution of justice, according to those laws under whose sway he has voluntarily placed himself. If the laws of nations were doubtful on this point to the extent the language employed imports, the treaties between the United States and Mexico are emphatic. Conceding this, it can not be claimed that the Republic of Mexico has guaranteed the safety of citizens of

the United States within her borders in every case and under all circumstances. We think the most that can be claimed where the injury happens, not by the direct action or by the connivance of the authorities, or the wrongful act is not after the fact assumed or justified by them, is the discharge by Mexico of her obligations as a nation by the enforcement of her laws, with reasonable vigor and promptness, to prevent violence when practicable, or failing in that to punish the offenders criminally, and to indemnify the injured party by her remedial civil justice. It is only, it seems to us, when there has been some plain violation of duty in these particulars of international or treaty obligation, that diplomatic interference may be properly invoked and the affair assume national importance.

"Tested by this perhaps imperfect definition of the rights of citizens of the United States temporarily resident in Mexico, and of the obligations of that republic to them, we have been wholly unable to perceive from the testimony in this case any culpable neglect on the part of Mexico to prevent the outrage on Mr. Mills, or afterward to punish the wrongdoers or redress the injuries of the sufferer. The violence which injured him came from the territory and jurisdiction of his own country and, accomplishing its circuit, returned to the place from whence it came. It came without warning to him, or to the authorities of his asylum, and prevented all interference, as we are bound to conclude, by the suddenness of its departure, or overawed all ordinary means of resistance by the force employed and the presence of a larger military force, near enough to aid in the lawless enterprise, and lawless enough to render its aid, if circumstances should require it. We do not see how under these circumstances by the use of any customary or reasonable means in the remote village of 'El Paso,' the authorities of Mexico could have prevented the arrest and deportation of Mr. Mills, and his severe imprisonment at Fort Bliss. Equally we are unable to perceive how Mexico could have punished the violators, at the same time, of her jurisdiction and the claimant's rights, after the fact, or have redressed his wrong by her civil justice. The parties returned to the country of the claimant's own sovereign, out of reach of Mexican laws, and for that matter out of reach of Mexican arms. Moreover, under these circumstances it might well be supposed that the United States would do her own faithful citizen, injured for her sake, justice by punishing his assailants and securing for him at their hands an ample indemnity through her courts.

"And this reasonable conclusion founded on the duty of the United States, and a knowledge of her character, is well supported by subsequent events. The United States subdued these rebel enemies by war, and brought the sheriff of El Paso County into her courts and compelled him to repair, so far as in her power, his violence to the claimant. The latter obtained

a judgment against him for the wrongs inflicted, \$50,000 in amount, and has realized already upon this, by due process of law, the sum of \$9,141.12, and we do not doubt that the laws of his own country, if they have not already achieved that result, will do him complete justice.

"The motion by the agent of Mexico to dismiss this claim is granted, and the claim is disallowed and rejected."

William W. Mills v. Mexico, No. 378, July 6, 1870, convention of July 4, 1868, MS. Op. I. 8.

The opinion delivered in the present case by
The Piedras Negras Mr. Wadsworth, United States commissioner,
Claims.

applied to it and 189 other cases known as the Piedras Negras claims. The total amount of the claims was \$11,397,988.43. Many of them were concocted by means of forgery and false swearing, and the commissioners presented the names of several claimants to their respective governments for prosecution. The commissioners, exercising their best judgment upon the evidence both for the claimants and for the United States, disallowed the claims that were largest in amount, and for the claims which seemed to be more reasonable awarded to the Government of Mexico the sum of \$50,000 in United States currency, to be apportioned among the claimants. They arrived at this amount by making what seemed to be just and equitable allowances to such claimants as appeared to have suffered by the burning and pillaging of the town. They refused costs, but included interest in their award. The opinion of Mr. Wadsworth on the merits of the claims was as follows:

"On the 1st October 1855 a company of three-months' volunteers, commanded by Captain Callahan, organized by the governor of the State of Texas, and in the military service of the State, seized the ferry over the Rio Grande, opposite to Piedras Negras, a village in the State of Coahuila, Mexico, and crossed into that town. On the same day they left the village and proceeded some distance into the interior of Mexico, where they met a body of Mexicans, attended by a few Indians. A fight ensued, resulting in the death of a few persons on each side, when the Texans fell back to the town of Piedras Negras, not pursued by their late antagonists. Here they established themselves, and sent word to the commander of Fort Duncan, on the opposite side of the river, for assistance to enable them to recross the river, as they said, representing themselves to be in a deplorable situation and in danger of destruction from overwhelming numbers. Captain Burbank, commanding at Fort Duncan, in the service of the United States, believing

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being studied. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being studied. This is done by the investigator who is responsible for the study.

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

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This image is a high-contrast, black and white scan of a textured surface. It appears to be a wall or a large object covered in many small, dark, irregular shapes, possibly dust, debris, or a rough texture. The overall appearance is grainy and noisy, with a dense distribution of these small dark spots across the lighter background.

"We do not find any evidence that the United States forces connived at the invasion. The murders and robberies committed by the Indians justified the organization of volunteers by the State government, and furnished at all times a decent excuse for approaching the Rio Grande, a stream easily crossed at many places. They crossed suddenly, seizing the ferry by force. Captain Burbank says he knew nothing of it till they crossed, and he is entitled to the credit.

"But they violated the neutrality laws which he had special instructions to enforce, and under his guns. His interference enabled them, or emboldened them, to remain on Mexican soil and finally to burn and plunder. It was his duty to arrest them, at least on their return, as offenders taken *flagrante delicto*, violating before his face laws of the United States which the President had specially ordered General Smith to enforce. He permitted them to escape, and the authorities of the United States never afterward made any attempt by their punishment to vindicate the laws. Indeed, the governor of Texas and the Secretary of State of the United States applaud and justify their conduct. Congress at last, too, makes an appropriation to reimburse the State of Texas for the sums paid to these volunteers by that State for their military services during the period embracing these wrongs."

Pedro Tauns v. The United States, No. 679, April 17, 1872, convention between the United States and Mexico of July 4, 1868, MS. Op. II. 505.

"With reference to the case of 'William C.

Dickens's Case.

Dickens v. Mexico, No. 647, the umpire can not doubt that robbery of cattle on the borders of Texas adjacent to Mexico and their transportation across the Rio Grande has been carried on for several years past; but he thinks that the proofs are entirely insufficient and he is not at all satisfied that the robbers were always Mexican citizens and soldiers, that bands of robbers were organized on the Mexican side of the river under the eyes and countenance of the Mexican authorities, or that the sufferers by these plunderers were refused redress by those authorities when they were appealed to in particular instances with regard to specific cattle proved by the owners to have been stolen. The charges made are of a very vague character. They are general charges, and no precise dates are given at which it is shown that a raid was made by Mexicans shown to have been organized in Mexican territory, nor is it shown that there was a want of due diligence on the part of the Mexican authorities in preventing these organizations. Neither is any date given nor any precise occasion mentioned when the claimant pointed out to a Mexican authority cattle which had been robbed from

him, proved the fact and demanded their restitution; neither is the name of any such authority given. It is said with truth on the part of the claimant that such bands of robbers can be assembled at short notice, and can proceed upon their raids whilst the United States troops are at a distance from the point of attack. But if this makes it difficult for the United States authorities to prevent these raids, it must be still more so for those of Mexico; for the assembling of the band and crossing of the river is the affair of an hour, whilst the collecting of a large band of cattle and driving them into Mexican territory require much more time and would give more opportunity to the United States authorities to interrupt the robbers and recapture the cattle. In the present claim the scene of the robberies is said to have been in Dimmit County, Texas, which is not even immediately adjacent to the Rio Grande. It does not therefore seem that there has generally been a greater want of watchfulness on the part of the Mexican authorities than of those of the State of Texas and of the United States. The umpire can not see that in the above-mentioned case there are sufficient grounds for holding the Mexican Government responsible for the losses suffered by the claimant, and he therefore awards that the claim be dismissed."

Thornton, umpire, December 3, 1875, convention of July 4, 1868, MS. Op. 601.

"The umpire entirely coincides with what **Cases of Sumpter and Others.** appears to be the opinion of both the commissioners, that the Mexican Government can not be held responsible for the robbery of live stock belonging to the claimant in Texas by Kickapoo Indians from Mexico."

Thornton, umpire, June 29, 1876, *Jesse A. Sumpter v. Mexico*, No. 869, Am. docket, convention of July 4, 1868, 6 MS. Op. 478. The same principle was applied by the commissioners in *Mariano Trevino Garza v. Mexico*, No. 550, MS. Op. II. 576, and *Samuel Sperres v. Mexico*, No. 867, MS. Op. VII. 95. In the case of *Juan A. Robinson v. Mexico*, No. 709, Mr. Wadsworth thought that Mexico was liable on the ground that the Mexican troops appropriated the stolen property, after recovering it from a band of Yaqui Indians. Sir Edward Thornton held that there was not sufficient evidence that any of the property was ever recovered, though the Indians were pursued by the Mexican forces. He also said: "Reflecting upon the evidence on both sides, the umpire does not think that the Mexican authorities can be accused of a failure to furnish reasonable protection or to endeavor to punish the Indians for their depredations. It would be almost impossible for any government to prevent such acts by omnipresence of its forces."

Wipperman's Case: "This claim was submitted to the Caracas
Claim of a Consul. commission, and on the disagreeing votes of
the two commissioners was referred to the
umpire for decision, and by him rejected on the 2d of July
1868.

"The facts briefly are that the claimant, a naturalized citizen of the United States, was appointed consul to Maracaibo in 1861, and continued to act as such with the approval of Venezuela until the 28th of May 1862, when he sailed in the bark *Clara Rosa Sutil* for New York, on a five months' leave of absence on account of ill health. The bark was stranded on the morning of the 1st of June on the coast of Goagira, which appears to have been subject to the forays of a tribe of Indians residing or roaming within the jurisdiction of Venezuela, but never fully subjected to her authority. These Indians came on board and acted in such a threatening manner that the captain, crew, and passengers thought it was safest to leave the ship and return in the ship's boats to Maracaibo for assistance. The cargo consisted principally of coffee, but among other things on board were twelve trunks and boxes, the property of the claimant, containing a miscellaneous assortment of personal effects, and valuable sketches and drawings of great use in his profession as architect and civil engineer, and also a choice and well-selected library of classical, modern, and scientific literature.

"All these things were stolen or destroyed by the Indians at a loss estimated by the claimant of \$13,000. On the raid being reported at Maracaibo, the governor of the province immediately dispatched a war vessel to the scene of the outrage, and by her timely arrival and the use of cannon the Indians were driven off, and much pillage, both of the vessel and her cargo, prevented. Such damage, however, was done to her rigging and sailing apparatus that it was deemed advisable to send to New York for repairs, and the claimant took passage in another vessel bound for that port, where he arrived safely and without further accident on the 6th of July 1862. Three days afterward he addressed a communication to the Department of State complaining of the outrage, insisting that it was permitted by the Government of Venezuela for the want of those necessary and indispensable precautions which the laws of nations exact for the protection of aliens domiciled

within a foreign jurisdiction, and especially consuls, and claiming indemnity in the sum before mentioned.

"No action, as far as the papers disclose, was then taken by Mr. Seward, then Secretary of State, and the case appears to have been neglected until revived by the claimant in a communication to the State Department, under date of the 27th of February 1868, in which redress is again asked, and which was referred by the Secretary to the legation at Caracas, and by it submitted to the commission then in session, with the result before stated. It is resubmitted, under the treaty of December 5, 1885, for our action, not, however, on any claim by Mr. Wipperman of the injustice of the previous decision, in which he appears to have acquiesced, but as one of the claims which is entitled to consideration by reason of the sweeping provisions of that convention, which submits all the claims of citizens of the United States for adjudication by this commission which were considered by the former one without regard to the fact whether they were allowed or rejected, or whether the claimant was dissatisfied with the decision or not.

"The learned counsel for the United States, with his usual industry and ability, has filed a very elaborate brief in support of the claim, with the conclusions of which, however, we regret that we can not concur, although we can readily give our assent to most of the general reasoning in which he indulged on the subject of the duty of a foreign government with respect to the protection of official representatives of another sovereignty coming within its jurisdiction. It is perfectly true, as contended by the learned counsel, that the citizens of one state, whether holding office or not, but residing or doing business within the jurisdiction of another state, are entitled to the fullest protection of the laws of that state, both in their persons and property, and that on the authority of the case of the Spanish consul in New Orleans, after the execution of the unfortunate victims of the Lopez expedition, as stated by Mr. Webster, then Secretary of State, there would seem to be an additional claim upon this protection growing out of the consular office of the person injured, although it is to be noted that Mr. Webster, in the case referred to, observed that the case was a new one, and that the circumstances were such that indemnity would be offered without searching for precedents.

"But there can be no possible parallel between the case of a consul residing in a large city inhabited by civilized people,

whose house is deliberately invaded in open day and whose property is pillaged or destroyed by acts of violence, aimed at him in his official capacity and accompanied with studied insults to the government he represents, and all proceeding from a riotous body of persons who, presumably at least, ought to have been within the preventive or restraining power of the police or the military, and the accidental injury suffered by an individual in common with others, not in his character as consul, but as passenger on a vessel which has been unfortunate enough to be stranded on an unfrequented coast, subject to the incursions of savages which no reasonable foresight could prevent.

“The case would present more points of comparison if some savage tribe of Indians on the warpath had unexpectedly stumbled upon a consul, we will say of Venezuela, traveling for his health in some of the secluded bypaths of Arizona or New Mexico, and then and there, without respect to the dignity of the consular office and the law of nations, had divested him of all his valuables and then proceeded *suo more* to take his scalp. Could it be pretended that the United States could be held responsible for an act of violence of this kind, although committed by persons actually within her jurisdiction and nominally subject to her authority? It is notorious throughout the world that outrages of this kind on the western frontier of the United States are more or less frequent, and that the whole military force of that country out of garrison has not been sufficient to prevent the occasional robbery or murder of innocent persons, whether aliens or citizens. Unless a government can be held to be an insurer of the lives and property of persons domiciled within its jurisdiction, there is no principle of sound law which can fasten upon it the responsibility for indemnity in cases of sudden and unexpected deeds of violence, which reasonable foresight and the use of ordinary precautions can not prevent. Of course, if a government should show indifference with reference to the punishment of the guilty authors of such outrages, another question would arise, but as long as reasonable diligence is used in attempting to prevent the occurrence or recurrence of such wrongs and an honest and serious purpose is manifested to punish the perpetrators, the best evidence of which, of course, will be the actual infliction of punishment, we fail to recognize any dereliction in the performance of international obligations, as

measured by any practical standard which the good sense of nations will permit to be enforced.

"Nor do we perceive that there is anything in this ruling at variance with the propositions contended for by the United States and supported by an elaborate citation of authority by its counsel. The very language used in argument by Mr. Cushing in behalf of the United States before the Geneva Commission and now quoted by the counsel of the United States in his brief, is strikingly applicable to the facts in this case. 'The general allegation,' said Mr. Cushing, 'that acts committed furtively in remote and unfrequented coasts, against the wishes of a government and in spite of *well-intended, active efforts to prevent them*, are not acts over which the government could reasonably be expected to exert a control, commands the assent of the United States. They would not themselves consent to be held responsible for such acts.' The italicized part of the concession seems to be regarded as destructive of any value it might have in determining the rights of the claimant, which are sought to be founded on the assumption that there was *no well-intended, active effort* on the part of Venezuela to prevent the foray of the savages.

"But there is nothing in the record to show that the government had any notice of the incursion or any cause to expect that such a raid was threatened, and while it may be true that governments are *prima facie* responsible for the acts of their subjects and aliens commorant within their jurisdiction, this is a presumption which is always rebuttable by any facts which will afford a reasonable excuse for the dereliction against which the complaint is aimed. A different rule of responsibility applies where the act complained of is only one in a series of similar acts, the repetition, as well as the open and notorious character of which, raises a presumption in favor of knowledge being brought home to the authorities and with it corresponding accountability. It is in such a case that Sir Robert Phillimore says that it is to be 'presumed that a sovereign knows what his subjects openly and frequently commit, and as to his power of hindering the evil this likewise is always presumed, unless the want of it be clearly proved.' (Phill. Int. Law, p. 23.) The present case stands upon a different footing entirely. The tort committed proceeded from the wanton depredation of a lawless band of savages on a vessel unhappily stranded at a point where she could be made the

easy prey of such marauders, before notice could be received by the government, and under circumstances which satisfy us that notice is not imputable to the government, and that the raid was one of those occasional and unexpected outbreaks against which ordinary and reasonable foresight could not provide. As soon as the facts were reported immediate steps were taken for the relief of the vessel, and the savages were opened on with grape and cannon balls and dispersed. The claim is rejected."

Findlay, commissioner, for the commission, *Frederick Wipperman v. Venezuela*, No. 22, United States and Venezuelan Claims Commission, convention of December 5, 1885.

Mr. Ashton, agent of the United States, maintained in his brief the doctrine "that a government may, by *knowledge* and *sufferance*, as well as by direct *permission*, become responsible for the acts of its subjects, whom it does not prevent from committing injury to foreigners within its jurisdiction." He cited Rutherford, *Institutes of Natural Law*, Book 1, ch. 17; Phillimore, *Int. Law*, I. ch. x. 231, III. 218; *Papers Relating to the Treaty of Washington*, III. 22, 23, 54, 490; *Case of the Caldera*, 15 Court of Claims. As to the right of a consul to special protection, he referred to the case of the Spanish consul at New Orleans, Webster's Works, VI. 511, and the act of Congress of March 3, 1853, providing for payment of the losses both of the consul and of other Spanish subjects.

8. MISCELLANEOUS CASES.

Case of the "*Cossack*."

January 21, 1818, the American brig *Cossack* was seized by the Spanish authorities at Mazatlan, Mexico, for want of a sea letter. Subsequently she fell into the hands of the Mexican authorities, who on December 15, 1821, issued a decree, directing that the brig and her cargo be restored. This order, however, was never carried into effect. A unanimous award was made by the commissioners of \$13,313.33 for the brig, and \$25,218.26 for the cargo, with interest at 5 per cent per annum from December 15, 1821, the date of the decree of restitution by the Mexican authorities, to January 20, 1841, amounting, principal and interest, to \$75,323.80.

Case of the brig *Cossack*, commission under the convention between the United States and Mexico of April 11, 1839.

Case of the "*Mercury*."

The American ship *Mercury*, while off the northwest coast of Mexico, near California, was captured June 2, 1813, by the Spanish warship *Flora*. The cause assigned for the capture was that there were "indications" that she had been engaged, or that

she intended to engage, in an interdicted trade on the Spanish coast. The *Mercury* had been at Canton, and had on board at the time of her capture a large quantity of specie, silks, and furs, of the value of \$59,340.83. It was also stated that the vessel was taken as a prize; but the captors did not proceed to condemnation, nor was the capture ever subjected to the definitive judgment of any tribunal. The proceedings were suspended before reaching that point. Mr. Poinsett, the American minister, in presenting the claim to the Mexican Government, stated that the viceroyal government in November 1814 ordered the property to be restored to the claimant; but the order was not in evidence. The Mexican Government, however, in the treaty with Spain of December 28, 1836, by which Mexican independence was recognized, assumed the debts of the viceroyal government; and it would seem that it undertook as a consequence to answer the claim on account of the unexecuted decree of November 1814. However this may be, another decree of restitution was made on December 14, 1821, which was confirmed by a resolution of the Mexican Congress. As this decree, like that of 1814, was not executed, it was admitted that an indemnity was due from Mexico, but the commissioners differed as to the amount. The umpire awarded \$96,988.66.

Washington Eayres v. Mexico: Commission under the convention between the United States and Mexico of April 11, 1839.

Peter Harmony, a naturalized citizen of the United States and a resident merchant of the city of New York, in February 1822 shipped a quantity of merchandise to Vera Cruz, where the goods were safely landed and sent to the City of Mexico, under consignment to Don Francisco Almirate, a merchant of that city, to be sold on account of Harmony. In October in that year the consignee remitted from the City of Mexico a sum of money as part of the proceeds of the goods. In passing from the City of Mexico to Vera Cruz this money was seized and taken possession of by order of the titular government of Mexico, and was placed in the Castle of Perote for the use of that government. It was accordingly applied to the use of the Mexican Government, and was never paid over or accounted for by that government to Harmony or to anyone for him. On these facts the commissioners unanimously awarded that the Government of Mexico should pay to Peter Harmony the sum of

\$11,130, which represented the amount seized by the Government of Mexico, with interest thereon at the rate of 5 per cent per annum from October 22, 1822, till the date of the award, that being at that time the legal rate of interest in Mexico.

Case of Peter Harmony v. Mexico, commission under the convention between the United States and Mexico of April 11, 1839.

A claim was made on account of the brig *Case of the "Ophir."* *Ophir*, embracing two items—(1) a detention at Vera Cruz for several days, and (2) a detention and certain judicial proceedings at Campeachy. The detention at Vera Cruz was in consequence of an inhibition, issued by the local authorities, of the departure of any vessel from the port. This inhibition was based upon the existence of local political disturbances.

The umpire awarded \$400, with interest, for this detention.

The detention at Campeachy continued for a long time, and was based upon the failure of the master of the brig to produce his manifest on anchoring, as required by law. The court of original jurisdiction pronounced a sentence of condemnation, which, however, was reversed by a higher court, but with imposition of the costs on the claimant.

The umpire disallowed the award made by the American commissioner for the detention and proceedings at Campeachy.

Commission under the convention between the United States and Mexico of April 11, 1839.

Case of the "Industry." The American brig *Industry* was seized and detained, and her master imprisoned, by the

Mexican authorities, for the purpose, as the claimants alleged, of extorting money. The commissioners agreed that an award was due, but differed as to the amount. The umpire, February 23, 1842, awarded the sum of \$18,148.96.

Cyrus Sibley et al. v. Mexico: Commission under the convention between the United States and Mexico of April 11, 1839.

A claim was made for the wrongful detention *Case of the "General Morelos."* by the Mexican authorities at Vera Cruz in

1830 and 1831 of the brig *General Morelos*, the property of citizens of the United States. On the part of Mexico it was alleged that the reasons for the seizure and detention of the brig were (1) that a quantity of gunpowder was found on board, and (2) that, after the seizure of the powder and the brig, a legal proceeding was begun between

two persons named Ross and Thompson for the control of the brig. As to the first ground, it was alleged by the claimants that the powder was surreptitiously put on board at Vera Cruz, and that the Mexican courts finally decided in their favor, ordering the brig to be restored. As to the second ground, the American commissioners maintained that the proceeding between Ross and Thompson was instituted by Thompson for the purpose of recovering one-fifth part of the right of property in the ship, a claim which did not justify her detention, while the Mexican commissioners contended that the object of the proceeding was to determine which of the two, Ross or Thompson, was the representative of the owners, and that in no other way could the ultimate delivery of the brig to the proper one be insured, pending the suit. An award was rendered by the umpire in favor of the claimants, but the grounds of it were not stated.

James W. Bradlove and J. Gourley & Co. v. Mexico: Commission under the convention between the United States and Mexico of April 11, 1839.

Case of the bark In the case of the bark *Jones*, before the
"Jones:" Irregular commission under the convention between the
Seizure and United States and Great Britain of February 8,
Trial for Slave 1853, the reporter gives the following syllabus:
Trading.

"The bark *Jones* was seized in the harbor of St. Helena, on charges—

"I. Of being in British waters, without having ship's papers on board, and therefore without national character.

"II. For being engaged in and equipped for the slave trade.

"There was a competent court for the trial of these charges at St. Helena, but the bark was taken to Sierra Leone for trial, and the charge of being engaged in and equipped for the slave trade was adjudged by the court there 'to be without foundation, and destitute of any probable cause to sustain it.' It appeared, also, that the ship's papers were duly deposited at the collector's and consul's offices, on her arrival, as required by law, but the court assessed the vessel in costs, on the ground of alleged resistance to constituted authorities, and it was sold at auction for the payment of these charges.

"Held, that the allegation of being without ship's papers, and without a national character, was unsustained by evidence.

"Held, also, on the judgment delivered by the court, that no costs could be taxed against the vessel, and that no resistance to authorities was shown. And further, that the removal of the vessel from St. Helena, where a competent court existed for the trial of these charges, to Sierra Leone for trial, was a violation of the rights of the parties, and that the owners of the *Jones* were entitled to full remuneration for all damages sustained."

The case was fully argued before the commission by J. A. Thomas, agent for the United States, and James Hannen, agent for Great Britain.

The bark *Jones*, of Salem, Massachusetts, with a crew shipped for Montevideo and other ports north of the thirty-sixth parallel of south latitude, sailed from Boston in March 1840 for the west coast of Africa, having an assorted cargo of flour, biscuits, soap, candles, tea, fish, furniture, lumber, and gunpowder. On June 17 she arrived at Ambriz, on the coast of Africa, and after having disposed of a considerable part of the cargo, sailed for Loando, on the same coast. On the way she was visited by the British armed brig *Water Witch*, but after examination of her papers and cargo was permitted to proceed. From Loando, where she exchanged some merchandise for ivory and other African produce, she returned to Ambriz, and after obtaining more produce sailed for St. Helena. Arriving at St. Helena on the 24th of August 1840, she entered at the custom-house and discharged and received cargo. But on the 14th of September, after she had been there for twenty-one days, she was seized by the British ship *Dolphin* and taken to Sierra Leone, where on the 5th of October she was libeled in the vice-admiralty court on the ground that she "was found in British waters without any national character and having no ship's papers or colors on board, and for being engaged in and fitted and equipped for the slave trade, contrary to the provisions of the acts of 5 Geo. IV. ch. 113, and of 2 and 3 Vict. ch. 73." Of these two charges the first, of being in British waters without national character or ship's papers, was clearly unjustified by the statute under which it was brought. The act of 2 and 3 Vict. ch. 113, empowered British cruisers "to capture Portuguese vessels engaged in the slave trade, and other vessels engaged in the slave trade not being justly entitled to claim the protection of the flag of any state or nation," and by its terms, unless the charge of being engaged in the slave trade was sustained, it became wholly immaterial whether the *Jones* had papers or not. The charge, therefore, "of being found in British waters without having ship's papers on board and having no national character" was no allegation of an offense against 2 and 3 Vict., and the whole proceeding, so far as it was based on that act, fell to the ground. The only remaining ground of seizure of the vessel was "her being engaged in and equipped

for the slave trade," which was charged as a violation of the act of 5 Geo. IV.

By that act all vessels, seized for being concerned in the slave trade, "shall and may be sued for, prosecuted and recovered * * * in any court of record or vice-admiralty in any part of His Majesty's Dominions in or nearest to which such seizures may be made, or to which such * * * vessels, * * * if seized at sea or without the limits of any British jurisdiction, may most conveniently be carried for trial."

Mr. Upham, the American commissioner, maintained that by this act the vessel should

have been tried at St. Helena, where there "had long been a court of record of an established character and competent to try any felony or capital offense against the laws of Great Britain," and that her removal to Sierra Leone was an illegal act; that the act of 2 and 3 Vict. gave authority to seize in the open sea vessels having no national character and concerned in the slave trade, and was not necessary to give jurisdiction over the *Jones* in the harbor St. Helena; and that, if the *Jones* was engaged in fitting out there for the slave trade she should have been tried at once. Even if the seizure had been made under 2 and 3 Vict., there was in his opinion the alternative of a speedy trial of the vessel at St. Helena, under the act of 5 Geo. IV., for the only essential charge against her, and it would have been the imperative duty of the captor to proceed under that statute.

On the arrival of the vessel at Sierra Leone, public notice was, said Mr. Upham, first given of the offense for which the vessel was seized, by the posting up of a statement that she was to be "condemned, unless the owners should appear and show just cause to the contrary." But, notwithstanding that the witnesses were engaged in open hostility to the captain, the acquittal of the vessel was on all grounds triumphant and complete. The judge at Sierra Leone said that he could have "no rational doubt" that her papers proved her American character, and that the proceeding under the act of 2 and 3 Vict. must consequently fall to the ground. As to the charge of slave trading, the judge remarked, in respect of a paper signed by a part of the crew, protesting against going to the coast of Africa, and which was alleged to have been the original cause of the seizure, "that not even the most distant allusion is made by the seamen * * * that the vessel had been, or was about to be, engaged in the slave trade;" and, after a full

examination of the testimony, he declared "that not a single article of slave equipment is established against her;" that "the evidence of the witnesses has literally produced nothing which can by possibility affect the character of the vessel;" that "no indication has been adduced, showing the vessel's employment in the slave trade, and that there has not been a single paper found on board the ship that could warrant him in drawing such a conclusion." And, still referring to the judge's decision, Mr. Upham continued:

"After having carefully reviewed the grounds upon which sentence of restoration had been given by him, with a view of discovering, if possible, some probable cause of seizure as regards the vessel's alleged equipment for the slave trade, he never saw a case so free even from suspicion.

"The necessary result of this finding was that the vessel should have been discharged, and the captor treated as a trespasser from the beginning. The captor stands condemned by a court of his own choosing, on a wholly *ex parte* examination, and by a judgment unimpeached, of the seizure of a vessel having an established national character, and against which there was no probable ground of charge of her being concerned in the slave trade. Such being the case, it is clear that the party offending is directly responsible to the owners of the vessel. No obligation rested on the owners to follow their property to a remote jurisdiction, to rescue it from the control of the law thus unwarrantably asserted.

"No principle of common law is plainer than that trespassers and wrongdoers, *ab initio*, in the seizing and removal of property, are at once personally liable, and it rests not in their mouths to say that the party aggrieved should not prosecute them, but must follow the property and abide the result of the legal proceedings instituted against it. With much more propriety might the owners of the *Jones* have said that Lieutenant Littlehales, after the discharge of the vessel, instead of instituting an appeal from the decision of the court, which he never prosecuted, should have at once returned the vessel to America, and make ample indemnity to the owners for all costs and damages for its illegal seizure and detention.

"For the seizure of a vessel without probable cause, the legal rule of damage is full restitution and compensation for all costs and injury sustained."

But, by a most singular proceeding, said Mr. Upham, the court then undertook to consider another charge, not within the statute, and of which it had no cognizance, of a personal character, against an individual not present, and not against the vessel, and on this charge of "resistance of the master to fair inquiry" and "his willful misconduct in resisting constituted

authorities," mulcted the vessel in costs. It was, said Mr. Upham, a charge which, if it had been fully sustained, could not have affected the vessel or her exoneration, and warranted her assessment in costs, either under the statutes in question or the common law. But it was wholly unsustained by the testimony. It was alleged, as the ground of this charge, that late in the afternoon of Saturday, September 14, after the vessel had been in port twenty-one days, Lieutenant Littlehales, by whom the seizure was made, met Captain Gilbert, the master of the *Jones*, in the street, and demanded of him the ship's papers; and that the master refused to comply with this demand, or with a similar one subsequently made the same evening on board the vessel. Mr. Upham, however, maintained that it was clear upon the testimony that, although the demand made by Lieutenant Littlehales on the street was wholly unauthorized, on neither occasion did Captain Gilbert refuse to show his papers; but that, on the contrary, he stated that his manifest was at the custom-house and his ship's papers with the consul, and when the demand was made on board the vessel promised to obtain and exhibit them on Monday, which he was prevented from doing by the immediate seizure of his vessel and his expulsion from it. Said Mr. Upham:

"Captain Gilbert seems to have been very unfortunately situated. When called upon for his papers, his precise form of reply, though he offered to produce them at the earliest possible moment, is regarded as opposition to authorities; if he goes to his vessel to deliver his papers, he is threatened to be shot at; if he writes a letter to Lieutenant Littlehales, he receives no answer; if he gets the American consul to write for him, his letter is returned unopened, because, though previously acknowledged by competent British authorities for seven years, it is now said he has no *exequatur*; if he gets the collector of customs to write, Lieutenant Littlehales tells him he has seized the vessel, and the collector says he can go no further; if he applies to the governor and secretary, he is informed they have no power over the commander of Her Majesty's armed vessel; if he applies, as a last resort, to his government for redress, it is held to be an improper appeal from the jurisdiction of British courts, 'whose duty it was,' it is said by Lord Palmerston, 'if circumstances required it, to give the claimant full indemnity,' and that Captain Gilbert 'had no right to call for the interposition of the state to do that which he might, by *ordinary care and diligence*, have done for himself' through the aid of such tribunals. And this is said when a commander of Her Majesty's cruiser has expelled the captain from his vessel, refused all specifica-

tion of charge against her, and taken her away to a coast, no one knew where, except by hearsay."

But, said Mr. Upham, the wrongs of the owners of the vessel did not terminate here. When the decision of the court was rendered against the captors, an appeal was taken. It was never prosecuted, and proceedings were thus stayed, and the case rendered more complicated. Moreover, though the regulation of the British service required all cruisers, under the slave-trade acts, to report the particulars of each seizure by the first opportunity to England, no such report was made by Lieutenant Littlehales in the case of the *Jones* for a long period. Continuing, Mr. Upham said:

"Lieutenant Littlehales had all the means of knowledge before him that was subsequently possessed by the court of Sierra Leone. He was bound to come to the same just and impartial decision as to the character of the vessel, and the want of all probable ground of her connection with the slave trade. By his hasty and illjudged proceedings, and relying on trivial circumstances and vague surmises, of no weight to an unprejudiced mind, contrasted with known facts before him, he has been guilty of a wrong against unoffending citizens of the United States that has ruined their pecuniary prospects, and has caused an embittered state of feeling between the two countries in reference to his acts.

"The course of the British Government, also, not only in not affording redress in this matter, but in delaying prompt inquiry and investigation, and in not holding its officers and tribunals responsible for the enforcement of their own laws and rules important to the protection of American commerce, is a ground of grave and serious complaint by the parties in this case.

"Both the 5 Geo. IV. and the 2 and 3 Vict., as amended, require the vice-admiralty courts, on the first Monday in January and July of each year, to report to Her Majesty's commissioners of the treasury all cases which have been adjudged in the court for the six months preceding. These returns are to give 'the date of seizure, the property seized, the name of the seizer, the sentence, whether of forfeiture or restitution; whether the property has been sold or converted, and whether any part remains unsold; and in whose hands the proceeds remain.'

"When it has answered the occasion of the British Government to represent its regard for the rights of American commerce, the provisions of law as to immediate returns, and the particular and cautious instructions to their cruisers on this subject, are pointed to as proof of their prompt watchfulness over every invasion of the American flag. But here, where these provisions have been wholly disregarded, we have yet to

learn that there has been a word of reproof to these officers; and through the whole correspondence on this subject there has been no explanation, palliation, or apology on this account, but these provisions of law have been permitted to remain a dead letter.

"And this has greatly prejudiced the interests of these parties. Captain Gilbert returned from St. Helena, at the earliest possible moment, to his employers to represent the facts as to the *Jones*, and the American consul at St. Helena sent immediately to his government an account of the seizure of the vessel, and the circumstances in relation to it. Representations were at once made in London to the British Government, by Mr. Stevenson, the American minister, and until some answer could be had on his application, indicating the determination and disposition of the British Government in relation to the claim, no other course seemed advisable or proper by the owners of the vessel.

"The case was one requiring urgent and prompt action on the part of the British Government, so that if the proceedings of Lieutenant Littlehales were not disavowed, any other less adequate remedy the case might admit of could be resorted to in season to retrieve the owners of the vessel from destructive loss.

"The communication from Mr. Stevenson to Lord Palmerston on the subject was on the 16th of April 1841, five months after the adjudication at Sierra Leone. But it appears from the correspondence in the case, that no inquiry was instituted in reference to it for more than four months after that time; and though the attention of the British Government was repeatedly and earnestly called to the subject, as late as October 5, 1842, Lord Aberdeen, in reply to a letter from Mr. Everett in relation to the *Jones*, states that, 'from the want of the proceedings at Sierra Leone, Her Majesty's government had been unable yet to come to a decision in the case, and that a renewed application had this day been made to the proper department on the subject, and that, as soon as Her Majesty's government shall have received the necessary information, he will lose no time in communicating to Mr. Everett the decision of Her Majesty's government in the case.'

"Five months after this time, on the 2d of March 1843, and more than two years after the adjudication at *Sierra Leone*, the first information is given 'of the decision of Her Majesty's government,' and of the grounds on which the justification of the seizure of this vessel, and of the conduct of Lieutenant Littlehales is placed.

"During all this time the owners of the *Jones* were kept in entire suspense as to what course would be adopted, and the vessel and cargo had been long before this sold, by order of the court, at a ruinous sacrifice.

"To the communication, giving the decision of Her Majesty's government, received after a delay of such extraordinary dura-

tion, and against which delay Mr. Everett strenuously remonstrated, a full and elaborate reply was drawn up by Mr. Everett on the 18th of May 1843. In this reply he presented the views of his government, and his comments on the evidence and grounds taken by Her Majesty's ministers, and earnestly asked Lord Aberdeen's attention to the statements and grounds submitted to him, representing 'the transaction on which it had been his painful duty to dwell as extraordinary and oppressive in all its parts,' and that a denial of reparation 'would produce a degree of discontent on the part of the government and people of the United States of a character greatly to be deprecated.'

"To this urgent letter, to which the attention of the British Government was again called by Mr. Everett in June 1846, no reply was made by the British Government for more than *three and a half years*, when Mr. Bancroft, November 26, 1846, addressed a letter to Lord Palmerston in reference to the unanswered letter of Mr. Everett of May 1843, stating 'that he was *instructed* by his government to ask an early and definite reply.'

"A reply was then made early in the ensuing month, which was responded to by Mr. Bancroft, and which was again replied to by Lord Palmerston, in which he sets up the closest technical grounds and objections to the claim of the owners of the *Jones*, and alleges that they had had 'ample opportunities to assert their rights, either in the court below, or by an appeal from the decision of that court to the judicial committee of Her Majesty's privy council,' and denying to them all other remedy.

"In March 1849 this whole subject and the correspondence in relation to it was communicated to Congress, and was passed upon by a very intelligent committee, who unanimously reported, through Mr. Marsh, of Vermont, their chairman, 'that the government of the United States was under a solemn obligation to protect the citizens of the Union, at whatever hazard, in the exercise of their lawful callings in their commerce with foreign nations, and that, in the deliberate judgment of the committee, the case of the *Jones* was one of the strongest in which the American Government had ever been called upon to discharge that obligation. That in the history of our intercourse with civilized nations they knew few instances of more wanton and unprovoked outrage than this case exhibited, and that they believed the honor and the interest of the nation demanded that the government should insist upon the most full and ample pecuniary redress to the owners of the vessel, if not upon reparation for the indignity to the American flag, by the condign punishment of the offender, and that it was the duty of the Government of the United States to renew the demand for redress to the owners of the *Jones*, and strenuously urge the same.'

"From the proceedings in this and other cases this commission ultimately originated, by which it has been proposed to settle equitably and justly all outstanding claims between the governments accruing since 1814.

"The case is therefore now submitted to this tribunal under circumstances, after this long delay and hardship to these parties, entitling it to great deliberation and consideration. It has been fully argued. I have given the most attentive consideration to every suggestion that has been urged in defense of these proceedings, with a desire to regard equally the rights and interests of the two governments as an arbiter between them, bound by every consideration, as well as the explicit declaration subscribed by me, to decide all matters submitted to our decision 'to the best of my judgment, without fear, favor, or affection to my own country.'

"After such examination I have arrived at the conviction that the complaint made by the owners of the *Jones* is fully sustained; that the wrong done to them has been characterized, in its initiation and in almost every step of its progress, by oppressive acts wholly uncalled for in the circumstances of the case; that the seizure of the vessel was without just cause; that its detention on the charge of being concerned in the slave trade had no probable ground to sustain it; that its removal to Sierra Leone for trial was in violation of just rights of these parties and of settled principles of English law; that the charge against Captain Gilbert 'of willful misconduct and of opposition to constituted authorities' had nothing to justify its connection with charges against the vessel, and is wholly unfounded in fact; that the delay and neglect of the British Government in looking into the circumstances of the case, after most earnest remonstrances of the United States had been repeatedly made to them, is without excuse, and has greatly prejudiced the just rights of these claimants; and that the owners of the *Jones* are entitled to full compensation against Lieutenant Littlehales and the British Government, who have throughout justified and sustained him as their agent, for all injury which has, directly or indirectly, arisen from these wrongs, and for the unjust delay of reparation of them to the present time.

"In coming to this result, it is with deep regret I find I have not the full concurrence of my associate commissioner as to the extent of redress these claimants are entitled to, and that this long litigated controversy must remain unadjusted to abide the final decision of the umpire appointed under this commission, to whom it is now ordered to be committed."

Opinion of Mr.
Hornby.

Mr. Hornby, the British commissioner, observing that the master of the *Jones* was not present at the trial at Sierra Leone, and that neither he nor the owners were represented before the court; that the costs assessed by the court were not paid; and that

the vessel, nobody appearing to claim it, "was ultimately sold in the usual manner, for the benefit of all concerned," said :

"Practically, then, the commissioners are asked to review the decision of the vice-admiralty court, which has never been appealed against, and which decided two points: First, that the vessel was not engaged in the slave trade; secondly, that she had a national character; with reference to which latter point the court expressed its opinion of the conduct of the master, as supplying a probable cause for the seizure, by awarding costs to the captor.

"The claimants approve the first portion of the judgment, but declare the latter part to be wholly unfounded in either reason or justice.

"Now, I do not think it was ever intended that the commissioners should sit as a court of appeal from the properly constituted courts of either country; and if there were no facts before us but those on which the vice-admiralty court decided, I should, without hesitation, reject this claim on the ground that this was not a court of appeal.

"I do not mean to say that circumstances might not arise in many cases which would induce me to reverse the judgment of a court, but the circumstances must be of a certain character and importance. It would not be sufficient simply to show that a point of law was doubtful, or that another judge might have taken a different view of the facts. Such matters are within the jurisdiction and province of a court of appeal; but if, in a case like the present, additional evidence was afforded—evidence of a character tending to show that had it been brought before the judge of the vice-admiralty court, a judgment more favorable to the claimants might have been passed, or that the wrongful act of the party complained against prevented such evidence from being taken—then I think the way would be opened for our action.

"In the present case, the commissioners have before them the additional evidence of the master, the supercargo, and such members of the crew as were not present at the trial. Two points therefore arise for us to determine: First, whether this additional evidence is of such a character as to induce us to overrule the judgment of the vice-admiralty court as to costs; and secondly, whether upon this evidence we ought to award compensation in the nature of damages to the owners for the losses which they have sustained *subsequent* to the date of the judgment.

"As I differ from my learned colleague on both points, I feel bound to go somewhat at length into the evidence.

"In doing this I propose to divide the case into two parts; the one having reference to the seizure and its immediate consequences, the other to the damages which may be said to have been sustained subsequently to the judgment of the vice-admiralty court. Before doing so, however, I must repeat that,

as a *general principle*, effect ought to be given to the judgment of every competent tribunal, when nothing appears tending to impugn the integrity or fairmindedness of the court.

"The commissioners are asked to adopt one part of the judgment in question and to reject the other portion of it. I can not accede to this course, because both parts appear to me to be founded upon an equally careful consideration of the circumstances and evidence, and arrived at after equal deliberation."

The first fact, said Mr. Hornby, in reference to the seizure, was the application of the crew of the *Jones* to Lieutenant Littlehales for his intervention on finding that they were about to return to the coast of Africa. They contended that they had signed articles to proceed to Montevideo and a market, and thence to a port of discharge in the United States, the fact being that they had agreed to go to "Montevideo or other ports between the line of latitude 36 degrees south and back," and that the American consular agent at St. Helena decided, when appealed to by the master, that they were bound to go to ports on the coast of Africa north of that line. But the crew represented to Lieutenant Littlehales that they suspected there was a false set of shipping articles on board; and the mate said that the papers exhibited by the master to an officer of a Portuguese man of war at Loando were headed "Ambriz" and not "Montevideo." On this information Lieutenant Littlehales determined to inspect the ships's papers, and, meeting the master in the street, made the request to see them. Mr. Hornby maintained that to this request the master replied that the "papers" were at the custom-house, where in fact only the manifest was. The next scene was on board the *Jones* two hours later, when no one disputed that the "papers" were asked for and that the answer then given was that they were at the "consul's." Lieutenant Littlehales denied that the master ever offered to show his papers, or to give any information on Monday morning; and it was, said Mr. Hornby, a curious fact that neither the papers nor copies of them were before the commission, and that it did not appear that they were ever shown to anyone whose seeing them would have facilitated the discharge of the vessel. If the master had facilitated the inspection of the papers by the captor, "all the subsequent mischief would," declared Mr. Hornby, "in my opinion, have been avoided. Nothing would have been easier than to have sought Lieutenant Littlehales on board H. M. S.

Dolphin, yet this was never attempted, and in fact no attempt was ever made to show this officer the papers, nor does it appear that the subaltern in command of the prize was ever asked to look at them, or was even told that the captain had them with him when he went alongside the *Jones* on the Monday following the seizure. Nor does it appear in the affidavits of the master and supercargo that the former really had his papers with him on these occasions, or went for the purpose of showing them."

The next step in the case was, said Mr. Hornby, the overhauling of the vessel and the finding on board of two letters, both addressed to the supercargo, one being from the owners and the other from a Spaniard of the name of D. Masoro Maray. These letters were as follows:

"Messrs. Farnham & Co. to Mr. Sexton.

"SALEM, March 12, 1840.

"DEAR SIR: Your much-esteemed favor of December 4, from Ambriz, per *Quill*, was promptly delivered on the arrival of that vessel, February 2. Your remarks on the trade with Doctors Wilson and Savay, and others, at Cape Palmas are noted, but will not be acted upon at present. We have no doubt there is a field there to work in to advantage, but we shall probably omit it till your return. The information however is very acceptable. Your sales at other places were so limited that the profits will not pay for the delay; but we think you will have found a very good market at Loanda for all the flour you had on board, provided you did not report over one hundred barrels. If you obtain the quoted rates, or even thirty dollars per barrel, for the 470 barrels remaining, the *Sarah* must make a fine voyage, unless she is very badly mismanaged on her return passage, of which there is much reason to fear. We regret much that we were so greatly deceived in Captain Cork.

"We know not whose fault it was that the specie was left in New York. The writer found it in the safe after you sailed, and used it; he knew nothing of it before.

"We heard of your arrival at Sierra Leone in twenty-four days by the British man-of-war brig *Butterfly* and her prize; but your letters did not come to hand till January 21, four months after they were written, and then by the *Saladin*.

"George and Cork's letters of November 21, via Rio, came to hand two weeks since, and we hope soon to hear in the same way or direct. The *Sea-mew* arrived at St. Helena January 6, and sailed 14th for Africa, and perhaps will soon get home. We hope you closed your sales, however, before she arrived at Loanda. The *Quill* is here, and idle we believe. Nathan

Augustus Frye was married last night, and probably will not wish to sail very soon for Africa. *It is not known that the 'Jones' is going to Africa, and we hope she will not be followed very closely; but the 'Jones' is a fast sailer and we hope will have a short passage.*

"Mr. Hunt has just been in to ask plainly, if the *Jones* goes to Africa. He writes to Captain Bryant by her. He says the *Quill* is doing nothing yet.

"Yours truly,

"P. J. FARNHAM & Co.

"Captain FRANCIS W. SEXTON, *Ambria*."

[Translation.]

"*D. Masoro Maray to 'Captain Sequeson.'*"

"BORNA, June 16, 1840.

"SIR AND ESTEEMED FRIEND: I hope you are well. I inform you now of all the trouble I had respecting the ivory. I am in expectation of *Chibuca* containing one hundred teeth of ivory '*together with one hundred slaves*;' and yet I shall not be able for the present to purchase them. It would not be amiss if you please to let me have some cash for me to finish this business, and also the barraca. At this moment I am in expectation of the boat from Loando, with her cargo, and also the launch in question. You will hear several more particulars from Juan Maray, who will communicate them to you in person. My desire is, sir, that you may keep in health.

"Your faithful servant,

"DOMINGO MASORO MARAY."

Besides these letters there were found on the vessel, said Mr. Hornby, "irons, spare planks, and articles used for slave-food." These letters and things constituted the evidence with reference to *the cause* of seizure. Mr. Hornby further said:

"And as the judge at Sierra Leone, whose experience enabled him to form an opinion on such a subject, has decided that the evidence was insufficient to sustain so serious a charge, I have no hesitation in giving my full assent to that judgment; but, on the other hand, I can not but feel, when endeavoring to place myself in the position of Lieutenant Littlehales, and viewing these events and circumstances separately and in the order in which they happened, and not collectively and from an epoch long subsequent to the time of their occurrence, that the judge at Sierra Leone was right in considering the error of the seizure materially induced by the conduct of the master. The suspicious circumstances were undoubtedly those connected with the shipment of the crew, their assertion with regard to false papers and the objects of the voyage, the evasive answers and

¹ Mistake for Sexton.

questionable conduct of the master, and lastly, the two letters to which I have alluded.

"The seizure being complete, on the *sixth day* after it the vessel sailed for Sierra Leone with three of the *Jones's* crew. It is not alleged that the master, or the supercargo, asked to be allowed to go, although this is sought to be inferred when it is stated, *but contradicted*, that he twice, before the Monday previous to the departure of the vessel, tried to get on board. About six or seven weeks after the arrival of the vessel at Sierra Leone she was libeled, tried, and declared free.

"The reason why Lieutenant Littlehales sent the vessel for adjudication before a vice-admiralty court, instead of libeling her before a court of record at St. Helena, is stated to be that the latter court had only jurisdiction under 5 Geo. IV. ch. 113, to try the simple question of *whether or not the ship was actually engaged in the slave trade*, while the charge made against the *Jones*, involving the doubt of her nationality, suggested by the suspicion of her having double or false sets of papers on board, coupled with *a suspicion* of her being engaged in the slave trade, being only *an offense* created by the 2 and 3 Vict. ch. 73, it could not be tried by any other court except that specially pointed out by the statute.

"I come now to the second division of the case, namely, to that part which has reference to the cause of the damage subsequent to the decree of the court; and the first question which I find myself called upon to answer is this: Was the master justified, under the circumstances, in abandoning his vessel so entirely as he did? I [can not] believe that he was; and if I am right in the view which I take upon this part of the case, namely, that the conduct of the master in abandoning his vessel was, under the circumstances, *unjustifiable*, and that the losses subsequent to the judgment of the court were in the first instance the result of such abandonment by him, and afterward by his principals (the owners of the vessel), it follows that it would be an act of injustice to hold the British Government responsible in damages for consequences which were the natural result of the conduct primarily of the claimant's agents, and subsequently of their own. In making these remarks, I am, of course, confining myself to the losses suffered *after* the judgment decreeing the vessel 'recete.'

"Now, in order to test the conduct of the master, I propose to inquire whether, as between insurers and owners, such an abandonment (supposing capture to be a risk insured against) would have been justifiable, so as to render the former liable, as on a total loss, to the latter; and, on looking carefully through the cases on the subject, I do not find anything to justify me in deciding this case upon the basis that the master acted either prudently, fairly, or for the interests of both parties. The rules laid down, so far as they concern the master, and in so far as the British Government may now, for the *purpose of illustration*, be considered as standing in the position

of insurers called upon to pay as in the case of a total loss, are, in my judgment, equally applicable. It is stated in Phillips on Insurance (Vol. I. page 38) that 'abandonment is only justifiable as against insurers when the thing insured is *irretrievably* lost;' and it is elsewhere laid down that the total loss on which abandonment is naturally consequential must be 'clear and absolute;' that is, '*where all probable hope of recovery is gone.*' Lord Mansfield, too, in giving judgment in a case in which the alleged loss was the consequence of a capture, said (M. & J. 2 Douglas, 232) the question is, 'Whether the consequences of the capture were such as, notwithstanding the recapture, occasioned a total obstruction of the voyage, or whether they merely occasioned a partial stoppage, as in the case of *Hamilton v. Mendes.*' It has been held, also, that although capture will sanction an abandonment, as in the case of a total loss, yet when followed by a recapture or *restitution* (and it must be recollected that by the maritime law no change of property takes place until after condemnation) *it does not do so*; and this doctrine is practically laid down by Chief Justice Marshall in a case cited in the work of Mr. Phillips, to which I have referred. In the case of *Gardere v. Col. 7 Johns*, 514, Mr. Justice Yates says that it is the bounden duty of a master to labor diligently for the recovery of his owner's property; and that if he does not he lays himself open, after abandonment by his owners, to an action at the suit of the insurers, whose agent by that act he becomes in the contemplation of the law. And in numerous other works it is laid down as a maxim of maritime law, that it is incumbent on the master 'to stick' to the vessel until the last moment, and even to its 'planks.' I have merely cited these authorities in proof of what I consider to be the undisputed duties of a master of a vessel; and if a fulfillment of them were necessary to enable an owner to recover as against his insurers, there is no good reason for assuming them to be unnecessary as between parties situated as the claimants are toward the British Government. If, then, in the present case the insurers could not have been called upon to pay, as in the case of a total loss, it is difficult to discover any principle which should impose a heavier obligation on the British Government.

"Having, then, determined the question of what was the duty of the master under the circumstances of this case, I proceed to examine the ground upon which its performance is sought to be excused, and the first is that Lieutenant Littlehales did not send him and the supercargo with the prize crew to Sierra Leone. I do not find, however, that either of them ever asked to go, nor is it stated anywhere that they were unable to go there, or that no subsequent opportunity presented itself; while the presumption is, from what is well known concerning the intercourse between the African coast and St. Helena in 1840, that communication between the two places was frequent. Not only, however, was no attempt made, either by the captain or supercargo to accompany the vessel (for the alleged refusal

of the subaltern in command of the *Jones* to permit them to come on board only extended to the Monday, and the vessel, it must be borne in mind, did not sail before the following Saturday), but it does not appear that they ever attempted to apprise, or ever did apprise, by letter or otherwise, the factors of Messrs. Farnham and Frye on the coast of Africa, or, in short, any of the trading connections of the owners; and it is in evidence that they had large trading connections on the coast who could have watched the proceedings on behalf of the owners, and who might have reclaimed the vessel the moment she was declared free from the charge made against her, and enabled her to continue her voyage. Nothing, however, was done; the most ordinary precautions against consequent losses were systematically neglected, and thus it appears, from the first, that those most concerned and interested in the case made up their minds to wash their hands of the whole affair—therein, as it appears to me, neglecting the very first duties of men in their position, and strongly suggesting the suspicion that the master and supercargo, *at least*, must have had pretty strong grounds, only known perhaps to themselves, for suspecting that the charge would be substantiated; in which case they may have considered that their own personal safety within the jurisdiction of the court would have become somewhat problematical.

“It has been said, however, that the master being left without money or clothes, could not proceed to Sierra Leone; but the same means which enabled him to take the longer journey to England, and thence to America, would also, it may be fairly presumed, have enabled him to make the shorter journey to the coast of Africa.

“Passing by the question as to whether the master and supercargo were guilty of misconduct, it becomes important to ascertain the course pursued by the owners on their being made acquainted with what had taken place.

“In the month of January 1841 they had received intelligence of the capture and sending of the *Jones* to Sierra Leone, and as early as the 8th of February, in the same year, they had notice of the clearance of the vessel by the judgment of the court. Both prior and subsequent to these dates they had other vessels trading on the coast; their supercargo had returned to Africa, and yet no attempt was made by them, or by any one in their behalf, to reclaim the *Jones* or to prevent the damage which was then going on. These are *laches* which I can not overlook. It is conduct strictly in keeping with that of the captain, and was probably suggested by him; and throughout it savors of a determination, through the instrumentality of the United States Government, to make the British Government answerable, not only for losses sustained through the error of an officer in its service, but also for losses the immediate result of *laches* which even the most vexatious,

unjustifiable, and improper conduct on the part of the British authorities would have neither justified nor excused.

"Feeling therefore that the seizure, though not justified on the ground upon which it has been asserted the vessel was seized—namely, that she was engaged in the slave trade—was the consequence of the suspicions excited in the mind of Lieutenant Littlehales by the crew, of the unsatisfactory conduct of the master, and of the discovery of the letters addressed to the supercargo, I must say that I agree with the spirit of the judgment pronounced by the vice-admiralty court at Sierra Leone, which by its terms attributed, to a very great degree, the 'error of the seizure' to the conduct of the master. The case, however, is now brought before the commissioners upon different grounds. We are not asked to declare the vessel guilty or not guilty of the charge under which she was libeled, but we are simply asked to give the owners compensation for any damages they may have sustained through the conduct of an officer of the British Government. To this extent I am willing to accede to the prayer of the claimants; but I can not go further, and compensate them for losses which appear to me the direct and natural result of their own *laches* and those of their authorized agents. One fact, however, has entered into my computation of the compensation to which I conceive the owners have a fair claim, and I mention it because on principle I shall feel it my duty, whenever it occurs, to treat it in the same way. To the judgment of the court, the captors thought fit to enter an appeal; and although such a proceeding does *not* appear in the present case to have in any way affected the vessel, yet I consider that where an appeal is entered without any sufficient or probable cause for disputing the judgment of the court, and subsequently abandoned, the parties *intended* to be affected thereby are fairly entitled to compensation for any expense, inconvenience, or loss of time to which they may have been put.

"The cargo, of whatever it consisted (and on this head there is a very great disparity, both as to quantity and value, in the evidence of the master and owners and that of the supercargo, see statement in memorial and affidavit of F. Sexton, p. 218 of printed evidence), was sold simply for the benefit for all concerned, because it was deteriorating in value in consequence of the neglect of the owners to look after it, after they had notice that the vessel was acquitted; and for this reason I do not consider them in justice or equity entitled to more than the proceeds of the sale.

"Estimating, therefore, the detention of the vessel consequent on the seizure—as from the 12th of September 1840 to the 12th of May 1841, a period of eight months—at £1,500, putting down, also, the probable injury sustained by the vessel in that climate at a third of its alleged value—that is to say, at £1,000—and awarding for the loss suffered on a forced sale of

stores, rendered necessary by such detention, at £300, with interest on these three sums for twelve years and six months at 5 per cent per annum from September 1840 to February 1853, equal to £1,749, I adjudge to the claimants these four sums of £1,500, £1,000, £300, £1,749, together with the sum of £1,635 3s. 7d., the amount realized by the sale of the ship, stores, cargo, etc., and also the bags of coin and specie found on board the *Jones*, and now in the custody of the marshal of the vice-admiralty court at Sierra Leone, making a gross total, exclusive of the said coins, etc., of £6,184 3s. 7d."

Decision of the Mr. Bates, the umpire, rendered the follow-
Umpire. ing decision:

"The umpire, appointed agreeably to the provisions of the convention entered into between Great Britain and the United States, on the 8th of February 1853, for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of the owners of the bark *Jones*, so far as regards the amount of compensation to be paid by the Government of Great Britain, and having carefully examined and considered the papers and evidence produced on the hearing of the said claim, and having conferred with the said commissioners thereon, hereby reports and awards that there is due from the government of Great Britain to the owners of the bark *Jones*, or their legal representatives, the sum of \$96,720; to the supercargo, Sexton, the sum of \$1,200; to James Gilbert, the master, the sum of \$1,863; to Ebenezer Symonds, the mate, the sum of \$842; together, \$100,625, or, at the exchange of \$4.85 per pound sterling, £20,747 8s. 5d., the British Government retaining the proceeds of the sales of the bark and cargo at Sierra Leone and the silver coin now in the possession of the vice-admiralty court at that place."

Commission under the convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. 83-119.)

Case of the "Conf- "The umpire, appointed agreeably to the
dence:" Damages provisions of the convention entered into be-
for a collision. tween Great Britain and the United States on
the 8th of February 1853, for the adjustment
of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of the owners of the brig *Confidence*, of Bristol, against the Government of the United States, and having carefully examined and considered the papers and evidence

produced on the hearing of the said claim, and having conferred with the said commissioners thereon, hereby reports that this claim arises from the running down by the *Constitution*, American frigate, on the 1st December 1851, in the Straits of Gibraltar, off Cape Spartel, of the brig *Confidence*, coal laden; and, having consulted with several experienced navigators to whom the evidence in the case was exhibited, they all agree with me that while all praise is due to the officers of the *Constitution* for their exertions in saving the lives of the crew, and their kindness to them afterward, the *Constitution* was in fault.

"I therefore award to the owners of the *Confidence*, or their legal representatives, the sum of two thousand and fifty-five pounds, or, at 4.84, nine thousand nine hundred and forty-six dollars, 20/100, on the 15th January 1855."

Bates, umpire, January 13, 1855, convention between the United States and Great Britain of February 8, 1853. (MSS. Dept. of State.)

Case of Calmont & Co.:
Plunder of Goods
under Military
Convoy.

"The umpire, appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February 1853 for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of Messrs. Calmont & Co., of London and Vera Cruz, against the Government of the United States, for return of duties on goods plundered by Mexicans from a caravan under the protection of the United States troops; and having carefully examined and considered the papers and evidence produced on the hearing of the said claim, and having conferred with the said commissioners thereon, hereby reports that the said United States authorities made no charge for convoy and took no risk. The mules, with their loading, were seized by Mexican soldiers, or robbers, and the Government of the United States appears in no way responsible for the loss of the goods; and the return of the duties paid on the goods would, if allowed, be merely an act of liberality on the part of the government. This commission has no power to dispense such liberality. Therefore no compensation can be awarded."

Bates, umpire, convention between the United States and Great Britain of February 8, 1853. (MSS. Dept. of State.)

Adams's Case: Detention of a Vessel. The American brig *George E. Prescott* arrived at Tampico, Mexico, in 1858, shortly after the garrison, under Moreno, had declared for the reactionary revolution of Zuloaga. Subsequently General Garza of the constitutional government besieged and blockaded the place, and as the brig was leaving the port, after having paid all port dues, detained her, demanding that the dues, amounting to \$38, should be paid again to him. In consequence of the refusal of the master to comply with this demand, the brig was detained for a number of days. A claim was made before the commission under the convention between the United States and Mexico of July 4, 1868, (1) for losses by delay in the discharge of the brig after her arrival, because the siege made it difficult to obtain laborers, and (2) for the detention for the dues. Mr. Wadsworth, the United States commissioner, delivering the opinion of the commission, pronounced the first item "absurd." The second was allowed in the form of demurrage, on the ground that the vessel was entitled under the treaty of 1831 to leave the port without opposition on the part of General Garza in the same manner as if no siege had been established.

Samuel G. Adams v. Mexico, No. 418, MS. Op. II. 157. A precisely similar claim was allowed by the commissioners in the case of the *Virginia Antoinette*, No. 322, MS. Op. II. 159.

Hill's Case: Detention in Extradition Proceedings. Claimant was arrested in Mexico and imprisoned on suspicion of a murder in Texas, with a view to his extradition. No demand having been made he was discharged. Subsequently he was arrested again, and on a demand was extradited. It was held by Mr. Palacio that there was no claim against Mexico for his first arrest and detention, the Mexican authorities having acted with a view to the execution of the extradition treaty, and having been justified in retaining him in expectation of a demand. Mr. Wadsworth expressed his concurrence in a formal opinion.

James Hill, sen., v. Mexico, No. 377, convention of July 4, 1868, MS. Op. I. 57.

Kellar's Case: Retention of a Bond. A claim was made for the value of a bond which was alleged to have been stolen from the Mexican Government at the taking of the City of Mexico by the American forces in 1848. The bond was afterward sold to claimant, having no marks upon it to show

that it had been canceled. Afterward the Mexican Government, getting hold of it, kept it and refused to give it up or to pay it. The umpire allowed the value of the bond, estimated not by its face value, but by its market value at the time of purchase by claimant, with interest on that amount.

Thornton, umpire, *Edgar Keller v. Mexico*, No. 95, convention of July 4, 1868, MS. Op. VII 95.

Cahill's Case: Various Complaints. The memorialist, a native citizen of the United States, preferred a claim against Spain for damages suffered by him while conducting a drug store in Cardenas, in Cuba, and for the breaking up of his business. He attributed his misfortunes to the machinations of a rival druggist, who was also an official, "a subdelegate of pharmacy," named Barranat. As the claimant was not duly registered in Cuba as a pharmacist, he opened his store under the name of another person who was duly licensed. During the temporary absence of the latter person, the store was closed and a fine imposed on the claimant for keeping a drug store without being registered. The closing of the store was effected in accordance with the forms of law. The claimant also demanded damages for the seizure by the authorities of a consignment of patent medicines, the importation of which was forbidden by law. He also complained that when his wife wanted to come to the United States, the authorities required as the condition of issuing her a passport, that he give bond that she should not do anything in aid of the insurgents while she was in the United States. It appeared that this bond was, through the intervention of a consular officer of the United States, returned to the claimant a few days after it was given. He also complained of various acts of the authorities touching matters such as the hanging out of a flag, threats, disrespectful remarks, etc.

The arbitrators held that the claimant had no title to recover, and dismissed the claim.

John F. Cahill v. Spain, No. 98, U. S. and Span. Com., January 8, 1876.

Adam's Case: Legal Tender Act. "In the case of William Adam (No. 72), the claimant, a British subject domiciled in England, alleged that he was, in 1862, the owner of certain bonds of a railroad company within the United States, amounting to \$5,000 principal, with interest, payable half yearly, at six per cent per annum, the interest upon which had been regularly paid in specie up to the 31st De-

cember 1861; that in the year 1862 the Congress of the United States passed a law making paper money a legal tender, without any protection to preexisting contracts; and that immediately after that law the paper money of the United States became depreciated in value, and the claimant was thenceforward compelled to receive payment of his interest in such depreciated currency, and that the bonds themselves and the prospective interest to become due thereon had likewise become depreciated in consequence of the same legislation; that the Supreme Court of the United States had, in 1871, adjudged the act of 1862 valid in its application to preexisting debts. He submitted with his memorial a computation of his losses in the premises, and claimed damages \$3,309, besides interest. A demurrer was interposed to the memorial on behalf of the United States, on the ground that it stated no case within the jurisdiction of the commission and no facts showing any liability for compensation to the claimant.

"The commission unanimously made an award as follows:

"The commissioners are of opinion that the matters alleged in the memorial do not constitute the basis of any valid claim against the United States. The claim is therefore disallowed."

Am. and Br. Claims Commission, treaty of May 8, 1871, Hale's Report, 159; Howard's Report, 78.

"The questions raised by the demurrer in Case of the "*Itata*:" this case are very important, and have been argued with unusual zeal and ability by the learned counsel on both sides. At present we deem it only necessary to decide whether the steamship *Itata* was the property of the claimant at the time the acts complained of were committed, and whether her alleged seizure by the Government of the United States was illegal. As to the question of ownership, there is a distinct allegation in the memorial that the vessel belonged to the memorialist. That allegation is admitted by the demurrer to be true in so far as it is not contradicted or controlled by the accompanying documents. After a careful examination of those documents, we find nothing inconsistent with the allegation of the memorialist as to ownership; on the contrary, we think they fully sustain its claim. They show that at the time of its seizure the steamship *Itata* was in the temporary possession of the provisional government of Chile. It is immaterial to inquire whether that possession was acquired under a charter party or by virtue of the authority

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trality Laws.

given by the laws of Chile enacted on the 29th of December 1883 and the 1st of February 1888. If the possession was only temporary and the general ownership of the vessel remained in the company, it has, beyond all question, we think, the right to maintain an action *for any damage done to the vessel itself*. It appears that when the libel or information against the *Itata* was filed in the district court of the United States for the southern district of California the captain, in the navy of the Republic of Chile, who commanded her at the time of the seizure, made the following claim: 'That he is the commander and in possession of the steamship *Itata*, her tackle, apparel, and furniture, for the Government and Republic of Chile, as charterer thereof under the laws of said republic from the South American Steamship Company, owner of said steamship. Wherefore this claimant prays that this honorable court will be pleased to decree a restitution of the same to him as such commander in possession, and otherwise right and justice to administer in the premises.'

"But it also appears that Charles R. Flint, intervening as agent for the interest of the South American Steamship Company in the said steamship *Itata*, appeared before the court and made claim to the said steamship and averred: 'That said company was the owner of the said steamship at the time of the attachment thereof, and that the said company is the true and *bona fide* owner of the said steamship, and that no other person is the owner thereof.'

"The record of the suit also shows that there was no contest made by the counsel representing the steamship company and the provisional government of Chile as to the ownership of the said vessel. It seems they were in perfect accord on that subject, and that by an agreement entered into between them and announced in open court the vessel was delivered to the representatives of the provisional government of Chile. Under these circumstances we are unable to assent to the proposition that the South American Steamship Company has forfeited its right to appear before this commission and assert its claim. It may or may not be true that the said company has a valid claim against Chile, and that Chile has a valid claim against the United States, growing out of the seizure of the *Itata*. We do not feel called upon to express any opinion upon that subject. We only decide at present that the memorialist, *as the owner of the steamship 'Itata,' is entitled to maintain its claim for any dam-*

age done to the vessel itself, if such damage has been occasioned by any unjustifiable action of the United States. Did the Government of the United States, by the seizure of the *Itata* for an alleged infraction of its neutrality laws, incur any legal liability? The record of the suit referred to shows that the district court of the United States for the southern district of California, after full consideration of all the evidence, documentary and oral, ordered and decreed that the United States should recover nothing by reason of the libel against the steamship *Itata*, and that said libel should be dismissed. The United States took an appeal from this decree, and it was affirmed by the circuit court of appeals, the three judges of that court being unanimously of the opinion that the evidence adduced was not sufficient to justify a decree of forfeiture. It is true they pronounced the seizure to have been justifiable under the circumstances, but as the question of probable cause was not involved in the determination of the question before the court, we do not feel bound by the dictum of the judges on that subject. In view of the occurrences that took place after the original seizure of the *Itata*, we do not deem it necessary at this time to decide whether there was probable cause for that seizure or not.

"After stating that on or about the 6th of May 1891, while lying in the harbor of San Diego, the said steamship was boarded by a person who alleged himself to be one Spaulding, an officer of the United States, and in such pretended capacity assumed to take possession of said vessel; that the said Spaulding was unable to exhibit any authority as an officer of the United States, and the officers of the said *Itata*, believing him to be falsely impersonating an officer of the United States, set him on shore, and said *Itata* put to sea, the memorialist proceeds as follows:

"Meanwhile the Government of the United States, or the duly authorized and responsible officers thereof, had taken cognizance of the presence of the said *Itata* within the jurisdiction of the United States and the fact of her departure therefrom, and for reasons unknown to your memorialist directed certain of its naval officers to proceed with vessels of war in pursuit of the said *Itata*; to intercept her by force if found on the high seas, and to cause her to return to San Diego.

"It became known to the provisional government of Chile, or its duly authorized and empowered representatives, through the medium of the public press, that the steamship *Itata* was

charged by the Government of the United States, or by certain of its officers, with an infraction of the neutrality laws of the said United States; that a portion of the United States naval forces were then *en route* to the port of Iquique for the purpose of securing the said *Itata*, and said reports were confirmed by a note to Mr. Isidoro Errázuriz, minister of foreign relations, from Admiral W. P. McCann, in which the latter, in his official capacity as commander in chief of the United States naval forces on that station and as the representative of his government, solemnly asserted and declared without qualification that, in his opinion, the said *Itata*, in procuring her cargo within the waters of the United States, was guilty of a violation of said neutrality laws. Upon these representations of Admiral McCann, made in the manner aforesaid, and because of the demands of the Government of the United States, accompanied as they were by the presence of a large naval force, the said *Itata*, with her cargo, was surrendered under duress to the representatives of the United States.

"The said *Itata* was accordingly taken possession of by said Admiral McCann on the 4th day of June 1891, and departed from Iquique on the 13th day of June 1891, under convoy of the U. S. S. *Charleston*, Captain George C. Remey commanding, by whom she was placed in the custody of the United States marshal at San Diego on or about the 6th day of July 1891."

"We find nothing at variance with these statements in the documents accompanying the memorial or in any public document to which we may properly make reference. Assuming it to be true that after the departure of the *Itata* from the port of San Diego she was pursued by the naval authorities of the United States upon the high seas into Chilean waters, induced to surrender by a display of superior force, and brought back under duress, the question arises whether or not such action on the part of the United States was allowed by the laws of nations. After an examination of many authorities on international law and numerous decisions of courts, we are of opinion that the United States committed an act for which they are liable in damages and for which they should be held to answer. Mr. David Dudley Field, in his *International Code*, sec. 626, says:

"'An inmate of a foreign ship who commits an infraction of the criminal law of a nation within its territory can not be pursued beyond its territory into any part of the high seas.'

"In the case of the *Apollon*, reported in 9 Wheaton, p. 361, it was decided—

"'That the municipal laws of one nation do not extend in their operation beyond its own territory except as regards

its own citizens, and that a seizure for a breach of municipal laws of one nation can not be made within the territory of another.'

"Mr. Justice Story, in delivering the opinion of the court, says:

"It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories for the purpose of seizing vessels which had offended against our laws. It can not be presumed that Congress would voluntarily justify such a clear violation of the laws of nations.'

"In the case of *Rose v. Himely*, reported in 4 Cranch, p. 239, Chief Justice Marshall, speaking for a majority of the court, says:

"It is conceded that the legislation of every country is territorial; that beyond its own territory it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law or to enforce obedience to that law without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the specific rights of sovereignty must be exercised within the territory of the sovereign. If these propositions be true, the seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas for the breach of a municipal regulation, is an act which the sovereign can not authorize. The person who makes this seizure, then, makes it on a pretext which, if true, will not justify the act, and is a marine trespasser.'

"In view of these authorities and others that might be cited, we are of opinion that the South American Steamship Company has a claim for extraordinary repairs of machinery and boilers made necessary by the long voyages to and from San Diego. We do not deem it necessary at this time to examine the other items of the damages claimed. If any single item in the list constitutes a valid claim for damages, the demurrer can not be sustained.

"We therefore decide that it should be overruled and the respondent required to answer."

South American Steamship Co. v. The United States, No. 18, United States and Chilean Claims Commission, convention of August 7, 1892. See also Shield's Report, 90.

CHAPTER LVIII.

DENIAL OF JUSTICE.

1. CASES UNDER ARTICLE VII. OF THE JAY TREATY.

By Article VII. of the treaty between the United States and Great Britain of November 19, 1794, commonly called the Jay Treaty, it is recited that "complaints have been made by divers merchants and others, citizens of the United States, that during the course of the war in which His Majesty is now engaged, they have sustained considerable losses and damage, by reason of irregular or illegal captures or condemnations of their vessels and other property, under color of authority, or commissions from His Majesty, and that from various circumstances belonging to the said cases, adequate compensation for the losses and damages so sustained can not now be actually obtained, had, and received by the ordinary course of judicial proceedings." On the strength of this recital, "it is agreed, that in all such cases, where adequate compensation can not, for whatever reason, be now actually obtained, had, and received by the said merchants and others, in the ordinary course of justice, full and complete compensation for the same will be made by the British Government to the said complainants. But it is distinctly understood that this provision is not to extend to such losses or damages as have been occasioned by the manifest delay or negligence, or willful omission of the claimant."

Obviously one of the first questions that
Case of the "Diana,"
Gardner. arose before the board of commissioners organized to carry these stipulations into effect was, whether the several claimants could obtain compensation for their alleged losses in "the ordinary course of judicial proceedings." The first case in which this question was determined was that of the American brigantine *Diana*, Gardner, master, which, while on a voyage from the French island of Guadaloupe to New York with a cargo of sugar was

captured by two British cruisers and carried into St. Christopher. The capture took place December 2, 1793; on April 2, 1794, the vessel and cargo were ordered to be restored, but the claimants, besides being refused their costs and damages, were ordered to pay costs to the captors. From this sentence both parties appealed; the claimants from that part which disallowed them costs and damages, and ordered them to pay costs to the captors, and the captors from so much as ordered the vessel and cargo to be restored. The captors, however, took no further proceedings. The claimants, on the contrary, duly prosecuted their appeal, which was at length set down for a hearing. But while the case was in this situation the lords commissioners of appeal decided that from the 6th of November 1793, when the instructions under which the capture was justified were issued directing the commanders of British ships of war and privateers to "stop and detain all ships laden with goods the produce of any colony belonging to France," till notice was received of the instructions of January 8, 1794, revoking and modifying the former instructions, captors were justified in seizing, prosecuting, and bringing to judgment the vessels of neutrals laden with the produce of the French colonies, even though they were not apprised of the instructions of November 6, 1793; and that persons who pressed appeals in such cases should pay costs to the respondent. When this decision was rendered, the claimants naturally abandoned their appeal, since its prosecution could only serve in the end to subject them to further costs. The board decided that under these circumstances the claimants could not obtain reparation "in the ordinary course of justice," and awarded them compensation according to the orders given below.

On the 13th of March 1797 the board made the following order:

"In the case of the Brig *Diana*, Gardner, ordered,

"That it be referred to Samuel Cabot and Alexander Glenie, esquires, to ascertain the compensation to be paid as demurrage to the claimants for the detention of the said brig from the time of her capture to the day of her final discharge by the vice-admiralty court of St. Christopher, and also whether any and what compensation ought to be paid to the said claimants on account of the damage alleged in the affidavit of Capt. Gardner to have been sustained by the said vessel during her detention by the fault of her captors, and also to report to the board the sum to be paid to the claim-

ants for the difference between the proceeds of the cargo at St. Kitts in the month of April 1794 and the value of the same at New York according to the prices current of the different articles whereof the said cargo was composed at such time as the said vessel would probably have arrived at her said port of destination if she had not been detained by the captors; and also to ascertain what compensation shall be paid to the claimants for any loss or damage arising from the detention of the residue of the said cargo not sold at St. Kitts.

"And it is further ordered

"That the claimants be directed to bring in upon oath, such further documents and proofs as may be in their possession or power respecting the quantities of the cargo sold in the West Indies and the proceeds of such sale, and that in the mean time the execution of the order of reference in this case be postponed, and the said Samuel Cabot and Alexander Glennie, esq., are to make report to the board of their proceedings under this order."

On the 12th of April 1797 the board modified the foregoing order as follows:

"Ordered

"That such part of the order of reference in this case passed on the 13 March last, which is contained in the following words, viz:

"'and also to report to the board the sum to be paid to the claimants for the difference between the proceeds of the cargo at St. Kitts in the month of April 1794 and the value of the same at New York according to the prices current of the different articles whereof the said cargo was composed at such time as the said vessel would probably have arrived at her said port of destination if she had not been detained by the captors'—

"be revoked, and that in lieu thereof the following words be substituted and make part of the said order of reference, viz: "and also to report to the board (without deducting freight) the sum to be paid to the claimants for the difference between the proceeds of such part of the cargo as was sold at St. Kitts in the month of April 1794 and the value thereof at New York according to the prices current of the same articles at such time as the said vessel would probably have arrived at her said port of destination; and also to ascertain what compensation shall be paid to the claimants for any loss or damage arising from the detention of the residue of the said cargo not sold at St. Kitts."

"And it is further ordered,

"That the claimants be directed to bring in upon oath such further documents and proofs as may be in their possession or power respecting the quantities of the cargo sold in the West Indies and the proceeds of such sale, and that in the mean time the execution of the order of reference in this case be postponed."

“The following are the material facts of this case, as they appear from the memorial of the claimants, and the affidavit of Mr. Mullet, the truth of which is not controverted.

“This ship, loaded with rice and some other articles, being on a voyage from the United States of America to France, and belonging to citizens of the United States, was captured by a British ship of war, and sent into a British port, in virtue of orders from His Britannic Majesty to stop all vessels bound to France loaded with provisions.

“The vessel and cargo were libeled in the high court of admiralty, and a claim was made for the property of the memorialist, stating these facts, on which the court pronounced the property to belong as claimed, and decreed the same to be restored, or the value thereof paid to the claimant for the use of the owner.

“The registrar of the court of admiralty, taking to his assistance two merchants, estimated the value of the cargo by adding to the invoice price thereof ten per cent—the registrar and merchants declared they were prevented by directions of the British Government from applying any other rule to ascertain its value. This price was less than could be obtained for the same articles in London, and much less than the memorialist could have sold them for in Bordeaux, which was the place of destination.

“The memorialist received the money at which the cargo was estimated, protesting at the same time that this sum was less than its value.

“If the memorialist had not received this sum, bills of exchange which the owners of the cargo had drawn for its proceeds would have returned under protest, to the great loss if not utter ruin of the drawers.

“It is alleged in behalf of the crown that the claimants, if they had sustained any injury, might have obtained compensation in the ordinary course of justice, in which course they failed to seek it, and are therefore guilty of willful omission; that they expressly joined in an application to the court that the report of the registrar and merchants might be confirmed; that provisions going to an enemy in some circumstances become contraband, in certain cases are liable to confiscation, and in others to a right of compulsory preemption, and that this principle is expressly and mutually acknowledged in the

eighteenth article of the subsisting treaty; and that the stoppage of sale of this cargo was made under those circumstances of distress, on the part of the enemy, to which that article of the treaty applies; and that the valuation of the cargo, as fixed by the registrar and merchants, has been settled with a just conformity to the intentions of the contracting parties expressed in that article.

"The first question that arises is, whether, from any circumstance belonging to this case, the claimants could not obtain, have, and receive, adequate compensation for the loss and damage sustained by this capture in the ordinary course of judicial proceedings.

"The ordinary course of judicial proceedings in the case of a vessel captured as prize, by which a claimant may seek compensation, is by prosecuting the captor in the prize courts of the nation whose subject the captor is. The claimants did that here—they claimed their property in the high court of admiralty, and obtained a decree pronouncing the property to belong as claimed, and ordering the same to be restored, or the value thereof paid to the claimants for the use of the owners, with costs and damages. In terms, then, this was satisfactory, and the most that could have been obtained in any case against a captor.

"At this stage a new party steps in, viz, the British Government, and not only discharges the captor and pays him the costs which he had incurred, but prevents by its own act the claimants from availing themselves of the sentence ordering restoration etc.

"The prize act, as it is called, defines the duties and authorities of the court, and the course of proceedings to be pursued by a claimant, to obtain compensation for an illegal or irregular capture.

"The following is the course of procedure directed by that act.

"In all cases of capture the papers are to be brought in and the judge to proceed to discharge and acquit such capture, or to adjudge and condemn the same to be good and lawful prize.

"In cases of doubt, where delay is necessary, the judge shall forthwith order such capture to be appraised by persons well skilled in the same, to be named by the parties, and approved and appointed by the court, and sworn truly to appraise the same, according to the best of their skill and knowledge. On

security, the judge is to order the prize to be delivered to the claimants; if they refuse to give security, the judge, on security from the captors, is to order it to be delivered to them.

"In case of appeal, the property may be valued according to agreement of parties, and the party on giving security to that value shall receive the said capture.

"In case of objection or difficulty to the giving or taking such security, the judge shall, at the request of either party, order such goods and effects to be entered, landed, and sold by public auction, under the care and custody of the proper officers of the customs, and under the inspection of such persons as shall be appointed by the claimant and captors, and the money brought into court, etc.

"Such is the ordinary course of judicial proceedings, as prescribed by the legislature of Great Britain, and which the claimant is to pursue, in order to obtain and receive adequate compensation for a loss and damage sustained by an irregular or illegal capture.

"If a case has any circumstances belonging to it, whereby the claimant could not obtain adequate compensation in this course, it is a case within the description of those to which the article extends relief.

"The party is not confined to any particular mode of proving that a case has such circumstances attached to it—much less is he under the necessity of substantiating the fact by a decision of the lords of appeal in the case itself.

"The board has unanimously sanctioned this principle in their decision in the case of the *Diana*, Gardner.

"Let the case now under consideration be examined, and the proceedings therein compared with those prescribed in the act before referred to, that it may appear whether or not the claimant could have obtained, had and received compensation in this course.

"The capture was made under the express orders of the British Government, to stop, etc. vessels loaded with provisions and bound for France, and send them into Great Britain.

"In the ordinary course of judicial proceedings, as we have seen, the claimants could have had their property restored to them with damages and costs, and if from any delay the cause could not have been decided, an appraisement was to be made by persons named by the parties and approved by the court, under oath truly to appraise the same, according to their best

skill and knowledge. And the claimants might have had their property restored to them on giving security.

"The government interfered and would not suffer the claimants to have their property, although the court adjudged it to belong to them.

"Instead of the rule of appraisement prescribed in the ordinary course of justice, and by the appraisers under the sanction of an oath, the government, assuming the right to judge in its own cause, establishes a particular rule by which compensation shall be made by itself to the claimants. The merchants who assist the registrar in estimating the compensation are not under the oath imposed in other cases, and instead of their being named by the parties, they are taken by the registrar, without the consent of the claimants.

"In the ordinary course, if a sale of the cargo from any cause had become necessary, it would have been sold at public auction, under the inspection of the claimant and captor, and the proceeds would have been decreed to the claimants. In the present case the claimants prayed they might sell the property, and have the market price, but it was refused.

"From this examination and comparison it is manifest that the claimants could not have, obtain, and receive compensation in the ordinary course of justice, and that they were prevented from pursuing this course by the express orders and acts of the government.

"The decree of the court is that the cargo shall be sold to His Majesty's government.

"Whatever may have been the state of the case, or whoever the parties, prior to this decree, it is evident that the party thus raised, from whom the claimant was to seek compensation, was the Government of Great Britain; and nothing is clearer than that seeking compensation from the British Government could not have been within the meaning of the parties to this treaty, when they adopted the terms *ordinary course of justice*. The very reverse is true, viz, that compensation against the government could not be obtained in the ordinary course, and this doubtless was a very important reason for making the seventh article of the treaty.

"It is said, however, that the party might have obtained compensation by appealing to the lords commissioners of appeal in prize causes. We have seen that their lordships refused to afford to the claimant any relief against a captor,

who acted under the orders of November 1793, and, far from rendering any judgment against the government, they declared they would mulct in costs any claimant who should persist in appeals, after knowing this opinion of the court.

"Indeed, a capacity to have and obtain compensation for an injury done by a government, through the ordinary course of judicial proceedings emanating from and subject to that government, would be a solecism in any country.

"Such a capacity in the subject of a foreign nation to obtain compensation from the Government of Great Britain, through the prize courts of His Majesty, which are expressly subject to the orders of the crown, involves a contradiction of all the principles of government, and an absurdity too glaring to be entertained after the smallest reflection on the subject.

"If the claimants had appealed to the lords commissioners, and they had chosen to estimate the sum to be paid greater than the amount assessed by the registrar, no one would pretend that there was any power in that court to enforce a decree against the government.

"The crown may or may not have complied with it, but a sentence of court, obligatory on the party against whom it is rendered, no further than at the pleasure of that party, can never be considered a remedy in the ordinary course of judicial proceedings.

"In ordinary cases of capture, there is a substantial reason why the claimant should prosecute through His Majesty's courts of justice, to obtain compensation for an illegal capture or condemnation, before he can entitle himself to compensation from His Majesty himself. Until that is done, it is a case between the captor and claimant, and the government can not be considered responsible for the acts of its subjects unless redress has been sought and found unattainable by the ordinary course of judicial proceedings. If the party neglect to prosecute the captor who has possession of the property, the loss, for aught that appears, results from his own act, and it would be injustice to render the government liable to the claimant when it had provided means by which he might have obtained satisfaction from those who did the wrong, and who, by consent of the claimant, remain in quiet possession of the thing for the loss of which he claims compensation; and against whom his act bars the government from claiming restitution. In the case under consideration the whole process is between the government and claimants, especially after the decree of the

admiralty court, and it is the act of the government that prevents the claimants from obtaining compensation from the captor.

"It is a satisfaction to reflect that from the claimant's omitting to prosecute in the high court of appeals, no evil has resulted to the British Government, but expense has been avoided.

"In the case of a decision by the court in the last resort, it seems to be implied by the answer of Mr. Gostling that the complainants might have had recourse to this board, though, from his former answers it is highly probable that the decree of the lords would have been urged as conclusive and binding.

"To render it manifest that no possible evil could have been avoided, or benefit gained to the British Government in any event by such procedure, let it be conceived that the court of appeals would have awarded a larger sum than is allowed in the registrar's report.

"If the claimants had been satisfied with the decree of the court of appeals and the government had chosen to pay the sum decreed, the amount to be paid by the British Government would have been increased by the costs of this court. If the claimants had not been satisfied, and had come before this board, the additional sum to be awarded, if, in the opinion of the commissioners, any should be due, would still be increased by the costs they incurred.

"The complainants prefer their claim in the present case, not having gone through and sustained the expenses of this court. The sum, then, which may be awarded to be paid will not be so great by the amount of costs, which would have been incurred, solely to ascertain by the decree of the lords commissioners of appeal, that compensation could not be obtained in the ordinary course of judicial proceedings, a fact as satisfactorily and conclusively proved without as with it.

"The foregoing reflections render it evident to my mind that the complainants could not obtain, have, and receive compensation in the ordinary course of justice, and that no injury, but advantage, has accrued to the British Government from their having refrained to prosecute in His Majesty's courts any further than they did.

"Mr. Gostling says that the claimants made application that the report of the registrar should be confirmed by authority of court.

"Mr. Mullet's deposition states this to have been indispensable to the obtaining any payment.

"It would hardly be considered a good plea to set aside a demand in a court of common law, that, under circumstances like those of the present case, a release of all demands had been executed by the plaintiff. It is in evidence that the party could obtain nothing unless such an application had been made. [It is in evidence] that bills had been drawn on the fund which this cargo was expected to raise; and if the party had not taken this only step to obtain part of what was due, these bills must have returned on the drawers, which return, with the accumulated damages (in some cases twenty, and I believe never less than ten, per cent), would have been attended with the greatest distress, if not ruin of the drawers, according to the opinion of the witness. Under these impressions, the agent was constrained to apply to the court of admiralty, that the reports might be confirmed.

"It is not possible to conceive that this application was made under any other than the most pressing necessity, and but from the most sincere and well-grounded conviction that nothing could be obtained by objecting to the report and prosecuting appeals, for it is proved that the agent for the claimants exerted his utmost endeavors to obtain possession of the cargo by offering to indemnify the British Government against any demands from the claimants, and to give complete security that the whole should be sold in Great Britain, if the property was delivered over to him.

"If this was not permitted, he prayed he might receive for his cargo the fair market price of London. This was refused, though the liberality and justice of the offer was acknowledged by those to whose particular province this business was confided.

"Thus absolute were considered the orders which related to every part of the transaction, from the capture to the report of the registrar and merchants and the payment of the money awarded by them. The registrar and merchants confessed the case to be hard and severe, but declared their orders to be peremptory, to allow no more on any cargo than the invoice price and ten per cent thereon.

"It would be doing great injustice to the British Government to suppose that it could entertain the smallest desire that such an implied and forced consent, as can be deduced

from this application to have the report confirmed, should be considered as an interference with a claim before this board."

Gore, commissioner, June 30, 1797, case of the *Neptune*, Article VII. of the treaty between the United States and Great Britain of November 19, 1794.

"This case has gone to the merchants upon the opinion of a bare majority consisting of the two American commissioners and the fifth commissioner, and of course I think myself, as one of that majority, strongly called upon to state and file the reasons which have governed my judgment.

"In making this statement I shall not (as it has been supposed I ought to do) confine myself to what is called the question of jurisdiction. The motives which influence me to record the grounds of my decision arise out of a sense of the delicacy of my situation. And these motives apply as forcibly to a decision upon the merits as to a decision upon the import of the words of the treaty.

"In the course of the following detail it will appear that I have sometimes noticed the topics insisted on by others as militating against the determination of the board, and it is proper for me to observe that I have not studied to avoid this.

"My sole view is the vindication of my own opinion, but this requires the discussion of objections to it.

"If the manner in which this is done shall be temperate and decorous (and I hope I am incapable of adopting any other manner), the thing itself can neither be oppressive nor reprehensible. I may indeed misrepresent what possibly I may not have understood, but it will be easy for those whose ideas I have misconceived to counteract the effect of accidental misrepresentation by putting on record their real thoughts.

"The general nature of the case is briefly as follows:—

"In April 1795 (between the time of the signature of the treaty and the time of exchanging the ratifications) his Britannic Majesty in council issued an instruction to the commanders of his ships of war and privateers, etc., by which they were directed to stop and detain all vessels loaded wholly or in part with corn, flour, meal, and other articles of provisions therein mentioned, bound to any port in France, etc., and to send them to such ports as should be most convenient, in order that such corn, etc., might be purchased in behalf of His Majesty's government, etc.

"I state the tenor of the instruction not from any authentic copy, for that is not to be obtained (the instruction never having been published, as is customary), but from a collation of the evidence of its purport with the first additional instructions of the 8th of June 1793. The substance is sufficiently established by proof, and I have merely borrowed from the instruction of 1793 the language in which it was probably clothed.

"In virtue of this instruction the *Neptune*, belonging to American citizens, laden in part with rice and bound on a voyage from Charlestown to Bourdeaux, in France, was stopped by one of His Majesty's ships of war and finally brought into the port of London, where proceedings were commenced against her in the high court of admiralty.

"The court of admiralty ordered the cargo to be sold to His Majesty's government and the proceeds¹ to be brought into court for the benefit of those who should be entitled, and upon a claim being made in the usual form, in behalf of the owners, restitution of the cargo or the value was decreed. The ship was restored, with freight, demurrage and expenses.

"The ascertainment of the value of the said cargo and the account for freight, demurrage and expenses were referred to the registrar and merchants.

"The registrar and merchants, in ascertaining the value of the cargo, allowed much less than the claimants demanded and much less than it would have produced at Bourdeaux or even in London. The rule by which they made this ascertainment was *the invoice price and a mercantile profit of 10 per cent*, which they alleged they had not the power of departing from, that rule being prescribed to them by the British Government in all cases under those orders.

"Mullet & Co., the agents of the claimants, upon the arrival of the ship at Portsmouth, applied on their behalf to the lords of the treasury and also to Claude Scott, esquire, the agent appointed by the British Government for the management of cargoes of this description, offering to indemnify the British Government against all claims and demands on account of the capture, and also to give security to sell the cargo in England, provided it was given up to them to be sold on account of the owners. This offer was refused.

"The claimants did not except to the reports of the registrar and merchants, but being told by the officers of the govern-

¹ "The proceeds were never brought into court."

ment that payment of what was so reported could only be obtained by joining in a prayer for their confirmation, they did so accordingly, protesting, however, against their errors and injustice; and received from His Majesty's government the amount of these reports.

"The memorial is for further compensation over and above the compensation already received from the British Government under the above reports.

"Upon the coming in of the memorial the following preliminary question was started:

"Whether it sufficiently appears that the claimants could not obtain, have, and receive *by the ordinary course of judicial proceedings* adequate compensation for the loss and damage they are supposed to have sustained by the seizure complained of?

"Upon this question I have given my opinion in the affirmative, and the following are my reasons:

"There are only two parties against whom complete judicial redress is alleged to have been practicable, viz, the captor and the British Government, and if it is clear that it was not attainable against either of these it follows that it was not attainable at all.

"1st. I am satisfied that it was unattainable against the British Government in such manner as is pointed out by the treaty.

"One would think that this position need only be stated to be acceded to. It has been combatted, however, and therefore requires to be remarked upon.

"It will not be pretended that the sentence of Sir James Marriot or the lords of appeal would, as against the British nation, have carried along with it any further efficacy than the government of the country *chose to give it*.

"He who should seek the performance of such a sentence must address himself to the *discretion of government* and *not to the powers of any ordinary judicature known to the laws or constitution*.

"It has been admitted (and very properly) by one of the board, in a written opinion filed on a former occasion, that the treaty extends to cases 'to which circumstances belonged that rendered the *powers of the Supreme Court of this country acting according to its ordinary rules incompetent to afford complete compensation*.' I do not think that this admission is coextensive with the actual scope of the treaty, but as far as it goes

no person will question the propriety of it, and surely no case can be imagined more unequivocally within it than the case I am now considering in the view in which it is now presented to us.

"The powers of the lords (as well as those of the high court of admiralty) were and are notoriously incompetent to afford *any compensation at all* against the British Government in the sense the treaty contemplates.

"They may be competent to pronounce *an opinion in judicial form* that compensation *ought to be afforded*, but the opinion when pronounced would be intrinsically inefficient and powerless.

"It is said, indeed, that the government would be bound in *good faith* to comply with any sentence the lords or the high court of admiralty might pass upon the case, and I am not disposed to doubt that it would have done so. But the treaty does not call upon the claimants to apply to the *good faith* of either of the contracting parties *except through our instrumentality*.

"The claimants, when they come to us, are required to show that they could not obtain, have, and receive adequate compensation *by the ordinary course of judicial proceedings*. On this occasion (unless the captor was liable) they show beyond all controversy that this was impracticable, by proving that the only party against whom redress was demandable could never be affected by the ordinary course of such proceedings.

"They show that although judicial proceedings, as against this party, might possibly have reached a certain point—i. e., the formal rendition of a judgment—they could never in the nature of things reach that point expressly designated by the treaty—i. e., the *actual receipt* of complete compensation. They show that even if the lords or Sir James Marriott had adjudged in their favor to the utmost extent of their present demand, all *beyond that judgment* must have been a perfectly discretionary act on the part of the British Government, with which the ordinary course of judicial proceedings could have no connection and which they could not in any shape have accomplished. It is not to such nerveless judgments that the treaty can be supposed to refer the claimants.

"Thus in the case of the insolvency of the captor and his securities, the court of appeals may pronounce a sentence; but as it can not enforce that sentence by reason of the insolvency

of those upon whom only it can operate, we are all agreed that the claimant is entitled to come here for redress. The present case is infinitely stronger than that of an insolvent captor, etc., for there the incompetency of judicial authority results from a fact collateral to it, whereas here it is radical and inherent.

“The lords never had and never can have even the shadow of power to execute a decree against the Government of Great Britain. No proof, no experiment can be necessary to establish a truth so palpable.

“Will anyone maintain that the compensation already paid on this occasion was obtained or could have been obtained against the *British Government* by the ordinary course of judicial proceedings? On the contrary it is certain that the payment was merely voluntary, and that although consequent upon, it was not and could not be procured by any judicial proceedings whatsoever.

“It is in proof that, notwithstanding the decree, payment was refused unless the claimants would join in a prayer for the confirmation of the report of the registrar and merchants. And it was in virtue of their constrained consent to do so that they have received what has been paid to them. If the refusal to pay had been *peremptory* instead of conditional, by what form of judicial proceedings could the claimants have compelled compliance against the sovereignty of the British nation!

“In short, it is an incomprehensible solecism to talk of obtaining, having, and *receiving* adequate compensation against the government of this country by the ordinary course of judicial proceedings. The moment it should be granted that redress was only practicable against the government it would follow as a self-evident conclusion that it was not judicially practicable at all to the extent intended by those who appointed us.

“A decree for compensation is not compensation in fact, and however the former might have been obtained against the government in the ordinary course of judicial proceedings, it is certain that the latter (of which only the treaty speaks) was not so obtainable.

“If this part of the question be plain upon the letter of the treaty, it is (if possible) yet plainer upon its spirit.

“With what rational object can it be conceived the treaty should compel the neutral claimants to apply to the lords of appeal for retribution against the government of the country

before their complaints shall be laid before us? In ordinary cases between *claimant* and *captor*, there is the best reason for such an application. The national responsibility in such cases would be lessened in proportion to the quantum of compensation judicially received from the individual wrongdoer, and if the compensation so procured from the individual should be equal to the injury, the national responsibility upon which we are appointed to act would be at an end.

"But in a case where the government and the government only is answerable to the claimant, there is no inducement to prescribe to him the circuitry and expense of exceptions and appeals. The national liability being fixed, no judicial proceedings can diminish it. They may, indeed, enlarge it, and doubtless would uniformly have that effect inasmuch as the claimant could not except and appeal without incurring considerable costs which either the lords of appeal or this board would be bound to reimburse against the British Government.

"By sending the claimants, therefore, in a case of this kind, to the lords, the treaty would have prejudiced one of the contracting parties and the claimants without benefiting either, and it is of course fair to presume that it had no such intention. If the words of the treaty necessarily purported such an intention, we should then have only to obey, whatever our opinion might be of its propriety; but I have already shown that the words are so far from conveying any such meaning that their natural interpretation leads to its reverse.

"2d. I am also satisfied that judicial redress was unattainable against the captor.

"As the seizure was made under an order of council, the captor could not be made to restore more than the property seized or its value. He was not liable for costs and damages, as the lords of appeal have uniformly determined on analogous occasions.

"Immediately upon the case getting into a train of judicial inquiry the high court of admiralty ordered the cargo to be sold to His Majesty's government and the proceeds to be brought into court for the benefit of those who should appear to be entitled to them. The sale was made (though upon no specific terms), but the proceeds were not and indeed *could not* be brought into court. The consequence was that the property, for the restitution of which the captor might originally have been answerable, was *by the act of the court, in plain pur-*

suance of the order in council, placed out of his reach and converted into a mere debt due from the British Government to whomsoever should appear to be entitled to it.

"I take it to follow undeniably that the captor was no longer liable for the restitution of the *property itself*, since no court can be supposed capable of enforcing against a party that which it has *by its own decree* disabled him from performing.

"It is only to be inquired, then, whether he remained answerable to the claimants *for the value of the property*.

"That value was the *proceeds*, and in ordinary cases he would doubtless have been answerable to that extent, *and to that only*. But in ordinary cases, where a sale is directed, the court does not prescribe to whom it shall be made, and such a sale always creates somewhere a *legal responsibility* for the purchase money of which the captor may avail himself so as to get in the proceeds to meet the court's decree.

"In the present case the court departed from the ordinary mode and directed the sale to be made *to His Majesty's government* (evidently in execution of the order of council), over which neither the captor nor the court of admiralty, nor any other court, had or can have the least efficient control. Upon the completion of the sale, then, the property was put beyond the power of the captor and of judicial process. And as the proceeds were not paid into court, they, too, were equally beyond the arm of justice exerting itself in the ordinary course of judicial proceedings. Nothing remained but an engagement on the part of the government to pay the proceeds to whomsoever should be entitled; but upon that engagement no judicial proceedings were competent to act. Its performance depended, not on the agency of judicial authority, but upon the pure discretion of the state.

"In this state of things it is impossible to imagine that any decree could be procured, or, if procured, executed against the *captor*, he being deprived of the goods with a view to which his liability commenced, and nothing being substituted in their place but the honorary promise of a sovereign power.

"Accordingly we find that, in fact, the court of admiralty has not made any decree against *him*, but that the decree actually made by it is wholly against the government. So far has it been from attempting to impose any burthen upon the captor in favor of the claimants that it orders the captor's as well as the claimants' costs to be paid by the state.

"It could decree in no other form without violating its own established rules and subverting every principle of law and equity. If it had decreed the captor to pay costs, damages, and expenses it would have trenched upon the settled rule that the orders of council justified him; and if it had directed him to restore the cargo or to pay the value or the proceeds (such proceeds not being brought into court), it would have made him responsible for unavoidable obedience to its own orders (founded upon the order of council), by which he was compelled to part from the cargo without receiving or having the means of enforcing payment of the value or the proceeds.

"In no stage of the cause was it possible for the captor or the court to get possession of the proceeds by the instrumentality of any judiciary interference. And if under these circumstances a decree should pass against him to the extent of these proceeds, it is manifest that it would have been founded in gross iniquity, since it would have been an attempt to coerce or rather to influence the sovereignty of the nation (the only party really bound to compensate the claimant) by penalties upon an individual admitted by the tribunal inflicting them to be entirely innocent.

"I will not presume nor can I believe that any court of judicature would proceed to an end, however just, by means so flagrantly oppressive.

"It is no answer at all to say that the honor of the British Government would not have permitted it to abandon the captor to the operation of the admiralty sentence without furnishing him with the means of complying with it. I do not question the national honor, for no one believes more highly of it than I do, but I may, notwithstanding, be permitted to suggest that a dependence upon it might have failed, and that, whether it should fail or not, the result must have sprung from the mere pleasure of the government, and not from the operative power of the law.

"Even if the court of admiralty or the lords had (as I am thoroughly persuaded they would not) pronounced against the captor an absolute sentence to pay the proceeds, in a hope or upon a reliance that it would be discharged by the government before process was taken out upon it, yet if such hope or reliance should be disappointed, they could not have executed the sentence against him without bringing upon the administration of admiralty justice imputations which I am confident

it will never deserve. So that in any view in which this subject can be considered, the court of admiralty or the lords could only proceed upon the *good faith* of the British Government, and the whole question at last resolves itself into this, 'Is it a sufficient reason under the seventh article of the treaty for dismissing the claimants' case that they did not persevere in a dilatory, expensive, and ruinous proceeding, which, although obviously incompetent to arrive *by its own efficacy* at the point relied upon by the treaty and affording no *certain* prospect that it could even aid them in reaching that point at all, might possibly have *induced* the British Government *voluntarily* to do them justice?' To this question there can be but one answer.

"Before I dismiss this part of the subject (upon which, perhaps, I have already dwelt too long) I will subjoin some further observations to prove that the captor was not on this occasion *in any degree* liable to the claimants' remedy.

"The orders of council in virtue of which American vessels bound from the French West Indies to the United States with the produce of those islands were captured and taken in for adjudication, have (although revoked) been held to deprive the lords of the power of adjudging against the captor the costs and damages accruing from the seizure. It is agreed on all hands, however, that there have been cases of capture under these orders in which the neutral claimants were entitled to have costs and damages, if not against the captor, at least against the government of this country. We have been told that to afford compensation for those costs and damages was one of the principal objects, and indeed, almost the only object, of the seventh article of the treaty, and on one occasion we have unanimously granted compensation for them.

"But if it be true that in the case of the *Neptune* the lords of appeal could have proceeded against the British Government through the sides of the captor (as has been contended) for the proceeds of her cargo, I can not discover why they could not also have proceeded against the government in the same way for the costs and damages above mentioned, but for which it seems *we* only have authority to grant redress.

"The same sense of honor would, it is to be presumed, have influenced the government to interpose itself between the claimant and the captor by paying out of its treasury the amount of the costs and damages decreed, and yet it never

occurred to the lords that upon the probability of that inference they were justified in decreeing them against him.

"Rather than accomplish in this mode the indemnification of the claimant, they have said that however well grounded his claim, he should have no costs and damages at all.

"The force of this analogy will not be weakened by any suggestion that the instances placed in comparison are different in their circumstances.

"In both instances the captors' situation is *substantially* the same as long as the government has not supplied him with the means of payment. He is equally innocent in both, and has in both the same excuse, viz, *obedience to the orders of complete superiors*.

"The orders of April 1795 under which the *Neptune* was seized, directed the *sale of the cargoes to His Majesty's government* as well as the seizure of them.

"If the captor was not answerable for the consequences of one part of this order (and we know he was not), why was he answerable for the consequences of the other? And if, in truth, he was not (out of his own funds) liable for the consequences of either, why is a decree or process against him, personally, to be used as the instrument of giving effect to the responsibility of the government in one case more than in the other? These are distinctions which I confess myself unable to make, and I have not found others who differ from me disposed to assist me in making them.

"The nature of this order of council and the proceedings upon it show decidedly that the government alone was *intended* to be liable to the claimant.

"It was an order from which the captor was to derive no benefit and in the execution of which he was to acquire no interest that should create any correspondent liability unless upon grounds entirely distinct from and out of it.

"In the body of the order it was declared that the cargoes were to be purchased by the state, and accordingly the court of admiralty always so decreed except where government, in one or more instances late in the year, gave permission to the claimants to sell to others.

"The government after becoming the purchaser (not for any entire sum, or at specific prices as in common cases) kept the supposed purchase money in its own hands and never placed it under the control of the court. Of the cargoes it took pos-

session immediately upon their coming into port without waiting for the formality of Sir James Marriott's order to sell.

"The agency and influence of the government is visible and prominent in every step of the transaction. The sale was the obvious effect of its will. Even in the ascertainment of the compensation to be paid to the neutral owners (although it is pretended it was a proceeding in the ordinary course of justice), the measure of redress was dictated by the state, and as prescribed applied.

"In short, the whole affair was so plainly, and indeed confessedly, a mere political arrangement for the compulsory purchase by the British Government of articles of provision from neutrals that it seems wonderful how it can be imagined that a case arising under it was a case between captor and claimant in which the claimant was to look to the captor for the promised retribution.

"Upon such a subject there needs no labored argument.

"I have thus stated the principal reasons upon which I have formed the opinion 'that it does not sufficiently appear on this occasion that the claimants could not by the ordinary course of judicial proceedings obtain, have, and receive adequate compensation for the loss and damage they are supposed to have sustained by the seizures complained of.'"

Pinkney, commissioner, June 25, 1797, case of the *Neptune*, Article VII., treaty between the United States and Great Britain of November 19, 1794.

"I am next to examine the second leading question, viz, Whether, *in the ordinary course of judicial proceedings*, the neutral claimant could actually have obtained, had and received, full and adequate compensation for the loss and damage which he has so sustained?

"When in a public instrument of contract between two nations the ordinary course of judicial proceedings of one of the parties is made the rule by which the other party is bound to govern his conduct on an important point, we must presume that the meaning of the term *ordinary course* is easily within the knowledge of the foreigner whose interests are made so materially to depend upon a correct understanding of the term. In the present case, the most obvious and authoritative source to which a foreigner would naturally look for information on the subject appears to be the written law, by which proceedings in matters of prize are regulated, commonly known

by the name of the prize act. He would naturally conclude that this act was intended by the legislature to provide and define the *ordinary* course of judicial proceedings in matters of prize.

"I have followed this mode of inquiry, and in seeking in that act for provisions descriptive of or applicable to the proceedings which have been had in this and similar cases, I find very few of its provisions which are so applicable. But I observe that the thirty-fifth section of the act reserves authority to His Majesty, with the advice of his privy council, to give from time to time such further rules and directions to his courts of admiralty as by him shall be thought necessary and proper.

"The ordinary course of judicial proceedings I conceive, then, to be pointed out in the body of the act; and the thirty-fifth section, I presume, was intended to apply to extraordinary and unforeseen cases which might arise, and which might, in the opinion of His Majesty's government, require measures varying from the ordinary course which the act had already defined.

"The prize act authorizes all persons acting under commissions or letters of marque, duly granted, to seize and bring into port, etc., all vessels, etc., belonging to *enemies* of Great Britain. The seizure in question is understood to have been made under an order or instruction of His Majesty for seizing and bringing into port, etc., *all neutral vessels*, laden either in whole or in part with provisions and bound to ports of the enemy. It is further understood to have been part of that order and instruction 'that the officers and companies of His Majesty's vessels of war, acting in execution thereof, were to be paid a certain sum per ton on the measurement of the neutral vessels which might be so taken in lieu and discharge of all other and customary claims.' I say *understood* to have been, because we have not been able to procure a copy of the order itself, which circumstance forms an additional point, in which this business varies *ab initio* from the ordinary course of proceedings, according to which His Majesty's orders and instructions (of this nature) to his vessels of war are public, and copies thereof always easily to be obtained at his courts of admiralty. Thus it appears that the capture, or first step in the business before us, took place in obedience to a particular order of His Majesty's government, varying from the ordinary course of proceedings.

"The second step in this case, in which a wide deviation from the ordinary course of judicial proceedings is observable, is, that the judge of the high court of admiralty, as soon as the cause was brought within his cognizance, and before any decision or even inquiry was made, whether the property belonged to neutral, friend, or enemy, ordered the cargo to be sold to His Majesty's government, and afterward, upon due examination, decreed both vessel and cargo to belong as claimed to neutrals. In this deviation from the ordinary course, it is also understood that the judge acted in obedience to an express order of His Majesty's government.

"A third conspicuous deviation from the ordinary course of judicial proceedings observable in this case is the manner of sale and the rule by which the value of the cargo, decreed to be paid to the neutral owner, was ascertained. The merchants, by whom the registrar was assisted in this case, are highly respectable and very well informed men. It must have been obvious to them that the cargoes of different ships are very seldom composed either entirely of similar articles, or of various articles in precisely the same proportion, and that, of course, one rate of compensation could never, with equal justice, be applied to many cases. In cargoes composed principally of articles for which the demand was great, it must have been evident to them that ten per cent advanced on the foot of the invoice was not an adequate compensation; and it must have been equally evident that in other cases of cargoes composed principally of articles not in demand ten per cent might be more than an adequate compensation. Those gentlemen acting as in the ordinary course of judicial proceedings, and following the dictates of their own judgments and consciences, would never have thought it their duty to adopt this rule of ten per cent (which might thus prejudice, in some instances, the interests of their own nation, and in very many those of the neutrals) as a measure of justice equally applicable to all variety of cases which the order of April 1795 might bring before them; and, accordingly, we find them declaring to the claimant that they (in thus deviating from their ordinary course) acted in obedience to the particular and positive instructions of His Majesty's government.

"The agent for the neutral owners (a respectable merchant of the city of London and a British subject), states to us, in an affidavit in due form, that after remonstrating in vain with

the registrar and merchants while making up their reports, on the injustice of applying the rule of ten per cent in this case, he (being so referred by them for further information) made personal application to Mr. Long, one of the secretaries of His Majesty's treasury; that, having repeated to him his representation of the hardships of the case, and having solicited permission to take the sale of this cargo into his own hands, giving bonds that it should be sold in England, he received for answer from Mr. Long 'that the whole business had been conducted, and the registrar and merchants had acted in obedience to the orders of His Majesty's government, and that no deviation from the rules established by those orders could be admitted in any particular case;' and upon the proposal of the said agent to carry his inquiries and remonstrances to a still higher authority, he was answered by Mr. Long 'that all further application would be vain; that the execution of this branch of business was committed expressly to his (Mr. Long's) direction, and no variation from the system which had been adopted by His Majesty's government would be admitted.'

"Thus it appears that the whole of this transaction, from its commencement to its ultimate stage, was out of the ordinary course of judicial proceedings, and that by the express and repeated orders of His Majesty's government.

"It is now to be inquired, whether the claimant, by any possible endeavors to pursue the ordinary course of judicial proceedings further than he did, could in the end actually have obtained, had, and received full and adequate compensation for the loss and damage which he complains to have sustained in this case.

"We have been told that an application to the judge of the high court of admiralty, to correct the report of the registrar and merchants, would have been effectual; but I can not consider this to be presumable; nor can I even regard the claimant as having been under any obligation to attempt that mode, because we have seen that the judge himself had deviated as essentially from the ordinary course of proceedings, in obedience to one order of His Majesty's government; and I can not perceive a shadow of reason for believing that he who had yielded a ready obedience in one stage of the business would have undertaken, at the next step, to oppose or control another order emanating from the same high authority.

"It does not indeed appear to me that the judge could have so done consistently with his duty; nor, in truth, can I compre-

hend that the captor, the judge, or the registrar and merchants have done either more or less than their duty in the whole course of this transaction. They have acted in their several characters of officers or servants of His Majesty, who, by the thirty-fifth section of the prize act, is expressly invested with the power to give them such further instructions as to him, with the advice of his privy council, shall appear to be necessary; further instructions were given in this case, and these servants of the crown had but one duty—to obey.

“It may here, perhaps, be objected, ‘that it does not appear that the order under which the registrar and merchants acted was an order of His Majesty, with the advice of his privy council, and that neither were they bound to obey an order given by any other authority, nor was the judge bound to confirm their report, unless made in obedience to the order of that particular authority.’ I beg leave to reply, that neither does the contrary appear; the objection may with equal justice be extended (for aught we know) to the orders under which the capture was made and to that under which the cargo was directed to be sold to His Majesty’s government, since all these orders were in such complete deviation from the ordinary course, as to have been, and to remain at this hour, all and equally invisible to us. It is enough to my argument that they were thus out of the ordinary course, and (whether rightfully or not is not for us to inquire) that in fact they have been obeyed by His Majesty’s officers and servants, and thus have hitherto prevented the actual receipt of full and adequate compensation by the neutral claimant.

“One step only remained to have been taken by the claimant in compliance with the ordinary course which appears to me to have offered any hope of relief—an appeal to the lords commissioners—and this we understand to have been omitted, in consequence of the answer of Mr. Long to the agent, which has been stated above. We are told that this was not sufficient authority, and that an appeal ought to have been instituted notwithstanding that answer. What authority, then, would have been sufficient? Is it expected that the prime minister, or the lord president of the council, shall personally answer every question respecting the several departments? Why are secretaries attached to those departments, if faith and credence be not due them? Mr. Long, a member of the House of Commons of England, has been for several years one of the confidential and efficient secretaries of the first minister,

a character of no light import, whether we consider the very important duties of the employment or the discriminating talents of that great man, under whose near and constant inspection those duties are performed.

"I confess myself so confirmed in habits of discipline and subordination that I should regard the information officially given to me by Mr. Long, relative to a measure actually adopted, or to an order actually given by His Majesty's government, to be of exactly equal authority as if it had been communicated to me by the minister himself.

"But here again the objection returns, 'that the order of His Majesty's government is not the order of His Majesty with the advice of his privy council.' Granted; and I will for a moment admit (what, however, is by no means ascertained by any evidence before us) that the orders under which the captor and judge acted were orders of the king and council and that the orders under which the registrar and merchants acted were not. What, then, would have been the course of the business? By His Majesty's government let me be understood to mean those ministers to whom His Majesty is pleased to confide the executive power and business of the government. His Majesty's government (in common with the executive branch of every government) must possess an unity of sentiment and action; that is, there must reside somewhere a power to prevent discord, and the struggle of any part against the general will, since these would tend to produce contradictory measures, to introduce confusion, and to obstruct the business of the nation. This controlling power is generally understood to be in the prime minister; where it actually does reside, requires no long investigation. We need only to look at the order of council of 26th of February last. Let it further be remembered that the ministers composing His Majesty's government are also members of His Majesty's privy council, and of course have a right to—and on important occasions actually do—sit as lords commissioners of appeal in prize cases. Knowing and remembering these things, are we to believe, in direct contradiction to precedent and to daily practice, that the lords commissioners of appeal would on this occasion have placed themselves in direct opposition to an important measure of His Majesty's government; that His Majesty's government would thus have become 'a house divided against itself?' Is it not rather to be believed that if the lords commissioners had found themselves embarrassed by the supposed informality of the

order in question, this embarrassment would have been removed by a reference to the privy council for the adoption of the necessary forms? I can not but believe that such would have been the course, and that an appeal would thus have answered no purpose to the neutral claimant but to create delay, and to increase his expenses; neither can I believe that many Englishmen of candid minds can really persuade themselves to entertain a contrary opinion.

"I trust that I have thus made manifest at least a very high degree of improbability of redress having been attainable by the neutral claimant in this case, in the ordinary course of judicial proceedings; but it may be denied that I have demonstrated the absolute improbability.

"I beg leave to refer those who may be disposed to make this objection to the legal arguments of other gentlemen on this subject, and particularly to that of Mr. Pinkney. These appear to me to be fully conclusive, and therefore have my entire assent. I shall content myself with further observing, generally, that the first step of the judge in ordering the cargo to be sold to His Majesty's government, and its consequent delivery out of the custody and control equally of the captor and of the court itself, into the hands of His Majesty's government, or its agents, discharged the captor in every view of justice or of equity, that I can comprehend, from any just responsibility thereafter. By what process consistent with the ordinary course of judicial proceedings the neutral claimant after that step was to obtain, have, and receive the full compensation which is the object of the treaty, either from the captor, who appears to me to have been thus deprived of that which in the ordinary course of judicial proceedings constitutes the object and measure of his responsibility, or from His Majesty's government, whose responsibility respects only the supreme tribunal of the nation, I confess I can not comprehend. I have searched in vain that act, which I understand to designate the ordinary course of judicial proceedings in matters of prize, and which is the measure and rule of the claimant's duties; and finding no such process there designated, I can not but conclude that it was not possible for the claimant in this case actually to obtain, have, and receive full and adequate compensation for the loss and damage which he has sustained in the *ordinary course* of judicial proceedings.

"To no extraordinary measures had he either the power or the obligation to have recourse, except to that which he has

followed by his memorial to this board; and it is clearly my opinion that we are bound carefully to examine his case, and to give therein such award as shall appear to us consistent with equity, justice, and the law of nations.

Trumbull, fifth commissioner, July 26, 1797, case of the *Neptune*, Article VIII., treaty between the United States and Great Britain of November 19, 1794.

“By the memorial it appears that this vessel
Case of the “Fame”: was captured 20th January 1794, and con-
Opinion of Mr. Gore. demned by the vice-admiralty court of Dominica on the 26th February in the same year, and time allowed for entering an appeal in that court until the 14th March; that a motion for entering an appeal before the lords commissioners of appeal was made on the 15th November 1795, when their lordships rejected the same.

“This endeavor to enter an appeal in the high court of appeals appears to be all that the memorialists ever did to attain redress against the captors after the decrees of the vice-admiralty.

“The omission to enter and prosecute an appeal in the vice-admiralty court is, to my mind, satisfactorily accounted for. The only question is, whether the memorialists, by not entering their appeal before the lords commissioners, or taking any steps to this end until the 15th November 1795, have not brought their case within that description to which the parties to this contract expressly understood its provisions should not extend.

“An order of His Britannic Majesty dated 9th August 1794 admitted of appeals from the judgments of the vice-admiralty courts, notwithstanding the ordinary time for entering and prosecuting the same had elapsed, provided they were presented within a seasonable time. Under this order appeals, not within the ordinary time, were admitted until the last of September 1795. In November 1794 Mr. Bayard was appointed by the Government of the United States to reside in London, as agent of claims and appeals, with authority, under the direction of Mr. Jay, to bind the United States for costs and damages attending the prosecution; and counsel to prosecute appeals in behalf of citizens of the United States was engaged by and at the expense of the government. Notice of the above order and of the appointment of Mr. Bayard, with his authorities and the engagement of counsel as aforesaid, was published

throughout the United States in the latter part of the year 1794, together with a letter from Sir William Scott and Dr. Nicholl, pointing out the mode by which appeals were to be entered and prosecuted.

"These different provisions afforded the memorialists eighteen months after the decree of the vice-admiralty court to appeal therefrom and enter their appeal in the high court of appeals, and nine months at least after all these provisions were known in every part of the United States, and an agent appointed to aid and assist the parties in prosecuting their appeal.

"Their not availing themselves of these opportunities to obtain compensation in the ordinary course of judicial proceedings for such a length of time, and under such advantages, brings their case within the terms of a loss and damage occasioned by manifest delay or negligence or willful omission of the claimant.

"I am therefore of opinion that the memorialists are not entitled to compensation under this article."

The claim was accordingly dismissed.

Gore, commissioner, July 6, 1797, case of the *Fame*, Evesham, master, Article VII., treaty between the United States and Great Britain of November 19, 1794

Renewal of Discussion.

After the opinions and decisions just set forth were rendered by the board under Article VII. of the treaty of 1794, the question of a denial of justice again arose in an acute form. In April 1798 the period prescribed by the treaty for the filing of claims expired. Various claims, in which judicial proceedings were still pending, were then called up for action. The British agent objected to the consideration of these cases on the ground that, as the judicial proceedings were not yet exhausted, it did not sufficiently appear that the claimants could not obtain compensation "in the ordinary course of justice." In the discussion of this question, in the case of the *Sally*, Hayes, master, Mr. Gore and Mr. Pinkney both delivered opinions, which are given below.

"The British commissioners having declared Case of the "*Sally*," that they do not think themselves competent under the words of the treaty or the commission by which they act to take any share without the special instruction of His Majesty's ministers in the decision of any case in which the judicial proceedings

Hayes: Opinion of
Mr. Gore.

are still depending in the ordinary course of justice and having caused that declaration to be placed on the records, renders it expedient that those who entertain a different opinion should state in like manner that opinion with the reasons on which it is founded, and also those by which it appears to them that the construction of the British commissioners is inadmissible.

"This declaration includes two opinions on the powers and duties of the commissioners.

"1st. That the board is not competent to decide on cases in which judicial proceedings are depending in the ordinary course of justice.

"2ndly. That in cases where they think themselves incompetent to act they are authorized to decline taking any share in the proceedings, thereby arresting the progress of the board in its duties and suspending for an unlimited time, at the will of the party promising to make compensation, the due execution of the article, if not rendering it absolutely null and void.

"I am of opinion that the board is now competent to decide on the case of the *Sally*, Hayes, master (the particular state and history of which is given in Mr. Slade's affidavit, inserted in the records on the 22d June inst.) and also on all cases of capture of the property of American citizens made under color of authority or commission from His Britannic Majesty since the commencement of the war in which his said Majesty was engaged at the time of exchanging the ratifications of the treaty under which we act and prior to the date of said exchange.

"The seventh article of said treaty ordains that in all cases of loss and damage resulting from such capture as aforesaid where adequate compensation *could not at the time of exchanging said ratifications* be actually obtained, had, and received in the ordinary course of judicial proceedings, full and complete compensation for the same shall be made by the British Government.

"The article affords a right to the American citizens to prefer their complaints within a certain term. The duty of the commissioners is expressly defined. It is to examine honestly, diligently, carefully, and impartially, and to the best of their judgment decide according to justice, equity, and the law of nations all such complaints as shall be preferred to them under the said article.

"The only discretion granted to the board is in cases where the commissioners shall think it just and reasonable to extend the term limited for the space of six months.

"There is not the smallest authority, either by express letter, or construction, to suspend the examination and decision of cases actually preferred.

"In the case of the *Sally*, Hayes, master, and in all those yet depending in the courts and which have been submitted to the agent of the British crown, both parties in their own opinion are prepared. Neither requests any delay. The complainant states a case which agrees with the description in the article and which if true entitles him to our award on the British Government. The King's agent denies a material allegation, and the issue before the board is, whether the complainant could at the exchange of the ratifications as aforesaid actually obtain, have, and receive adequate compensation for the loss and damage sustained by the ordinary course of judicial proceedings. If the claimant proves that he could not, his claim is supported. Whether he could or could not at the exchange of the ratifications as aforesaid actually obtain, have, and receive compensation in the ordinary course depends on this fact, viz, whether he did or did not obtain such compensation prior to the expiration of the term in which he was permitted to perfer his claim to the board.

"If he fails in his proofs the complaint must be dismissed. This is a duty due to the British Government, and this government has a direct and important interest to show that all complaints under this part of the article have been disposed of either by payment of all awards rendered or by a decision of the board that the parties complaining had no just cause of complaint.

"The very appointment of a court, the authorizing parties to prefer suits before such court, and an acceptance by individuals of the office of judges, supposes and includes an obligation on the part of the judges to decide the suits preferred as soon as possible: any unnecessary delay is a delinquency in them, is destructive of the very end of their appointment, and a breach of duty.

"The board is not only under the implied obligation, but the members have moreover expressly engaged to examine and decide all such cases as shall be preferred to them honestly and carefully, impartially and diligently. To prevent an

undue prolongation of the existence of the complaints provided for, and also of the duration of the commission, the parties have limited the time within which the board shall be competent to receive claims.

"From what has been before stated, it is evident that the parties have a right to our examination and decision; that they have required the same in the manner prescribed by the treaty and our own rules, and that it is the indispensable duty of the board to examine and decide the complaints without delay. The term within which the party complaining had a right to prefer his complaint expired on the 10th day of April last.

"If the allegation was not then true, it is immaterial to him whether or not he can prove at a future day that at such time he shall not be able to obtain adequate compensation, etc., for he is forever barred from deriving any advantage from the treaty, unless his complaint was true on the day of filing it, the term for preferring and supporting his claim having expired.

"The promise of the British Government is to afford compensation for losses, etc., where for '*whatever reason*' it was unattainable in the ordinary course of justice, at the date of the exchange of the ratifications aforesaid. The truth of the complaints of the American citizens as stated in the article, depended on events subsequent to the date of the treaty. The complaint, viz, That they could not then obtain, have, and receive compensation in the ordinary course might prove true in all the cases of capture, or only in a few—its probability in some was acknowledged by the provision.

"Having made a promise to afford compensation in any, where, for whatever reason, it should prove true, and having limited the time within which the means of obtaining the benefit of this promise should be admitted to the complainants, binds the party making the promise to afford it in the alternative, if not procured in the ordinary course; otherwise he defeats his own promise, especially as it depended solely on the party promising to grant the satisfaction, in the ordinary mode, and was not attainable by any exertion of the complainant.

"The limiting the term within which compensation should be demandable through this board, evidently shows the sense of the parties, that if any obstacle existed at the completion of such term to the obtaining and actually receiving compensation in the ordinary course, it should be awarded by the board

unless his not obtaining it arose from his own willful omission or neglect.

"The not being in possession of the decree of the court in his favor or not having actually received satisfaction in consequence of such decree at the expiration of the term aforesaid, is as conclusive evidence of the fact that the complainant could not receive the compensation at the exchange of the said ratifications as a decree against him, and is as clearly within the words 'whatever reason.'

"If therefore the not obtaining such compensation did not arise from the willful omission and neglect of the claimant, he has proved everything necessary to entitle himself to the award of the board.

"The following rules for the interpretation of treaties between states, and of contracts between individuals, are acknowledged by the law of nations, and by the common law of England, and may serve to justify my reasoning on this subject.

"No construction shall be admitted which renders a treaty null and illusive, nor which leaves it in the discretion of the party promising to fulfill or not his promise. When a party is bound to do two things, the performance of both dependent on himself, and he omits to perform one, he shall not avail himself of the nonperformance of that which is first in order of time, to discharge himself from the performance of the other, which is subsequent. Additional reasons confirm this rule of construction, when it is apparent that the party promising suffers but small inconvenience from its adoption, and the party to whom the promise is made would lose the entire benefit of such promise by adopting a different rule.

"To refuse an examination into the merits of the complainant's case when the time has arrived, after which he can not prefer his claim, is to render the article vain, illusive, and null.

"To refuse to receive the complainant's claim because the party has not obtained the decree of the court in his favor or been able to execute such decree when obtained at a period when he will forever after be foreclosed from showing this fact, is to make the existence of the very mischief complained of the cause for not granting him the redress promised.

"His claim for compensation from the British Government, which is the explicit promise of the article, and to obtain which was a principal cause of the treaty, is totally and forever

defeated, if proof of his not having thus actually obtained and received compensation at the expiration of the term for availing himself of this promise, without any willful omission or neglect on his part, be not deemed satisfactory evidence of this fact.

"If compensation is refused on the ground of the British Government not having caused satisfaction to have been made, through the ordinary course of judicial proceedings, it is making a nonperformance by the British Government the cause of defeating its own promise. If the party complaining is barred from obtaining a decision by the commissioners because the courts have not adjudged him satisfaction from the captors, such omission to pass judgment, unless it arose from the willful omission and neglect of the party, would be a breach of the treaty: for if one party does or forbears to do an act whereby he prevents the other from receiving the benefit of his promise, it amounts to a breach of the covenant or promise, on the part of him who thus acted, or neglected to act, so as to defeat the promisee of the benefit of his promise.

"It is contrary to the rules of just construction so to interpret the terms of a treaty as to impute to one party a breach thereof, when by any other admissible interpretation the treaty can be supported and no breach imputed to either.

"It is clear by the express limitation that if the construction of the British commissioners be just, the claimants are forever barred from every benefit of the article, while by the assignment of the demand against the captors the decision of His Britannic Majesty's courts may be had at another time, without any material loss or injury to the British Government.

"There appears no sufficient ground for the assignment under the construction of the British commissioners, for if the fact of the complainants not being able to receive compensation in the ordinary course can only appear by his having failed in all the various processes against captors, owners, and bail, the trifling benefit of an assignment to the British Government on the ground of insolvency, in all this various description of persons, would have been unworthy of a national stipulation.

"At the time of executing the treaty there could not have been less than 600 cases which the parties must have contemplated, as the subject of the seventh article, and also of judicial examination. Supposing a decision of them all within the shortest possible period, say one year, it could not have been

within human power to have obtained and executed all the various processes against these various persons within the time limited for preferring claims to this board.

"The construction then given by the British commissioners supposes that one party offered and the other accepted a satisfaction in terms which at the time of contracting they knew to be void in substance.

"In the preamble to the treaty the parties declare an intention to terminate their differences in such manner as to produce mutual satisfaction.

"It is directly contrary to this avowed intention to adopt a construction which places it in the power of the party promising to postpone indefinitely if not totally defeat the performance of the promise which was to afford the satisfaction agreed for.

"I have examined this subject according to the rules of construction well known and received as just, both in England and America. From this examination it is evident to my mind that the board is not only now competent to examine and decide in all cases of irregular or illegal capture or condemnation of the property of American citizens, under color of authority or commission from his Britannic Majesty, prior to the exchange of the ratifications of the treaty; but that it is their express duty to examine and decide all such as were preferred to them on the 9th day of April last past.

"It is also evident, according to the declared object and intention of the contracting parties, and according to all rules of sound construction, that proof that the claimant had not actually obtained, had, and received compensation in the ordinary course of justice, at the expiration of the term in which he might claim the promise of the British Government, verifies the allegation that he could not at the time of exchanging the ratifications of the treaty, actually obtain, have, and receive compensation in the ordinary course of justice.

"To state my sentiments on the second opinion contained in the declaration of the British commissioners it will be merely necessary to quote the words of the treaty:

"Three of the said commissioners shall constitute a board and shall have power to do any act pertaining to the said commission, provided that one of the commissioners named on each side and the fifth commissioner shall be present and all decisions shall be made by the majority of the voices of the commissioners then present.'

"Is it an act appertaining to the commission to decide whether a claim preferred to the board under this article be within its provisions? Or whether a material allegation made by the complainant and denied by the agent of the British Government be proved or not?"

"The answer to both must be in the affirmative, and the inference is clear.

"The duties and powers of the board and the rights of the complainants are expressly defined in the article. The opinion of one of the contracting parties can not alter them. If the case is provided for in the article the board can not refrain from acting. If it is not, although one party may consent, the board will have no authority under its present commission. I can not therefore accede to the reference proposed in the declaration for the purposes therein stated.

"However, I request that it may be understood that I shall be ready to concur in any manner of transacting the business before the board, which shall be most acceptable to the members, or to either government, provided such arrangement consists with the duties of the commissioners, according to my understanding of the treaty under which we are appointed."

Opinion of Gore, commissioner, in the case of the *Sally*, Hayes, master.

Case of the "*Sally*,"
Hayes: Opinion of
Mr. Pinkney.
"I come now to the other question involved in the declaration viz, whether the board is now authorized by the seventh article of the treaty to examine and decide cases in which proceedings are still depending in the ordinary course of justice.

"On this question the argument lies within a very narrow compass.

"The article stipulates 'that in all the cases of irregular or illegal capture or condemnation complained of in its recital where for whatever reason adequate compensation could not at the time of making and concluding the treaty be actually obtained, had, and received in the ordinary course of justice, full and complete compensation for the same will be made by the British Government to the complainants.'

"For the purpose of rendering this stipulation effectual the same article provides for the appointment of a board of reference (consisting of five commissioners) to whom the complaints in question are to be preferred, and submitted for examination and decision according to certain rules, and it declares that

the award of this board shall be final and conclusive, both as to the justice of the claim and the amount of the sum to be paid to the claimant.

"The article further provides 'that eighteen months from the day on which the said commissioners shall form a board and be ready to proceed to business, are assigned for receiving complaints and applications,' but that nevertheless the said commissioners shall be authorized *in any particular cases, in which it shall appear to them to be reasonable and just*, to extend the said term of eighteen months for any term *not exceeding six months after the expiration thereof*.

"The article further provides that each of the said commissioners shall take an oath or affirmation '*honestly, diligently, impartially, and carefully to examine, and to the best of his judgment, according to the merits of the several cases, and to justice, equity, and the law of nations, to decide all such complaints, as under the said article shall be preferred to the said commissioners.*'

"On the 10th of April last the term of eighteen months, limited by the article for the exhibition of claims, expired; but previous to its expiration (on the last day of the term) the present complaint with a variety of others, in which the judicial remedy was not exhausted, was preferred to us.

"As it is my intention to meet the general question arising out of the declaration of the British commissioners, I shall not here state or advert to the particular circumstances by which the present complaint, in relation to the point before us, might possibly claim to be distinguished.

"My opinion is, that in all the cases of irregular or illegal capture or condemnation recited in the preamble of the seventh article in which, without the manifest delay or negligence or willful omission of the claimants, adequate compensation has not been obtained in the ordinary course of justice, within the term assigned by the article for the reception of claims, we are authorized to proceed to an examination and decision of their merits, and to award compensation, if we shall believe it to be due.

"The following are in substance my reasons for that opinion.

"1. It is obvious that complaints thus circumstanced are properly before us, or to speak more correctly have been duly *preferred* under the article. If they *have not* been duly preferred, they *never can* be, and of course can never in any event

become the subject of our consideration, which none of us maintain.

"The article assigns eighteen months for the receipt of claims, and regularly every claim, to be entitled to the benefit of the article, must be presented to us within that term.

"We have authority, it is true, in *particular cases*, for the advantage of claimants, and upon special grounds of reason and justice to extend the term six months longer, but a claimant is not, therefore, under any obligation to pass by the general limitation, for the purpose of throwing himself upon our discretion, and hazarding the total exclusion of his application.

"If he steps his time in the first instance, the treaty still allows him to ask to have his complaint received upon showing sufficient cause to justify the indulgence; but it can not be imagined that he is bound to pretermitt the exercise of his right of coming within the eighteen months, in order to put himself in a capacity to ask a favor in relation to the extension of that term, which he does not know that we shall grant.

"Every claimant, then, whose case is, or can become, proper for our cognizance (and we all appear to agree that every case may sooner or later become so) *may* file his application within the eighteen months, and if it be manifestly in his power to do so, must file it within that period.

"The complaints in question, therefore, have been duly preferred, under the article.

"2. If they have been *duly preferred under the article*, it will not be difficult to prove by the express letter of it that it is *now* our duty to proceed to the examination and decision of them, according to their merits, and to justice, equity, and the law of nations.

"It is not, I think, to be doubted that the framers of the treaty, in adjusting the terms of our official oath, have taken care that they should be suitable to their own views, and to our powers; nor can it be too much to assume that whatsoever we find in that oath may be safely relied upon, so far as it reaches, as indisputable evidence of our duty.

"The oath commands us *diligently to examine and decide*, according to their merits, and to justice, equity, and the law of nations all such complaints as under the seventh article shall be preferred to us.

"Thus, then, a diligent examination and decision of complaints is required to follow their due exhibition; a command which assuredly can not be fulfilled, in regard to the class of

cases in question, by delaying all examination and decision until the lords of appeal (and, in some instances, Sir James Marriott, and after him the lords) shall have determined upon them, and until the tardy and circuitous process of that tribunal shall have been successively spent against captors, owners, and bail, to enforce their determination.

"Nothing can be more conclusive than the language of this oath, to show that the makers of the treaty did not mean to authorize, far less enjoin, the indefinite procrastination now contended for; but, on the contrary, that they designed to secure to the article that prompt and ready execution which alone could render it either just or satisfactory.

"3. But, independent of the explicit language of the oath, the whole scheme of the provision itself points to a certain era beyond which there shall not of necessity be any delay.

"The fixing of a period within which claims were to be preferred, and the precise and very narrow limits imposed upon the power to extend it in particular cases, is unequivocal proof that the complete fulfillment of our functions was not to depend upon events which might not happen for years, and might never happen at all.

"It is not practicable to conceive any valuable object that could be expected to be answered by compelling claimants to make their applications within a certain time, or to be barred forever from redress; if these applications were afterward to be dormant, not only until the determination of admiralty suits, but until the execution of admiralty decrees.

"In thus requiring the presentation of complaints within a defined limit, the framers of the treaty clearly supposed that all complaints, capable of being perfected at all, would be perfected by the lapse of it; that they would in its course obtain the ingredients indispensable to their validity, and that they would then, or *never*, be true in all those material allegations essential to their title to consideration and redress.

"In any other view they call upon parties to complain before the injury is consummate, and when it is uncertain that it ever will be so, and command them to allege that which is false, and may never be otherwise, for no conceivable purpose.

"It is not to be believed that claims would be thus forced before us with such anxious haste, and at the risk of so serious a penalty as future exclusion, if the negotiators had not meant that they might be acted upon as perfect.

"They would at least have guarded against the consequences to which the premature exhibition of them (if such they intended it to be) was plainly calculated to lead.

"They would have protected these unformed and defective applications from dismissal during their progress to completion if they had conceived that they were to rely for their perfection on a train of circumstances to occur long after they should be preferred. But they have not done this: so that if these applications do in fact want the characteristic feature of a complaint under the article, there is nothing to hinder us from rejecting them at once as irrelevant and groundless, and thus shutting them out from all possibility of relief.

"4. The article provides that His Britannic Majesty will cause the compensations adjudged by us to be paid at such places and times as we shall award, and on condition of such releases or *assignments* as by the said commissioners may be directed.

"If it was in the contemplation of the contracting parties that the judicial remedy should in all its stages be exhausted by every claimant before he should be authorized to demand our aid, it is not easy to ascribe to this provision for *assignments* any motive worthy of entering into a national stipulation.

"But if it be supposed that all cases, in which the judicial remedy could not be exhausted within the time limited for preferring complaints, were, at the expiration of that time, to be subjected to our cognizance, an adequate view is immediately found for this provision.

"5. If the British commissioners are right in their construction of the article, there never was a stipulation formed upon more inadmissible or more discordant principles.

"According to that construction the article refers the claimant in the first instance to the courts of admiralty of this country in a way so absolute as only to allow him to come to us for an award when they shall have finally refused him redress, when it shall have been found impracticable after a thorough trial to enforce that decree.

"But although everything is thus made to depend on the courts of admiralty, and although we are to have no jurisdiction until they shall have thought proper to determine, there is no part of the article which gives to the claimant any assurance that these courts shall perform with reasonable diligence, or even at all, what is thus made to depend on them.

"The case of the *Betsey*, Furlong, gives me authority now to say that this implicit confidence in the maritime tribunals of Great Britain (whatever titles they may have to the respect of neutral nations) is so far from distinguishing the seventh article of the treaty, that even after a decision by the highest prize court in the country *against the claimant*, we are authorized to entertain his claim, inquire into the merits of it, and grant compensation against the British Government, if by the laws of nations as applied to the case we shall think it right to do so.

"But if the *time of decision* is thus to be left to these courts of prize without any limitation whatsoever, why is it that the confidence which this implies is not extended to the *decision itself* ?

"If the era of redress is to be entirely with them, why is it that the redress itself is not exclusively submitted to the same discretion ?

"In fact, the most important point to be guarded against, and that which it was most natural to anticipate, was delay, for it was not probable that the decrees of so enlightened a tribunal as the lord commissioners of appeal could in many instances be the subject of well-founded complaint; but it was not at all improbable that such a tribunal should sometimes administer justice with more wisdom than dispatch.

"The preamble to the treaty declares the intention of the parties to it to terminate their differences (among which the captures and communications [*sic*: condemnations?]) recited in the seventh article were far from being the least considerable) in such manner as should be best calculated to produce mutual satisfaction and good understanding.

"In the spirit of this preamble and in the nature of the thing it seems just to consider the seventh article as a self-efficient definitive arrangement, intrinsically adequate to the accomplishment of the object it professes to aim at.

"But the interpretation put upon it by the British commissioners wholly deprives it of this character, by denying to it all activity and effect until the courts of prize of one of the contracting parties shall have done what the article does not stipulate that they shall do, either within a specified period, or generally within a reasonable time.

"Such an interpretation places the promise contained in the article in the power of the party making it, and thus leaves it a promise merely in name and form. I can not form an idea of a scheme of redress more ridiculously feeble and inoperative.

"On the other hand, if our construction be received, the article will be rendered not only consistent in all its parts, and simple and uniform in its principle, but capable of fulfilling its own destination.

"Nor does this construction, as has been supposed, in any shape violate the letter of the article.

"The words of the agreement are 'that in all such cases where adequate compensation can not, for whatever reason, be now actually obtained, had, and received by the said merchants and others in the ordinary course of justice, full and complete compensation will be made, etc.'

"That the impracticability of obtaining judicial redress, as mentioned in this agreement, could only be established by subsequent events—by the result of actual experiments then making, or to be made, by the claimants, is admitted by us all.

"The judicial remedy was to be tried; and doubtless it was meant that it should be fairly tried. Thus far is clear; but it does not follow that the duration of the prescribed experiment was intended to be indefinite.

"The negotiators might suppose, and evidently did suppose, that a term might be fixed, at the close of which that experiment should be said to be complete, and the inadequacy of the judicial remedy sufficiently manifested.

"The efficacy of the arrangement they were performing demanded that such a term should be agreed on. It could not have the stamp and quality of a conclusive stipulation without it. It could not, as a *contract*, be said to have done anything secure or obligatory, until such a limitation was inserted in it.

"That limitation is accordingly its prominent feature. It is to be seen in its *letter*, and to be inferred from every portion of the article, as I have already shown.

"Nor is the limitation such a one as it was improper for the United States to ask, or Great Britain to grant.

"The treaty was framed in November 1794, when the great mass of the cases were *sub judice*. Our board was organized in October 1796, and consequently the eighteen months assigned for the receipt of claims did not expire till April last, so that the limitation was not, and could not be, much short of three years and a half.

"It ought to be remembered, too, that the cases were not in general those of ordinary capture, but seizures under the immediate instructions of the British Government; instructions

of which it is moderate to say that some were of highly questionable legality, while others were plainly unlawful.

"It was not to be required (especially in a plan whose object was conciliatory and accommodating) that the neutral claimant should, under these, and perhaps other circumstances of aggravation, be compelled for an indefinite length of time to follow the captors for retribution through all the dilatory forms of admiralty proceedings before the responsibility of the British Government should become an available means of compensation. That Government, being originally a party to the wrong, could ask only a qualified resort to the ordinary remedy in its courts of judicature.

"The foregoing sketch, which has reached a size I did not wish or intend, contains the outline of my reasons on the subjects herein proposed.

"It is not such as I could desire it to be, for it has been hastily made; but I put it upon our files in the confidence that it will be received with candor."

Pinkney, commissioner, June 26, 1798, case of the *Sally*, Hayes, master, Article VII., treaty between the United States and Great Britain of November 19, 1794.

The arrangement finally made in regard to **Final Arrangement.** cases in which judicial proceedings were still pending is stated in the history of the proceedings of the commission under Article VII. (*supra*, I. chap. X.). The following letter from Mr. Gore to Mr. Pickering, Secretary of State, written on the receipt of news that the British commissioners at Philadelphia, under Article VI. of the treaty, were seeking practically to dispense with the trial by claimants of the ordinary judicial remedies, places in a very clear light the foregoing decisions and opinions and the course pursued by the board under Article VII.:

Letter of Mr. Gore, commissioner, to Mr. Pickering, Secretary of State.

"LONDON, July, 1799.

"MY DEAR SIR: I have lately seen some resolutions of the board of commissioners sitting at Philadelphia under 6 art. of the treaty of amity, etc., between the United States and the King of Great Britain, and communications founded thereon, by Mr. Smith, agent for the claimants, of an interesting nature to our country; and understanding that the 6th article may be the subject of a new negotiation, I have considered the same in relation to the 7th, with the view of examining if any aid could be derived to the construction of the British commissioners in Philadelphia, from the decisions of the commissioners in London, or the admissions of the British Government.

"I take the liberty of communicating to you this examination and the results, confiding for an apology, even if they should be of no use, in the motives which occasion them.

"Actual insolvency at the peace, and ever since, is almost the only circumstance that would have equally operated to create the loss, if no lawful impediment had existed; and the production of proof of such insolvency is incumbent on the United States before they can discharge themselves from their contract to make compensation for the loss. The resolution of the board in the case of William Cunningham & Co.'s claim has since confirmed that opinion."

"The treaty of 1794 never contemplated the necessity of an application to the courts of the country for a partial recovery, and to the board for the balance, but that in all instances, where full and adequate compensation can not now be actually had and received in the ordinary course of justice, the United States will make compensation."

"Resolved, Aug. 6, 1798.—That so far as the full recovery of the debts in this case claimed has, during the operation of the said lawful impediments, been delayed, and the value thereof impaired, and lessened or totally lost, by lapse of time, the loss of legal evidence, insolvency of debtors or otherwise, such delay of recovery, and diminution or loss of value and security are to be ascribed to such operation of lawful impediments, unless it be shown, within the proviso of the treaty of amity, that the delay of recovery was occasioned by other causes which would have equally so operated, if the said lawful impediments had not existed, or arose from the manifest delay or negligence, or willful omission of the claimant."

"The foregoing quotations are made from a communication of Mr. Smith to the claimants under the 6th article.

"In the case of Bishop Inglis,¹ so far as my recollection is just, for I have not the paper before me now and can not obtain it, it is insisted on by the British commissioners 'that an application to the courts is not necessary in order to entitle the complainant to the award of the board,' it being said by them that in analogous cases the point of incapacity to recover in the ordinary course of justice had been proved, on which the American commissioners declared that no such points have been determined, but the contrary, since it is evident from the decisions of the circuit and supreme courts, that if the complainant had applied in the ordinary course, he would have obtained compensation. The board under the 7th article has admitted no case where the party failed to make application to the courts for redress; but has uniformly and unanimously dismissed all such complaints, on the single ground that no cause could be entertained by the commissioners unless the party proved that he had sought redress in the courts of the country, or satisfied the board that his having failed so to seek and to obtain compensation was not owing to any willful omission or neglect in him.

"The commissioners have as yet awarded on no cases where an appeal claimed from the sentence of the vice-admiralty courts has been refused. They have, however, entertained some few. At present the number amounts only to two. Three others are yet under consideration, in which

¹ Supra, vol. 1, p. 288.

it is alleged that the neglect to prosecute an appeal in due season of law was not imputable to him. All the rest have been dismissed

"One of the cases admitted to consideration is where the party gave evidence that he had had a party attending more than a year to obtain a copy of the record of the vice-admiralty court before he could procure it, and that this was the cause of the delay. The other was where the party had appealed and, having so appealed from the vice-admiralty court, ought, according to the British statute, to have entered his appeal in nine months, which he failed to do. This delay was satisfactorily accounted for, and he in fact made an application to the lords of appeal for leave to enter his appeal before twelve months had elapsed after the sentence of the vice-admiralty court. In addition to his accounting for the delay, an act of the British Parliament, passed last winter, expressly declared that by the law of nations twelve months were allowed in all cases to make an appeal from the sentence of a vice-admiralty court. The complainant, therefore, in the case alluded to had, according to the declaration of the British Parliament, done all that the law of nations required of him; indeed, so strict has the board been in considering it necessary that the party should have prosecuted through all the courts to entitle himself to relief under the 7th article that, prior to the passing of the last-mentioned statute, it was determined on the application of Joseph Sterret, myself only being of a contrary opinion, although he prayed leave to enter appeal within twelve months after sentence of the vice-admiralty court, yet having appeared in the court below, according to the British prize act, he was bound to enter his appeal within nine months, and having failed to do so, that our board was not authorized to afford him relief. It was in evidence that he had taken uncommon pains to procure and forward his papers, and even to that degree that the privy council has since admitted him to prosecute his appeal before the lords of appeal.

"In that class of cases denominated provision cases the party prosecuted in the admiralty court and the board admitted his claim, notwithstanding his neglect to go before the court of appeals, because it manifestly appeared to be a case between government and claimant.

"The captor was completely discharged by the sentence of the court, the cargoes pronounced to belong as claimed, and the same ordered to be sold to the British Government, and were in fact delivered over to that government, at a price arbitrarily fixed by the administration. On the sentence of the admiralty court it ceased to be a cause between captor and claimant. The conduct of the board, therefore, in these cases does not militate in the smallest degree with the general principle assumed that the party was obliged to pursue the captor in the ordinary course of judicial proceedings for such portion of compensation as could be obtained thereby before he could support his claim on the British Government under the 7th article, for in these cases the claimant did pursue and exhaust every remedy against the captor.

"If the commissioners under the 7th article had adopted the construction of the British commissioners in Philadelphia, and proceeded to award in all cases where full and adequate compensation could not be obtained in the ordinary course of justice, there are but few cases where the board would not have assumed immediate jurisdiction; for the rule of compensation adopted by the board is so variant from that of the courts, and

from that prescribed by the prize act of Great Britain, that, after having decided the capture to be illegal, there could be but a small number of complaints wherein the rule adopted by the British courts, as a measure of damage, would afford to the party full and complete compensation.

"The rule adopted by the board was made at the commencement of their sittings, and agreed to, with but one dissentient. The estimating the damage on the principal sum by giving the legal rate of interest of the state where the claimant lives (and which part of the rule was, I think, agreed to by all the commissioners) compared with that of the British courts, which, according to my information, never grant more than the legal interest of Great Britain, would be sufficient to bring every case within the jurisdiction of the board, where the capture was, in its opinion, illegal.

"In that class of captures made under the order of November 6 [1793], the supreme court of appeals specifically refused costs and damages, although they restored the property, and declared the trade from the colonies to the United States to be legal; and this court gave public information that if claimants appealed to their lordships to obtain costs and damages in this class of cases they should be mulcted in costs themselves. No one ever doubted that these claimants, whose property had been acquitted in the lower courts, as well as those whose property had been condemned, were entitled to costs, interest, etc.; and of course that the legal remedy could not afford full and complete compensation. It was not only to suppose that the British courts would act with flagrant injustice against the captors to decree that they should make full compensation to the claimants, when the capture was expressly enjoined by the British crown, but the declaration of the court to the parties, captors, and claimants put this question beyond all doubt. This declaration was recognized in the case of the *Diana*, Gardner, and on this ground the board was unanimous, all the members being present, that the party in the case of the *Diana* was entitled to compensation under the 7th article, without waiting in the court of appeal for a decision. If, therefore, the construction made at Philadelphia had been assumed here, every one of these cases would have been immediately decided by the board, the party entitled to full compensation, and the British Government left to obtain a partial sum against the captors.

"The case of the *Sally*, Hayes, was a capture in March 1794 under the orders of November 17, 1793, and so stated in Mr. Bayard's memorial. For this reason the lords of appeal, although in April 1796 they reversed the decree of the vice-admiralty court of the *Bermuda* and ordered a restoration of the property or its value, refused to allow the claimants costs, damages, or expenses. It was surely, then, evident in April 1798, when this cause was brought before our board, that full and complete compensation could not be obtained in the ordinary course of justice. The particular state of this case at that time will be found in Mr. Slade's certificate.

"The proceedings on that case, with Mr. King's communication of what passed between him and Lord Grenville on the subject, will prove that the British Government adopted a resolution directing the reverse of the construction now insisted upon by the British commissioners. Indeed, it was then repeatedly said by the British commissioners here, and by other officers of their government, that it was impossible that the fact of incapacity

to have and receive compensation in the ordinary course of justice could appear, but by proving that the party had prosecuted therefor by every process known to the laws of either, and had failed to obtain the same. It is in consequence only of special instructions from the British ministers that their commissioners now proceed to award in any cases where the party has not prosecuted through every process that the forms and the practice of the admiralty courts can suggest, and we are told every time we meet that it is owing to the great consideration of the British Government that the board is permitted to examine and decide on cases after a final determination of the lords of appeal not only on the merits but on the amount to be paid. Such is the hideousness of the process, the delays of the court, and of the merchants whose duty it is to report on the value of property restored, that since this consideration only four cases were ready on 30 April to be awarded upon, as coming within the intent of that instruction.

"The statement of cases awarded upon by the board confirms my general remark as to the character of those acted upon under the 7th article, and shows decisively that no aid can be derived to the construction of the British commissioners, in Philadelphia, from the acts of this board. The opinions in the provision cases, already with you, show the nature of those and that the decision in them does not contradict my general remark on the quality of the cases decided.

"The memorial and answer in the *Diana* prove the understanding of all parties as to the incapacity to recover full and complete compensation in a large portion of complaints, and what would have been the effect, if our board had adopted the construction of the British commissioners under the 6th article, and that construction had been assented to by the British Government.

"The proceedings in the *Sally*, Hayes, distinctly prove that neither the commissioner of Great Britain nor the government would admit a construction that gave authority to the board to act in any case where every process had not been essayed, and its effect ascertained, and this decision was in a case where it was evident by the decree of the high court of appeals (being the last resort for judicial redress) that the complainant could not obtain, have, and receive full and complete compensation, in the ordinary course of justice."

2. RIGHT TO LEGAL PROCESS.

The American brig *Jane*, Henry Williams, Case of the "*Jane*." master, with a cargo of mules for New Orleans, was on March 31, 1836, detained by the authorities at Matamoras without judicial process. The embargo was raised April 16. The brig, however, did not sail on that day, because the master was in prison. He was arrested twice, (1) because, with a view to send advices of his detention to the United States, he signaled a vessel which came into the harbor flying American colors, but which turned out to be an enemy, and (2) because he refused to answer certain improper

questions or to sign a document in Spanish which he did not understand. He was released April 22, 1836, but had to go forty miles to his vessel, which consequently did not sail till April 24. A claim was made (1) for the detention of the brig and the detention and feed of the mules, as well as for the diminution in value of the mules in consequence of their detention; (2) for the detention and food of the persons detained on board; and (3) for the imprisonment of Captain Williams. The Mexican commissioners admitted that the brig was unlawfully detained, but estimated the detention at seventeen days, while the American commissioners estimated it at twenty-five. The umpire, accepting the latter view, awarded, under the first head, \$1,011.75, with interest from April 24, 1836, making in all \$1,317.98; under the second head, \$915.14, amounting, with interest, to \$1,157.48; and under the third head, the sum of \$600, in gross.

John P. Lund, Henry Belden, and Henry Williams v. Mexico, commission under the convention between the United States and Mexico of April 11, 1839.

In July 1857 Edmund W. Sartori, a citizen of the United States residing in Valparaiso, Chile, and having large commercial interests there, went to Arequipa, Peru, to collect some moneys due to him from inhabitants of the latter place on mercantile transactions. After his arrival at Arequipa the city, which was occupied by the forces of General Vivanco, was invested by General Castilla, and on the 25th of September Mr. Sartori, being ready to depart, applied to General Vivanco for a passport to Islay, the nearest seaport, with a view to return to his home. The passport was sent to him on the following day, together with a package addressed to Señor Pardo, a common friend of General Vivanco and Mr. Sartori, then residing in Chile, Mr. Sartori having, when he applied for his passport, promised to take the package with him. Mr. Sartori, with four traveling companions and a guide, then set out on his journey and proceeded directly to the lines of General Castilla, whose headquarters he inquired for and visited. On arriving there he was interrogated as to what papers he had on his person. He produced the package in question and submitted to a search, but, although no concealed communications were found, he was detained together with one of his companions. a Mr. Quintana. The rest of the party were dismissed.

On the 30th of September, the fourth day after his arrest, Mr. Sartori was subjected to a preliminary examination, and he was thereafter detained a close prisoner and *incomunicado* for a period of thirty-five days, at the close of which a court-martial was convened for the purpose of hearing his case. This tribunal on the 17th of December declared itself incompetent to adjudicate the case, and Mr. Sartori was then detained till January 6, 1858, when he was ordered to Lima for examination. He remained at Lima till the end of January, when he was dismissed without process of law or any judicial investigation of his conduct. During his four months' confinement his business was ruined. The American and Peruvian commissioners differed as to the allowance of the claim, the latter viewing the case as that of the detention of a person who had laid himself open to the suspicion of being an accomplice or partisan of General Vivanco. The American commissioners declared that the question before the commission was not "whether Mr. Sartori was or was not a partisan of General Vivanco or General Castilla, but whether as a citizen of the United States he has received that justice to which he was entitled under the solemn guarantees of international compacts." They cited Article XIX. of the treaty between the United States and Peru of 1851, by which it was provided that the citizens of the contracting parties should "not be liable to imprisonment without formal commitment under a warrant signed by a legal authority, except in cases *flagrantis delicti*; that they should "in all cases be brought before a magistrate or other legal authority for examination within twenty-four hours after arrest," and that, "if not so examined, the accused shall forthwith be discharged from custody." It did not, so the American commissioners argued, excuse the conduct practiced toward Mr. Sartori to say that the country was in a state of war, and that the civil tribunals were suspended. This fact, and the known promptness and thoroughness of military examinations, in their opinion made the wrong only the more serious. They maintained that Mr. Sartori should be allowed the sum of \$87,000—\$72,000 for business losses "resulting directly from his illegal detention," and \$15,000 for "personal wrongs and sufferings"—and that, on the sum so allowed, interest from September 27, 1857, to October 27, 1863, at the rate of 6 per cent per annum, should be paid—making in all the sum of \$118,755.

The umpire, General Herran, rendered, November 24, 1863, the following award:

"Whereas, the mixed commission of Peru and the United States has not been able to decide the claim of Edmund W. Sartori, a citizen of the United States, against the Peruvian Government for injuries and damages which he alleges to have suffered by his imprisonment, and the said commission not having been able to decide the said claim, it has been submitted to me in the following terms: 'Were the stipulations of the treaty between the United States and Peru of 1851 respected in reference to the proceedings of the authorities, in the case of Edmund W. Sartori? If not, in what amount is the Government of Peru responsible for indemnification of injuries and damages sustained by Edmund W. Sartori?'

"The town of Arequipa being besieged by the Peruvian Government in consequence of its being occupied by the principal portion of the forces then at war with the government, Sartori passed from the town to the besieging army and demanded a passport to continue his journey to Chile, *via* the port of Islay, a town in the hands of the party at war with the government. He was asked whether he was the bearer of dispatches from the enemy, and having answered in the affirmative, he immediately gave up the papers in his possession, together with \$100,000 in bonds, payable to the bearer, issued by the revolutionary government. Sartori was placed in confinement and brought to trial, but four months later, without judgment having been passed on his case, he was set at liberty.

"The honor and interests of the two republics represented in the joint commission require them to give proofs of the good faith with which each of the two countries fulfills the stipulations of the public treaty that binds them and requires that neither government shall allow the citizens so to abuse the protection and guarantees conceded to them by the treaty as to consider them a species of immunity under which they may infringe the laws.

"Such are the rules I must observe in deciding the claim, which embraces three cardinal questions.

"1st. Whether the general in chief of the besieging army had a right to arrest Sartori.

"2nd. In the subsequent proceedings were the stipulations of the treaty between the United States and Peru observed; and,

"3rd. Whether the Peruvian Government is responsible for the injuries and damages for which the claimant demands indemnity.

"First. From the fact that Sartori had gone out of a city in a state of siege where the chief of the revolutionary government and the greater part of his army were stationed, carrying written communications and \$100,000 in paper money, the property of the enemy of the Government of Peru, toward a port occupied by their troops, the general in chief of the besieged army had the right to prevent Sartori from continu-

ing his journey and to bring him to judgment. In so doing he acted according to the laws of war, and did not violate the guarantees which the citizens of the United States enjoy in Peru, according to the stipulations of the treaty celebrated between the two countries; and it seems to me this opinion is implicitly expressed in the note which Mr. Clay, minister of the United States, addressed, under date of September 13, 1857, to the Government of Peru, where he said 'the letters may have been merely recommendatory and the *vales* Mr. Sartori's own property. If so, the destruction of the *vales* and an imprisonment of thirty-five days would seem to me sufficient punishment.' (See original document.)

"Second. Sartori's declaration ought to have been taken within twenty-four hours from the time of his arrest; and although it appears that when he presented himself in the camp of the besieging army he was verbally examined, the spirit of the treaty requires, as I understand it, that a formal declaration be taken. He ought to have been tried before some judge or tribunal to arrive at some decision, after his defense should have been heard, as to whether the charges brought against him were sustained; but, inasmuch as he was not tried, the charges remained without the sanction of the judiciary, whose province it was to decide if Sartori had violated the neutrality which as a foreigner he ought to have maintained in the country. If this sentence had been in the nature of an acquittal the Government of Peru would not be responsible for his imprisonment and detention, inasmuch as it had the right to bring him to judgment in the same manner as a Peruvian citizen under similar circumstances; and the accused would have had the means of justifying himself, and, had he been condemned, the charges which might have been proved would have become facts, acknowledged as incontrovertible.

"I am of opinion, therefore, that the Government of Peru is responsible for the delay of forty-eight hours in taking the formal declaration of Sartori, and for not having brought him to judgment.

"There is no circumstance leading to the belief that this omission was intentional on the part of the Peruvian Government. Far from this, proofs exist that they were not influenced by bad will or the spirit of persecution, and that it was their desire to give no cause of complaint to the United States; but on the principle that reparation ought to be made in cases where responsibility is incurred, however small it may be, for noncompliance with the treaty, in order that each government may place entire confidence in the good faith of the other, it seems to me that an equitable and reasonable indemnity ought to be granted to Mr. Sartori.

"Third. The sum which Sartori claims by way of damages amounts to \$114,252, and I shall proceed to state the reasons which lead me to believe that the Government of Peru should not pay this sum.

"The depositions which have been presented to prove the

losses incurred are not based on sufficient evidence, and the causes to which said losses are attributed are in the nature of improbable conjectures. The Government of Peru is not responsible for the rumor which was spread in Valparaiso to the effect that Sartori had been shot, for his life was not threatened; nor was it likely that, in a country where cases of arbitrary executions during civil wars have been of very rare occurrence, such an outrage should have been committed with a foreigner who had not taken up arms in the strife. One of the items in the claim is \$22,000 alleged to have been lost by Sartori for the dissolution of his copartnership with Robert and John Walker. This claim is against the partners of Sartori, who took advantage of the unfortunate condition in which he was placed to deprive him of his property. The declaration which one of them and other persons have rendered to maintain this charge against Peru would be sufficient ground to condemn said partner to the payment thereof before a righteous tribunal. Another item is for \$33,000, for 'losses arising from the absconding of Alijandro José Perez, Sartori's agent.' Peru is not responsible for the fact that Mr. Sartori should have absented himself from Valparaiso, leaving his affairs in the hands of an agent in whose good faith he could place no reliance. Another item is \$6,000, for 'losses of his right to the mines of Santa Rosa de Belezario and of Gallozo, in consequence of not having found himself in Valparaiso in December 1857.' Mr. Sartori absented himself from said port of his own will; he went to Arequipa during the time that the city was occupied by revolutionary troops; he remained there while the dangers of the siege approached, and his detention in Sachaca was in consequence of his voluntary act, viz, the receiving of dispatches and *vales* which were delivered to him in Arequipa and of which he became the bearer. For this reason he incurred of his own accord the danger of losing the mines and of suffering the other losses, which without proper proof are attributed to his absence from Valparaiso. Two other items, together amounting to \$38,552, for exchange and interest on the sums above stated, are not valid, inasmuch as the items to which they refer are disallowed. The last item of the claim of Mr. Sartori is \$15,000, for compensation of personal suffering in Sachaca. In my opinion what may be conceded is a compensation for the delay of forty-eight hours in taking his declaration, and for not having passed judgment in his case.

"Therefore I decide that the Government of Peru pay to Mr. Edmund W. Sartori the sum of \$5,000 in current money of the country, with interest at the rate of six per cent per annum from the 29th day of September 1857."

"In 1869 Rozas entered into business in
Case of Rozas. Havana as a tobaccoconist. On the 5th of February 1869 he was captured, with some other persons, in a farmhouse. The circumstances seem to justify a strong suspicion that they were all assembled to join the

insurgents, but they were not armed when captured, and no overt act of insurrection had been committed by Rozas. The authorities were informed of his American citizenship, but he was denied the privileges of the treaty of 1795, and after trial by military proceedings he was kept in prison in Cuba until the 21st of March. On that day he was transported, with some 250 other prisoners, on a vessel to the island of Fernando Po, on the coast of Africa. About the 22d of May he arrived there, after having suffered great hardships on board the vessel. On this island he was kept until the 4th of August, when he escaped in a boat. He was picked up by a steamer and taken to Liverpool, whence he came to the United States.

"In the opinion of the umpire the original arrest was a lawful military act, but the trial by military proceedings was a violation of the guarantees and forms provided for in the treaty of 1795, and it is stipulated in the agreement of 1871 that in such cases the commission shall make such awards as the commission shall deem just. If the claimant had been expelled, Spain would not have incurred any liability under the circumstances in this case; but indemnity is due for long confinement and improper treatment, and also for the return voyage.

"The umpire hereby decides that an amount of \$14,000, without interest, be paid on account of this claim."

Count Lewenhaupt, umpire, case of John C. Rozas, No. 69, Span. Com. (1871), February 22, 1983.

"The greatest criminal brought to the bar
Driggs's Case. of justice is entitled to be tried according to the law of the land, not because he is deserving of any special sympathy or consideration, but because of the respect due to the law itself. Driggs, therefore, was entitled to be accused and tried as the law of Venezuela provided, and the record seems to show that, in some particulars at least, this was not done; and although we believe him guilty we can not say that he was not the victim of a wrong for which reclamation should be made. What, then, shall be the measure of damage? The old commission in this case allowed Driggs \$100,000, fifteen per cent, or \$15,000 of which has been paid by Venezuela, and with interest to date would amount to more than double that sum. This, we think, under all the peculiar circumstances of this case, is a sufficient allowance by way of indemnity for the wrong she committed in

not trying a guilty man and convicting him according to principles and methods of procedure established by their own laws; and as this sum has been paid, we will dismiss the petition and reject the claims.⁷

Findlay, commissioner, for the commission, *Seth Driggs v. Venezuela*, No 10, United States and Venezuelan Claims Commission, convention of December 5, 1885.

3. PURSUIT OF JUDICIAL REMEDIES.

Charles Turner, the master of an American vessel, while on a voyage to the port of Sisal, Mexico, discovered off the coast of Cuba a wrecked and abandoned English vessel, from which he took a quantity of cochineal. When he arrived at Sisal he paid duty on the cochineal to the amount of \$73, but the authorities took possession of it on the ground of certain alleged irregularities on the part of Captain Turner, and turned it over to a person who claimed to be the owner of it. A court of inquiry was then instituted, with the concurrence of Turner, who claimed salvage in the cochineal. The court, after hearing the parties, ordered the cochineal to be turned over to the alleged owner, and ordered that salvage should be withheld until the conduct of Turner could be investigated by a competent tribunal. Turner at the time declared his purpose to press the case in the courts, but subsequently sold his vessel and returned to New York without taking that course. He permitted the matter to rest until 1838, when he presented a claim against Mexico for the salvage and certain other alleged losses, and for the return of the duties. The Mexican commissioners contended that Turner had by his conduct waived his right to prosecute the case. The umpire concurred in this view, and disallowed all the claim but that for the refund of the duty, which he awarded with interest, amounting in all to \$138.67.

Charles Turner v. Mexico, commission under the convention between the United States and Mexico of April 11, 1839.

Dr. John Baldwin, a citizen of the United States, presented to the mixed commission under the convention between the United States and Mexico of April 11, 1839, a claim growing out of the alleged wrongful confiscation of a trunk of clothing by the Mexican authorities. The commissioners differing in opinion,

the claim was referred to the umpire, who, for lack of time, returned it undecided. It was afterward laid before the commissioners under the act of Congress of March 3, 1849, who rejected it, saying:

"Had the seizure of the claimant's property been ever so illegal or wrong, it was his duty to the government, if he meditated any demand against it, to have sought his redress through the tribunals of justice, the more especially in this instance, where the claimant was a resident of the country. Mexico was not bound to furnish him in this instance with any other means of redress. That such means were furnished, the case presents the most ample testimony, at least so far as the conduct of the claimant himself would permit. The court evinced no want of energy in attaining the ends of justice in his behalf, but, on the contrary, displayed the most laudable efforts in an impartial determination of the case; and at the very time when the court was about to consummate its endeavors to enforce obedience to its orders the claimant abandoned the court and his cause. There is nothing in the proceedings to show that a denial of justice was meditated or likely to ensue to the claimant, and only in such event could he have claimed from the Government of Mexico indemnity for the loss he sustained."

Case of the People of Cinecua. The inhabitants of the town of Cinecua complained of an act of the legislature of Texas of January 31, 1854, by which a part of their town, which had been separated from the rest by a change in the course of the Rio Grande, was incorporated into the town of La Isleta, Texas. The commission, Mr. Palacio delivering the opinion, held that the case was not one for international action, there being judicial remedies that could be pursued. The opinion referred to the judicial remedies, ordinary and extraordinary, which had been devised in the United States for the protection of vested rights of property.

The People of Cinecua v. The United States, No. 120, Mex. docket, July 13, 1870, convention of July 4, 1868.

Case of Moses. In the case of *Isaac Moses, assignee, etc., v. Mexico*, No. 197, American docket, convention of July 4, 1868, the claimant was the owner of certain goods in the warehouse of S. A. Belden & Co., American citizens, of Matamoras, upon whom a fine was assessed by the district court at Saltillo. The goods in question having been seized to satisfy the fine, Moses protested against the seizure, while Belden notified the seizing officer that the goods belonged to Moses, and pointed them out and declared that he

had no claim upon them. The agent of Mexico moved to dismiss the claim on the ground (1) that the seizure was a matter for judicial investigation, and that the owner failed to pursue the proper legal remedies under the laws of Mexico; (2) that the injury was done by "subaltern or inferior authorities," and that the owner, having failed to make reclamation on the supreme government of Mexico, could not present his claim before the commission.

Mr. Wadsworth, the American commissioner, maintained that as the proceedings were against Belden and not against the claimant, the latter had no remedy to pursue. The proceedings, he said, being against another person, and by final process to satisfy a fine to the Government of Mexico, the seizure was a naked trespass which the government could not justify by the process to take the goods of Belden. There was no sentence of a court against claimant from which he could appeal, and, assuming that he had a judicial remedy for the recovery of his goods, which Mr. Wadsworth did not admit, he could not have recovered damages for their unjust and illegal seizure.

Mr. Palacio, the Mexican commissioner, said that the claim was presented by the American minister to the Mexican Government, which replied that, the act being that of subaltern judicial authorities, the claimant should seek a remedy in the superior courts. This, according to the American minister, the claimant refused to do, because he said the courts were too corrupt to warrant one in seeking justice from them. The case was not further pursued diplomatically. Mr. Palacio contended that the claimant was bound to resort to the courts, especially as the treaties between the two countries secured to the citizens of each in the territory of the other the same legal remedies as were possessed by natives.

The umpire, Dr. Lieber, April 14, 1871, gave (MS. Op. I. 260) the following decision:

"If all the arguments against the jurisdiction of this commission, drawn from the rule that all inferior means of obtaining right must be exhausted before a higher one and an appeal to a higher authority is resorted to, were valid and substantial, there is no reason why claimant, a citizen of the United States, should not present himself before this commission and avail himself of the convention, which he thinks for his good fortune has come to be appointed by agreement between the two nations. This convention is an extraordinary one; it is no American or

Mexican court of appeal, and the claims of Isaac Moses, representing Joseph Moses, fall distinctly within the limits prescribed by the convention as to time and qualification. Joseph Moses was a citizen of the United States when a Mexican officer deprived him of his goods. An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority. The claim arises out of a transaction subsequent in date to the 2nd of February 1848, and it was preferred in proper time, designated by the treaty under the authority of which we are adjudicating claims between Mexico and the United States. Isaac Moses, an American citizen, seizes upon this court and commission to have his claim adjusted. There seems to be little or no doubt in the minds of all parties about the injury actually suffered by Moses, and only a desire to remove the case out of this court. It is my distinct and clear opinion that Isaac Moses has a legal standing before this commission which is bound to adjudicate his claim."

"It is objected that the case has been adjudicated by the proper Mexican court, and can not be reopened before this commission; that therefore it ought to be dismissed. It is true that it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country, which nevertheless the law of nations universally allows in extreme cases. It has done so from the times of Hugo Grotius. The difficulty and delicacy, however, is very much lessened when it is believed that so many irregularities or wrongs have been committed in two countries by the authorities of the one against the citizens of the other that these wrongs by the respective authorities are spoken of in a special treaty or convention (as that under which our commission has its being) in which the governments of these two countries agree to redress the wrongs as much as possible, according to justice and equity. No doubt is left on my mind that the Mexican court or judge in Acapulco acted with great irregularity, and even with some violence, and that, as matters went, the case of the steamboat *Commodore Stockton* was by no means fully adjudicated, and that an appeal from the Acapulco judge to a Mexican court of appeal was prevented by intrigues or unlawful transactions. The whole is wrapt in confusion and presents a very fair subject to be adjudicated by our commission. * * * I award to the United States the sum of \$20,000, with interest at the rate of 5 per centum per annum from the day of the seizure of the *Commodore Stockton* to the

close of the labors of this commission, and \$100 for printing and costs, in the currency of that government, for and on behalf of claimant."

Lieber, umpire, November 7, 1871, *Cornelius H. Garrison, surviving partner of Garrison & Fretz, v. Mexico*, No. 8, Am. docket, convention of July 4, 1868, MS. Op. II. 252.

"James Selkirk, a native Scotchman and a
Selkirk's Case. citizen of the United States by naturalization, is now domiciled at Brazos Santiago, in the State of Texas, but formerly was domiciled at the mouth of the Rio Grande, a somewhat indistinct location unless he had his habitation there as a pilot. When living there he owned the schooner or pilot boat *Helen Marr*, and took her as captain or master to the port of Vera Cruz, in Mexico, in the month of May 1851. After a certain time he considered his vessel regularly cleared for or permitted to go to the river Coatzacoalcos, but it seems was imposed upon in a gross manner, not at all habitual with Scotch people. His want of acquaintance with the Spanish language may have been the cause; but we can not occupy our lives with the psychology of the case. The fact is that a few days after his arrival at Minatitlan (a town some fifteen miles up the Coatzacoalcos, and I suppose the seaport of that portion of the Mexican littoral), and after having given his papers, which were, it seems, a clearance for New Orleans and no permit to go to Minatitlan, the *Helen Marr* was seized by the Mexican authorities, and sent, in fact, with some Mexican soldiers on board to Vera Cruz, where she was regularly libeled and tried for breaking the law. I have not been able to ascertain whether Minatitlan was at that time (in 1851, when what may briefly be called the Tehuantepec difficulties existed) a port of entry. It is stated by the Mexican commissioner that the *Helen Marr* could not have entered the Coatzacoalcos (then in the State of Vera Cruz, but now belonging to the new State of Tehuantepec) without a special permit; nor was claimant pursued by men-of-war or pirates, nor in stress of weather or foundering condition. His papers were simply incongruous with his presence in that river or in the port of Minatitlan.

"Selkirk, the claimant, refused to go to Vera Cruz in his own vessel, and went by land for reasons of his own, which have not been told us by him. The proper court of law gave its decision in the month of July of the same year, which was that Selkirk should pay two hundred dollars and costs, fairly

disclaiming that claimant had acted in bad faith, estimating, it is supposed, that his infraction of the law arose from want of judgment, allowing himself to be imposed upon especially by a man called Sardinier, and not from evil intentions. Selkirk on the other hand declares that he was unfairly treated. He was informed that he had the right of appeal to the higher authority in Mexico, and that until the second decision was known, or until he should pay the fine, the vessel would remain attached as a matter of course. Claimant neither paid the fine nor appealed; nor does he seem to have taken any rational steps in the matter. He returned to the United States and on September 5, 1851, therefore the same year, presented his case to the Department of State of the United States. The *Helen Marr*, we are informed, was lost at a later period in the port of Vera Cruz. The Department of State at Washington does not seem to have paid much attention to Selkirk's claim. At least, no documents before the commission show it. Claimant now, very nearly twenty full years after the infliction of the supposed wrong, comes before us, claiming \$3,500 for the value of the *Helen Marr*, \$700 for provisions and material on board, and \$5,800 for his own and his men's loss of time, with six per centum per year from May or June 1851, I forget which, to the present time or the close of the labors of the commission. * * * Claimant does not show how he will pay the proper proportion to the seamen who were under his command, or, if he paid them off, that he did so. The umpire willingly adopts the view which the Mexican court seems to have taken, and ascribes the irregular conduct of claimant to a serious want of judgment, or his unfitness, in an intellectual point of view, for the part he had assumed as captain or master of his own vessel in foreign ports where the Spanish language is spoken; but neither equity nor justice permits us to allow his claim. He might himself have easily avoided the difficulty."

Lieber, umpire, April 10, 1872, *James Selkirk v. Mexico*, No. 362, Am. docket, convention of July 4, 1868, MS. Op. II. 421.

A claim was made for the irregular seizure of a brig at Tampico in March 1858, after General Garza had established there a state of siege. The brig was seized and her master imprisoned for about two weeks, when the arrival of a United States man-of-war procured his release. The commissioners held that it was the duty of the authorities under the treaty

of 1831 either to warn the brig away and suffer her to depart, or else, if there was any justifiable cause for seeking to make her a prize, to have carried her into the nearest port and instituted judicial proceedings. Neither of these things was done. The commissioners therefore made an award that the Government of Mexico pay \$13,567, with interest from July 1, 1853, to the close of the labors of the commission, at the rate of 6 per cent per annum, and \$100 costs of printing.

Brig Nahum Stetson v. Mexico, No. 51, Am. docket, convention of July 4, 1868, MS. Op. II. 172.

Case of Reed and Fry. A vessel was seized in Mexico by the proper officers and libeled in a court of competent jurisdiction on a charge of violating the revenue laws. After a fair and full hearing and a strenuous defense on the part of the owners of the vessel, the court decreed confiscation, the owners being present and announcing to the court their determination not to appeal. The commission, Mr. Wadsworth delivering the opinion, said that there was sufficient evidence in the record to sustain the decision of the court, and that he would be rash who should affirm that "it was plainly wrong in *re minime dubia*." The claim was dismissed.

Steamer Warren, Thomas W. Reed and Budd H. Fry, claimants, v. Mexico, No. 38, Mex. docket, convention of July 4, 1868, MS. Op. II. 541.

Case of the Tehuantepec Ship Canal. In the case of the *Tehuantepec Ship Canal and Mexican and Pacific R. R. Co. v. Mexico*, No. 491, American docket, decided November 27, 1873, by the commission under the convention of July 4, 1868, a claim was made for \$546,315,038.66, interest included, for damages sustained by reason of the failure of the Mexican Government to comply with the terms of a contract of May 15, 1865. The contract was executed by José I. Carvajal, assuming to act for the States of Tamaulipas and San Luis Potosi and the government of Mexico, and by Daniel Woodhouse, secretary, superintendent, and general financial agent of the United States, European, and West Virginia Land and Mining Company. It contained the following stipulation:

"Also that all questions that may arise under this arrangement between the general and State governments aforesaid, and the said second party, shall be adjusted by private arbitration—the arbitrators, two in number, to be chosen one by each of the parties interested, and in the event of their dis-

agreement the question or questions in dispute shall be referred to some court of justice of lawful jurisdiction in the United States or Mexico."

The commissioners, Mr. Wadsworth delivering the opinion, said that, putting other questions aside, there was nothing in the record to show that the memorialists had made any effort to settle the questions of difference by arbitration or by an appeal to the courts of justice. "This," said Mr. Wadsworth, "must first be shown, before we can venture to decide upon the complaint, as one referred to by the convention."

April 21, 1868, a party of Mexicans and
Leichardt's Case. Americans, who "had been drinking champagne and were intoxicated," were walking along the streets of Monterey after 10 o'clock at night "singing and imitating the coyote." The governor of the State, hearing the noise, stepped out on his balcony with General Trevino to listen, but when he learned the character of the noise retired into the house and took no more notice of it. His secretary, one Davila, however, after the governor had left, sent for the police and had the party arrested. The Mexicans who were arrested knew Davila, and, together with the police officers, sought to obtain the release of their American companions. Davila directed the release of the Mexicans, but ordered the police to cast the Americans into prison, where they were put with condemned criminals, beaten, and subjected to other indignities. They were released the next morning. Mr. Wadsworth, the United States commissioner, said:

"When released the parties brought an accusation and made their declaration against the jailer and other officers of the prison, purposely omitting Davila, but reserving their right to proceed against him criminally and civilly. The prosecution was conducted with vigor. Both the State and Federal governments urged on the proceedings, and the parties were convicted and sentenced, the jailer to be removed from office and to be incapable ever after of holding office in the State, and each of his subordinates to forty days in the chain gang. Why the outraged parties did not prosecute the chief criminal or hold him to a strict account in a civil proceeding, they do not explain. I am not at liberty, in view of the action of both the political and judicial authorities of Mexico above briefly set forth, to suppose that the persons injured and insulted in so vile a manner could not have obtained redress in the courts of the country for the wrongful misconduct of Davila. I must suppose they could. For whatever conclusion might properly be drawn from the disorganization of society due to unending

years of revolutions and civil broils and strife, nevertheless Mexico was at peace in 1868, the judges were on the bench and seemed in this case to discharge their important functions with firmness and intelligence.

"Now, it must be understood by foreigners in every country that wherever there is a fair prospect of obtaining justice by due course of law, for wrongs and injuries inflicted by private persons or by 'paltry petty officers, drest in a little brief authority,' like the governor's secretary, for instance, they must resort to the courts of the country, and in such cases only appeal to their own sovereign when the courts of the country refuse to do their duty, or misconceive it, or pervert justice in *re minime dubia*. Although I sympathize with the persons who were subjected to such indignities and understand their feelings, I do not believe the Government of Mexico is responsible. It is my decision that this case must now therefore be dismissed, and so it is ordered accordingly."

Mr. Zamacona, the Mexican commissioner, delivered the following opinion:

"Evidently this claim is not founded upon any injury on the part of the Mexican authorities, since, in so far as they intervened in the matter, they acted within the sphere of their powers and in the discharge of their duties. The claim therefore should be dismissed."

E. F. W. Leichardt v. Mexico, No. 952, Am. docket, convention of July 4, 1868, MS. Op. II. 580. The case of *Samuel B. Catherus v. Mexico*, No. 928, growing out of the same transaction, was likewise dismissed by the commissioners. (Ibid.)

"In the case of *Frederic Bronner v. Mexico*,
Bronner's Case. No. 115, the memorial of the claimant to the mixed commission presents two claims. The first of these is on account of the confiscation by the Mexican custom-house authorities of certain goods imported by him at the port of Vera Cruz, with regard to which it was decided by Mexican tribunals that the invoices were not in due form and that the defects which appeared in them proved an intent to defraud. The umpire is always most reluctant to interfere with the sentences of judicial courts, but in this instance the decision appears to him so unfair as to amount to a denial of justice. So far from the evidence proving any intention to defraud, the umpire is of opinion that the claimant caused more than usual precautions to be taken with a view to prevent the possibility of any such accusation. Nor could the claimant at any time have harbored an intention to defraud with the slightest hope of success, for when amended

invoices were submitted to the Mexican consul at Liverpool, he must have been well aware that the consul would transmit them at once to the Mexican custom-house authorities at Vera Cruz and to the Mexican minister of finance. The umpire therefore feels it incumbent upon him to decide this claim is a just one and to award on account of it the sum of \$7,145.85 Mexican gold, with interest at 6 per cent per annum from the 1st of December 1854 to the date of the final award. The umpire has allowed the original value of the goods with the costs of freight, landing, etc.; but he has not taken into consideration the profit upon the sale of the goods, because he thinks that the loss of this is sufficiently compensated by the assured interest of 6 per cent per annum at the end of a number of years. Neither has he allowed for the legal expenses, because, although he repeats his conviction that there was no intention on the part of the claimant to defraud the revenue, the first invoices were not sufficiently explicit, and thence arose the legal proceeding, for which it would not therefore be equitable now to make the Mexican Government responsible."

Thornton, umpire, November 4, 1874, convention of July 4, 1868, MS. Op. III. 579.

"In the case of *Jennings, Laughland & Co. Case of Jennings, v. Mexico*, No. 374, a claim is put forward on Laughland & Co. account of injuries suffered by the claimants which arose out of a sentence given by a Mexican judge of first instance named Calixto Rosaldo. The claimants, residing at New Orleans, carried on commercial business through an agent at Minatitlan, in Mexico. This agent was Edward Forte; but his employers, not being satisfied with him, sent a power of attorney to Phillip Boylan. After some resistance on the part of Forte to Boylan's taking possession of the property, the former yielded after an agreement had been signed that his previous services should be compensated. The nonfulfillment of this agreement gave rise to litigation, and Forte at length succeeded in inducing the above-mentioned Judge Calixto Rosaldo to replace him in possession of the property of Jennings, Laughland & Co., on the ground, principally, that the power exhibited by Boylan was defective. Very soon afterward Forte was murdered, and the money derived from the sale of a portion of the goods was robbed. The remainder was sold by order of the judge, who does not seem to have accounted for the proceeds. The umpire does not feel

himself called upon to decide whether the above-mentioned sentence of Judge Rosaldo replacing Forte in possession of the property was just or not. If the claimants considered that it was not so, they failed in their duty in not appealing to a higher court against the conduct of an inferior judge with a view to his punishment and to the recovery of damages; but they appear to have taken no steps whatever, either themselves or through their agent, to avail themselves of the resources open to them, nor even to recover the proceeds of the sale ordered by Judge Rosaldo after the murder of Forte. The umpire does not conceive that any government can thus be made responsible for the misconduct of an inferior judicial officer when no attempt whatever has been made to obtain justice from a higher court. The umpire therefore awards that the claim be disallowed.

"Although he has taken into consideration the merits of this claim, the umpire must not be supposed to admit that both of the claimants, Jennings and Laughland, have a standing before the commission. Jennings was a citizen of the United States, but Laughland was confessedly a British subject. They were in partnership, but what share each had in the business there is no evidence to show; but if the umpire had thought proper to award compensation on account of the claim, it would only have been to Jennings, as a citizen of the United States, the same proportion of the compensation as his share in the business bore to the whole of it."

Thornton, umpire, November 5, 1874, *Jennings, Laughland & Co. v. Mexico*, No. 374, convention of July 4, 1868, MS. Op. III. 584.

"In the case of *Jennings, Laughland & Co Case of Jennings, v. Mexico*, No. 374, and with reference to the Laughland & Co.: motion made to rehear, which has been transmitted to the umpire by the commission, he observes that the agent of the United States relies principally upon the provisions of a Mexican law entitled 'Ley de procedimientos judiciales en materia civil.' The umpire is much surprised that this law should have been cited, because it is a law of the State of Oaxaca and not of the State of Vera Cruz, in which latter State the occurrences complained of by the claimant took place. It is also to be observed that the date of the law is January 7, 1870, whereas the acts complained of took place in 1858; so that neither at the time nor at the place had this law any force, as far as is shown. * * *

"It is clear to the umpire that, at whatever moment the sentence was notified to the claimant, it was his right for five days, counted from that moment, to appeal if the above-mentioned law were at all applicable to the case, which it is not. This right could not have been prejudiced by the fact that the judge had not caused the sentence to be notified to Boylan within the term ordered by the law. The right to appeal during the five days after the notification is unconditional. If by the act of not having notified the sentence in due time or by other proceedings the judge had violated the law, the umpire can not doubt that the claimants had their remedy at law against the judge and might have sued him for damages.

"The umpire has been given to understand that there existed at the time a court of appeal at the city of Vera Cruz, but if this was not the case, and if, as the umpire concurs with the agent of the United States in thinking, the court at Jalapa was not available, he can not doubt that, as the circumstance of the revolution had prevented the claimant through his agent from prosecuting his appeal before that court, he would have been permitted to do so upon the reestablishment of the authority of President Juarez in Jalapa, and from the moment of the renewed sitting of a legal court. The umpire believes that the President and the Government of Mexico were at the time, i. e., in June 1858, established at Vera Cruz. But it does not appear that the claimants' agent ever made an appeal to them, which would have been easy and would, if no court of appeal existed, have been a proper course, nor does it appear that after the murder of Forte, and after the judge took possession of the property which remained and sold it, the claimant, either directly or through an agent, even called upon the judge to render an account of the sale and to hand over the proceeds. The umpire is therefore of opinion that neither the claimant nor his agent availed themselves of the remedies which were within their reach; that the Mexican Government can not, therefore, be made responsible for the acts, illegal though they may have been, of Judge Calixto Rosaldo, and that consequently there is no ground for acceding to the motion for a rehearing."

Thornton, umpire, December 31, 1874, convention of July 4, 1868, MS. Op. III. 606. In this case it was alleged that in May 1858 a man named Forte, who had been but was then no longer the claimants' agent, asserted the right to have possession of a quantity of their merchandise at Minatitlan, which merchandise was in the possession of their actual agent,

named Boylan; that he accordingly presented to the judge of first instance a petition, asking that possession of the merchandise might be decreed to him, and that this might be done without notice to Boylan; that the judge at once (May 29, 1858) made the decree, and besides ordered Boylan to pay costs and damages, and the value of any part of the goods he might previously have sold; that on June 9, 1858, the judge went to Boylan's house and then first notified him of the decree, when Boylan refused to deliver the property "and recused (i. e., challenged) the judge for inaptitude, incompetency, and as having been bribed;" that the judge, after then appointing a stranger to represent Boylan, proceeded to take the goods and deliver them to Forte; that in the end Forte was murdered, and the property appropriated by the judge and a co-conspirator; that on June 11 or 12 Boylan left Minatitlan and went to Vera Cruz, and on June 20 wrote to his principals, Messrs. Jennings, Laughland & Co., of New Orleans, giving them an account of what had occurred; that Boylan when he left Minatitlan was sick, and that he "doubtless died of the disease he contracted there."

Margaret Glenn made a claim for herself and her minor children for the murder of her husband and son, and the robbery of their bodies.

This incident took place on November 1, 1858, about 2 o'clock p. m., within two leagues of the city of Saltillo, on the road to Monterey. The murder and robbery were committed by a squad of soldiers under a sergeant and corporal. It was alleged that these persons were under the orders of a person who was a lawyer in Saltillo and a deputy in the National Congress, but the participation of this person the umpire did not consider sufficiently proved. But the umpire found that there was a denial of justice in the failure to bring to trial those who committed the act of violence, by which means their guilt or innocence might have been established. On the ground of this lack of action on the part of the judicial authorities, the umpire made an award in favor of the claimants for \$20,000 in Mexican gold.

Thornton, umpire, *Margaret Glenn v. Mexico*, No. 62, Am. docket, convention of July 4, 1868, MS. Op. IV. 76.

Case of Stratton & Black. "It is alleged that in 1853 some horses, mares, and mules belonging to Stratton & Black were illegally seized and confiscated by

the Mexican authorities at Monclora. * * * The presumption must be that the authorities acted in accordance with law in confiscating and selling the animals in question, unless there be very strong proof to the contrary; but there is no

such proof. The inference is that not only was the confiscation legal, but that Mr. Black acquiesced in its legality; for, if not, it is incredible that upon such a flagrant violation of law as the claimant wishes us to believe that it was, neither Mr. Black nor his partner should have appealed to the courts of justice, nor have made any representation to the nearest United States consul, to the United States minister at Mexico, to the Mexican or their own government. The umpire would not be justified in condemning the Mexican Government to the payment of compensation upon such weak evidence as to the illegality of the acts of its authorities, and after more than sixteen years had elapsed without the claimants having made any complaint whatever of the conduct of those authorities. The umpire therefore awards that the above-mentioned claim be dismissed."

Thornton, umpire, May 26, 1876, *Black & Stratton v. Mexico*, No. 770, Am. docket, convention of July 4, 1868, MS. Op. VI. 430.

"In this instance the claimant represents
Green's Case. that he was imprisoned because he refused to pay \$34 on the ground that the exaction was illegal. * * * If the judge illegally imprisoned the claimant it was certainly in his power to appeal to a higher court and to sue Judge Perez for false imprisonment. It is shown that he was at Durango shortly after his imprisonment, and that he had a lawyer there. Nothing could have been more easy for him than to seek his remedy through the courts. But it does not appear that he took any steps in that direction. In view of these circumstances the umpire is of opinion that he would be in no way justified in making the Mexican Government responsible."

Thornton, umpire, May 31, 1876, *Alfred A. Green & Co. v. Mexico*, No. 776, Am. docket, convention of July 4, 1868, MS. Op. VI. 432. "The umpire has again examined the case of *Alfred A. Green v. Mexico*, No. 776, together with the papers having connection with it in the case of *The Sinaloa Silver Mining Co. v. Mexico*, No. 588, which had not been previously submitted to him. He has, however, found no reason or ground whatever for altering the decision which he came to and signed on the 31st of May 1876. It may be that the claimant has been the victim of ill treatment, but the umpire is of opinion that the Mexican Government can not be held responsible for that ill treatment at the hands of an inferior authority from whom the claimant has never attempted to obtain redress by judicial means. The umpire is therefore obliged to confirm his decision of the 31st of May 1876 in the above-mentioned case. Washington, October 25, 1876,"

"The umpire does not consider that he is
Burn's Case. called upon to decide whether the sentence of the judge and his action [the imposition of a fine of \$25 and a day's imprisonment] were just and in accordance with law or not. In such cases the umpire is of opinion that in order to make the Mexican Government responsible there must be the clearest proof of a denial of justice. But there is no such proof in this case. On the contrary, the claimant did not avail himself of the judicial remedies which were within his reach; for there is no doubt that if he was so convinced that the judge had acted unjustly and illegally, it was in his power to proceed against him in the supreme court. In distant parts of the country, where the inferior judge is perhaps the only authority within reach, and where the foreigner may be poor, uneducated, and isolated, such a proceeding might be almost impossible; but at the capital, where the supreme court was at hand, where the claimant himself was evidently a man of some education and determination, and where he had plenty of friends and countrymen to advise and assist him, no such excuse can be pleaded. The umpire considers, therefore, that the Mexican Government can not be made responsible for this claim."

Thornton, umpire, June 5, 1876, *Benjamin Burn v. Mexico*, No. 749, Am. docket, convention of July 4, 1868, MS. Op. VI. 453.

"The case of *Caroline B. Slocum v. Mexico*,
Slocum's Case. No. 798, is another of those where complaint is made of the conduct of inferior authorities. The claim arose in consequence of the refusal of the claimant to pay a tax which was levied upon her. * * * The claimant was certainly not justified in refusing to pay the tax, even though it may have been unjust; certain officers are instructed to collect taxes; it is not their business to consider whether they are just or not; and the tax payers ought to obey the orders which are transmitted to them through these officers. They have the power, if they think it expedient, to protest against such payment afterward and to appeal to the proper authorities, that taxes improperly levied should be refunded. With regard to the conduct of the prefect in ordering the imprisonment of the claimant, she had it in her power to proceed against him in a higher court and to hold him to account for it, if it was illegal. But the umpire is of opinion that the

Mexican Government can not be held responsible for such acts of inferior authorities, and he therefore awards that the above-mentioned claim be dismissed."

Thornton, umpire, June 7, 1876, convention of July 4, 1868, MS. Op. VI. 454.

A claim was made for goods seized and sold under an order of court. It appeared that the claimant did not avail himself of his opportunity either to prove his title in court or to take an appeal to a higher court. The umpire held that there had been no denial of justice.

Thornton, umpire, *Samuel W. Pratt v. Mexico*, No. 63, Am. docket, convention of July 4, 1868, MS. Op. IV. 89, VII. 353.

In the case of *John D. Pradel v. Mexico*, No. 815, Am. docket, convention of July 4, 1868, a claim was made growing out of the arrest of the claimant and the imposition upon him of a fine, which he paid, for killing a man. It seems that subsequently the Mexican authorities decided that there had not been a proper trial and subjected the claimant to a new one, which lasted for a long time and in which he was sentenced to three years' imprisonment. The umpire, Sir Edward Thornton (MS. Op. VII. 478), thought from the evidence that the first trial was not legal, but that there was no good ground to complain of the second, and he awarded the amount of what the claimant paid on the fine imposed upon him. It seems that the first trial, in which the fine was imposed, was ordered by the military authority at the time engaged in the siege of the City of Mexico, and that the fine was paid for the use of the forces under his command. The umpire observed that any attempt to recover the amount by judicial proceedings would certainly be illusory, and under these circumstances he made his award.

"In the case of *Felix Clavel v. Mexico*, No. 323, it appears that the steamer *Sonora*, belonging to the house of Clavel & Co., and not to the claimant alone, fell, through the treachery of her crew, into the hands of the Confederates, who were at the time the enemies of the United States, whose flag the *Sonora* carried. It is not shown whether the Confederates considered her as a prize of war and condemned her in a prize court; but it appears

that she subsequently proceeded to Tampico, where John McDonald, who was in possession of her and controlled her movements, sold her to Gregorio Cortina.

"Although this sale may have been entirely illegal and the vessel may still have really belonged to the house of Clavel & Co., the Mexican authorities would hardly have been justified in deciding at the instance of the United States consul and of Clavel, or *proprio motu*, that she belonged to Clavel & Co. and not to Gregorio Cortina, to whom she had been apparently sold. This was a question which could only be decided by the courts of justice. It is alleged by the claimant that it was submitted to them, and on one hand it is testified that the verdict was in his favor, whilst on the other it is stated that no decision at all was arrived at. But no copies are produced either of the proceeding or the sentence. Under these circumstances the umpire is of opinion that it is not within the province of the commission to declare that the *Sonora* was, at the time she was sunk on the bar of Tampico, the property of Clavel & Co.

"The fact that an order for her payment in the sum of \$17,000, with a premium of fifty per cent, was given to Mrs. Chase and Mr. Maples does not prove that this order was given in favor of the claimant or of Clavel & Co. There is nothing in the order which shows that it was so. It is true that Mrs. Chase testifies that she received the order on behalf of Clavel, and Maples, in a writing at the foot of the order, states that the document was obtained by Mrs. Chase on behalf of Messrs. Clavel and Laplace. But, on the other hand, Gregorio Cortina claims that the order was given by General Cuerta for him, and certainly the vessel was taken from him to be sunk. He, too, brings evidence to the effect that the order was given on his behalf.

"The two questions, then, as to the ownership of the vessel and as to the person on whose behalf the order for payment was issued, are in dispute, and can only be decided by the courts of justice of Mexico, within whose jurisdiction the occurrences took place, and before whom it is alleged that they were brought. The umpire is therefore of opinion that the case is not within the province of the commission, and consequently awards that the claim be dismissed."

Thornton, umpire, September 7, 1875, *Felix Clavel v. Mexico*, No. 323, Am. docket, convention of July 4, 1868, MS. Op. VII. 406.

“In the case of *Schooner Ada*, *Smith and Case of the “Ada.” Mason v. Mexico*, No. 188, the claim is put forward by Moore, the surviving partner of Moore and Folger, to whom the claim was assigned. But the persons who are alleged to have been injured by Mexican authorities are Smith and Mason, and it is therefore with them that the commission has to do. The injury complained of is that a Mexican judge of first instance ordered the sale of the schooner *Ada* at the port of Mazatlan in consequence of a demand to that effect made by one Fitch, who asserted that he held a bottomry bond on the vessel which was to be paid ten days after her arrival at Mazatlan. In spite of the opposition made by Smith and Mason, and by Smith alone as United States vice-consul, the sale was ordered by the judge.

“After a careful examination of the voluminous evidence and documents in the case, the umpire is inclined to believe that the cognizance of the matter by the judge and the subsequent sentence may not have been in accordance with law; but he is confident that there was no such clear denial of justice as to call for the jurisdiction of this commission. But, whether the sentence was in accordance with law or not, the umpire is of opinion that the commission ought not to take cognizance of the claim because Smith and Mason did not avail themselves of the legal remedies which were at their command. There is no doubt that they could have appealed from the sentence of the judge of first instance to a higher court; and if they considered themselves aggrieved they ought to have done so. However difficult it may sometimes be for an accidental traveler in a foreign country to be acquainted with its laws and judicial proceedings, there is no excuse for a commercial house regularly established there not being conversant with such matters and as able to carry on suits before the courts of justice as the natives of the country in which they reside. It would be preposterous to expect that on every occasion when foreigners consider themselves aggrieved by the sentences of inferior courts of justice their respective governments should intervene, should insist upon a reversal of the sentences of those courts, and should pretend to make the government of the country responsible for all the damages which may be alleged to have accrued.

“The crew of the *Ada* might possibly have had more difficulty in enforcing the complete observance of their rights with respect to their wages; and it was perhaps on account of this

difficulty that they consented to receive their wages without those for the extra three months; but, having done so, the umpire considers that they are debarred from all further claim.

"The umpire therefore awards that the above claim with regard to both Messrs. Mason and Smith, and the crew of the schooner *Ada*, be disallowed."

Thornton, umpire, August 27, 1875, convention of July 4, 1868, MS. Op. VII. 338.

"In the case of *Schooner Ana, or Sican, Case of the "Ana." Miffin Kennedy and Richard King, claimants, v. Mexico*, No. 340, the umpire has to make the following observations:

"It appears that on May 1, 1857, Kennedy & Co. purchased two steamers, the *Sican*, of 127 $\frac{3}{4}$ tons, and the *Guadalupe*, of 137 $\frac{1}{2}$ tons, paying for them the sum of \$20,000. It may therefore be supposed that the value of the *Sican*, the subject of the present claim, was then not more than \$10,000. A few months later the claimants sold the *Sican* to Diego de la Lastra, of Tampico, on condition of her being put into thorough repair, her name changed to that of *Ana*, and of her being delivered at the port of Tampico, where the purchaser was to pay for her on delivery the sum of \$13,000, Mexican eagle dollars. * * * When the vessel arrived at Tampico in January 1858 the purchaser refused to accept her; the question was put to arbitration and was decided against him; still he refused to receive and pay for the steamer. It is very doubtful whether the claimant should not have forced him to pay by judicial proceedings; at any rate, they had full grounds for being dissatisfied with his conduct.

"In the following April the vessel was taken possession of by General Moreno, the representative of the Miramon government and then occupying the town of Tampico. This was done in spite of the protest of the master. Moreno armed the steamer, but in a very short time he had to yield to General de la Garza, of the constitutional government, who took possession of the town and of the steamer. The United States consul demanded the vessel of General Garza, who declined to give it up without proofs that it belonged to Kennedy and Co., and requested that those proofs should be submitted to the 'juez de hacienda.' Mr. Chase, however, declined to comply with this request, and the vessel remained in the possession and in the service of the Mexican authorities and was subsequently wrecked near Vera Cruz.

"It is a fact worthy of remark that Kennedy & Co., although they had a right to be indignant at the conduct of Diego de la Lastra, wrote to Mr. Chase on November 6, 1858, and sent him a power of attorney 'conformably with the wish of and through' that gentleman, as they stated, and they instructed Mr. Chase 'to consult and advise' with Lastra in the matter. It really gives the impression that Kennedy & Co. were pushing the claim on behalf of Lastra.

"But the serious fault committed was the refusal of Mr. Chase, whether as consul of the United States or as agent of Kennedy & Co., to submit to the 'juez de hacienda' the proof of the ownership of the steamer. Moreno was a mere insurgent who did not enjoy belligerent rights, and when the vessel was found in his possession fitted with guns and taken from him there was no obligation to bring it before a prize court. The umpire believes that the 'juez de hacienda' is a judge named by the federal government, and that there is an appeal from his sentence either to the government or to the supreme court. Escriche says that the 'juez de hacienda' has jurisdiction in matters in which the public treasury has any interest, present or future, etc. The umpire can not, therefore, doubt that he was a proper authority to whom the question at issue might be submitted. The reason given by Mr. Chase for not acquiescing in the proposal of General de la Garza can not be maintained by one government against another. The umpire is therefore of opinion that the claimants did not avail themselves of the legal recourse which was open to them, and that the claim must consequently be dismissed."

Thornton, umpire, September 11, 1875, convention of July 4, 1868, MS. Op. VII. 414. Mr. Chase gave as a reason for not submitting the matter to the "juez de hacienda" that that officer did not inspire confidence, since he owed his appointment to the authorities of whose acts the claimants complained. Sir Edward Thornton, in dismissing the claim of *Wilkinson & Montgomery v. Mexico*, No. 105, said: "The umpire considers it quite unjustifiable on the part of Wilkinson and Montgomery's agent that immediately after the seizure of the merchandise he should have abandoned it and should not even have taken the trouble to inquire on what grounds the seizure was made, or for what cause the goods were subsequently confiscated. There seems likewise to have been great negligence in not applying to the superior authorities, as, for instance, to the minister of finance, demanding an investigation of the procedure." Again, in dismissing the claim of *Jaroslawsky v. Mexico*, No. 896, he said: "If the claimant thought that the seizure was illegal, it was for him to present the claim to the Mexican Government, as he certainly might have done, in accordance with the law of November 19, 1867." Again, in the

case of *Wm. J. Blumhardt v. Mexico*, No. 135, he said: "The umpire is of the opinion that the Mexican Government can not be held responsible for the losses occasioned by the illegal acts of an inferior judicial authority, when the complainant has taken no steps by *judicial means* to have punishment inflicted upon the offender and to obtain damages from him. The umpire does not believe that the Government of the United States, or of any nation in the world would admit such a responsibility under the circumstances which appear from the evidence produced on the part of the claimant, showing that Judge Alvarez was the person to blame, and that it was against him that proceedings should have been taken."

Claimant asked damages from the Mexican Government for alleged wrongful imprisonment by an alcalde at Mazatlan, where claimant was then United States vice-consul. It seems that he addressed a letter to the alcalde which the latter deemed offensive and insulting, and for which he fined claimant \$100, in default of payment of which he sent him to jail for four hours. The alcalde had no jurisdiction, civil or criminal, over the vice-consul, such jurisdiction belonging by the Mexican law to the federal courts. On this ground Mr. Wadsworth held that as there had been a stretch of power on the part of a judicial officer, there should be an award in favor of the claimant. The Mexican commissioner, Mr. Zamacona, disagreed. The umpire, Sir Edward Thornton, said:

"In this case there is no claim on the part of the Government of the United States with regard to the acts committed by Judge Aldrete against its vice-consul; it has doubtless asserted its own dignity in the matter and has taken the steps which it has deemed expedient. As the umpire understands the case, the claim is for inconvenience and injury done to the person of the claimant by Judge Aldrete. If Judge Aldrete acted illegally in the matter, the umpire is of opinion that the claimant ought to have endeavored to obtain justice and damages against the judge from a higher Mexican court of justice, and that the Mexican Government can not be held responsible for the illegal acts of inferior judicial authorities when no appeal has been made to a higher court."

Charles B. Smith v. Mexico, No. 139, convention of July 4, 1868, MS. Op. IV. 214, VII. 373. In the case of *William J. Blumhardt v. Mexico*, No. 135, the claimant demanded indemnity for ill treatment and illegal imprisonment by a Mexican inferior judge. Sir Edward Thornton said: "The umpire is of opinion that the Mexican Government can not be held responsible for the losses occasioned by the illegal acts of an inferior judicial authority, when the complainant has taken no steps by judicial means to have punishment inflicted upon the offender and to obtain damages from him. The umpire does not believe that the Government of the United States, or of any nation in the world, would admit such a responsibility

under the circumstances which appear from the evidence produced on the part of the claimant, showing that Judge Alvarez was the person to blame in the matter, and that it was against him that proceedings should have been taken."

"The question of the title to the land the umpire considers to be entirely out of the province of the commission, and one which could be decided only by the Mexican courts of justice. If the claimant's title was not good, the running the boundary line was probably in accordance with law, and if it was good the act might have been good ground for an action for damages, of which the courts alone could have taken cognizance."

Thornton, umpire, *Francis Nolan v. Mexico*, No. 337, Am. Docket, convention of July 4, 1868, 7 MS. Op. 411.

Nolan's Case. A Cuban named Riquelme, who was indebted to a firm of American merchants in the city of New York, ordered a cargo of gin and vinegar from Europe. About two months before the arrival of the cargo at Havana, Riquelme, by indorsement of the bill of lading, transferred the cargo to the agents of the American firm in that city in part payment of his debts. After its arrival at Havana the cargo was embargoed by the Spanish authorities as the property of Riquelme, who was then in prison on the charge of being a rebel, and it was sold, and the proceeds paid into the treasury. The American firm then filed a claim, through an attorney in Havana, for the value of the cargo, and the captain-general of Cuba ordered that the net proceeds of the sale be paid to them, less an amount which had been paid out on certain claims for freight against Riquelme. The American firm refused to accept the sum decreed by the captain-general and appealed to the commission under the agreement of February 12, 1871.

The arbitrator for Spain took the ground that the claimants "had a proper recourse before the tribunals of Cuba;" that "it was by their own negligence or voluntary act that they did not avail themselves of such recourse," and that the commission was not "called upon to take cognizance of any case pertaining of right to the municipal courts, in which a denial of justice shall not have been clearly proved."

The arbitrator for the United States maintained that it was the intention of Spain and the United States to have all claims of citizens of the latter country against Spain for injuries suffered since a certain date at the hands of the authorities in

Cuba settled and adjusted by a board of arbitrators, without regard to the question whether a remedy might be open before the tribunals of that island.

The umpire rendered the following decision:

"The claimants' demand being based on the admittedly unlawful seizure by Spanish authorities of property belonging to American citizens, this injury is sufficient of itself to entitle the claimants to a standing before this commission, even if no allegation of a denial of justice be superadded to the original demand. Article V of the agreement of 1871 confers upon this commission jurisdiction of all claims for injuries of that character. It makes no exception against those parties who may not have resorted to or exhausted the remedies offered by the courts of Cuba. The umpire, therefore, is constrained to hold that this is a proper case for the exercise of the jurisdiction of the commission, and that he is himself bound to decide on the merits of the demand presented by the claimants."

Baron Blanc, umpire, case of *Young, Smith & Co. v. Spain*, No. 96, U. S. and Span. Com., November 10, 1879.

The claimants, Danford, Knowlton & Co., and Peter V. King & Co., citizens of the United States, were special partners in the firm of Manuel Marquez & Co., of Nuevitas, Cuba, of which Manuel Marquez, of that place, was managing partner. Having fallen under suspicion of complicity in the insurrection of October 1868, Marquez gave a power of attorney to two persons to conduct the business of the firm, and in June 1869 left the island. One of those persons was arrested in the following July and the other in September, and in October the property of Manuel Marquez & Co. was embargoed, and was seized, inventoried, and placed in charge of sequestrators appointed by the local judge. Subsequently, petitions were presented to the lieutenant-governor and to the captain-general of Cuba, in which it was alleged that the claimants were partners in the firm of Manuel Marquez & Co., that they had a mortgage on the property for more than \$100,000, and that the entire assets of the firm were insufficient to meet their demands; and it was prayed that the property be turned over to the claimants and a liquidator appointed to continue the business or wind it up, as might seem best, the claimants binding themselves to account to the government for the share of Manuel Marquez. In the latter part of December 1869 the board of embargoed property recognized the rights of the claimants as mortgagees,

but required further proof of the partnership. Various petitions and orders followed, and it finally appeared that the original draft of the articles of partnership at Nuevitas had been lost. This fact having appeared, the captain-general on April 14, 1871, declared that the partnership was sufficiently proved by the firm's books, and directed that the liquidation be carried out as the claimants had requested. On April 18 the claimants filed a petition making certain requests as to the appointment of liquidators. This petition they renewed on May 31, and on June 23, their requests not having in the mean time been granted, they gave notice that they abandoned the further prosecution of their claims in Cuba. They then preferred a claim for damages before the commission under the agreement between the United States and Spain of February 12, 1871. The arbitrators (Mr. Segar and the Marquis de Potestad) rendered the following decision:

"It is admitted in this case that the Spanish authorities had a right to seize the property of Marquez, in which the claimants were interested, and that application to the said authorities or to the courts of justice of the Island of Cuba was the proper course for them to pursue; and in fact they did pursue such course.

"The claimants have laid their case before this tribunal of arbitration on the plea that the obstacles and delays they have met with in Cuba were evidences of bad faith, and that there was no hope of redress.

"Now the arbitrators, having examined the case, are agreed on the following points:

"1st. That there was no undue delay in deciding upon the claimants' rights of property.

"2d. That there was no undue difficulty or delay—certainly none that could be charged to the Spanish authorities—in the selection and appointment of liquidators of the estate of Marquez, in which claimants were interested.

"3d. That the lapse of time from the appointment of said liquidators without the order of liquidation being carried into effect was not such as to warrant, on the plea of injury, the withdrawal from Cuba of this claim.

"4th. That these claimants not having furnished any proof whatever of a denial of justice on the part of the Spanish authorities or of the Spanish tribunals, they are not entitled to appear before this commission.

"5th. They should prosecute their claim before the local tribunals in the Island of Cuba, which afford a full and complete remedy for their case."

Danford, Knowlton & Co. and Peter V. King & Co., No. 97, Span. Com. (1871), June 14, 1878.

Besides presenting their claims jointly with Peter V. King & Co., in case No. 97, Danford, Knowlton & Co. also presented their claim separately, as No. 33. When the arbitrators came to decide the latter claim, Mr. Segar changed his mind and declared that, after mature reflection, he had not "a shadow of doubt" as to the jurisdiction of the commission; and he therefore awarded Danford, Knowlton & Co. \$138,373.44, with interest at 8 per cent till the award should be paid. The Marquis de Potestad held that as the circumstances in both cases were the same, and as claim No. 33 was submitted at the same time as claim No. 97 and should have been included in the same judgment with it, the same judgment must now be given as was entered in case No. 97. On this difference of opinion case No. 33 was sent to the umpire, Baron Blanc, who, on July 30, 1879, held that as the arbitrator for the United States had failed to show how the case was "taken out of the purview of the said joint decision" (in No. 97), and as the conclusions of the arbitrator for the United States in No. 33 could not be "accepted either in whole or in part without directly impugning the joint judgment of the arbitrators in case No. 97," which judgment the umpire was "not allowed to ignore nor called upon to review," this judgment must be considered as covering case No. 33. In this relation it should be observed that the arbitrator for Spain had, on March 22, 1879, declined to concur with the arbitrator for the United States in granting a motion for a rehearing in case No. 97, in consequence of which the motion failed.

But the claim did not end here. Danford, Knowlton & Co. renewed their claim as No. 130, and, with Peter V. King & Co., renewed the joint claim as No. 131. In so doing, however, they alleged what they maintained to be a new and distinct ground of jurisdiction, which they had previously omitted to present, namely, that the partnership property was in reality confiscated by the political authorities in Cuba, who had "thereby deprived the claimants of any right to appear before any court of law in the Island of Cuba, and placed the whole matter under the absolute control of the political authorities of Spain." The advocate for Spain moved to dismiss these cases on the ground that they had already been decided by the commission and that they were therefore presented in violation of Article VIII. of the agreement of February 12, 1871. Mr. Stewart, arbitrator for the United States, and Mr. Brunetti, the arbitrator for Spain, differing in opinion on this motion, it

was referred to the umpire, Count Lewenhaupt, who, on March 31, 1881, held that "in case of seizure a claim can be presented on account of that injury, but that confiscation of the same property can not, as a distinct injury, be made the foundation of a new claim under a new number; that the present claim is part of claim No. 97, and that the question whether claim No. 97 may be reopened has not been referred." He therefore decided that the cases should be stricken from the docket.

In considering the opinion of Count Lewenhaupt, as above quoted, on which his decision was based, it should be noticed that the arbitrators, in dismissing case No. 97, said that it was admitted "that the Spanish authorities had a right to seize the property of Marquez, in which the claimants were interested, and that application to *the said authorities* or to the courts of justice of the Island of Cuba was the proper course for them to pursue, and, in fact, they did pursue such course." The allegation of confiscation subsequently made seems to have been, in substance, merely the presentation in a new light of the action taken by the authorities prior to the filing of the memorials in case No. 97 in order to show that the claimants had no recourse before "any court of law" in Cuba.

Mr. Stewart, the arbitrator for the United States, in his opinion against the motion to dismiss, laid much stress on the decision of Baron Blanc, umpire, in the case of Young, Smith & Co., No. 96, *supra*. The cases, however, were different in circumstances, however much the general language used in the one case, in respect to the broad question of "a denial of justice," may have seemed to be applicable to the other. In the case of Danford, Knowlton & Co. and Peter V. King & Co., the seizure of the property was held to be lawful, and the proceeding which the claimants instituted for the protection of their interests was voluntarily abandoned by them before its conclusion, though their rights had in substance already been recognized by the authorities. Moreover, the proceeding involved the winding up of the Cuban firm's affairs, which was not only yet to be performed, but which peculiarly pertained to the local tribunals. In the case of Young, Smith & Co., the claim was based, as Baron Blanc in his opinion declared, "on the admittedly unlawful seizure by Spanish authorities of property belonging to American citizens," and the authorities had rendered a final decision which the claimants alleged to be unjust.

Cases before the American and British Claims Commission.

"The question as to the jurisdiction of the commission in cases where the party complaining had failed to prosecute his appeal from the prize court of original jurisdiction to the court of ultimate appellate jurisdiction was raised by demurrer in several cases, and was argued at length in the case of the British brig *Napier*, Ryerson and others claimants, No. 147. In that case the vessel was captured as prize in July 1862 by a United States vessel of war near the mouth of Cape Fear River, on which river is situated the port of Wilmington, in North Carolina, a blockaded port. She had sailed from Turks Island, one of the Bahamas, with a cargo of salt, on a voyage alleged to have been destined for the port of Beaufort, North Carolina, then not blockaded, but in possession of the United States forces. She was taken by the captors to the port of Philadelphia, and there libeled in the United States district court for the eastern district of Pennsylvania, on the charge of attempting and intending to violate the blockade of the port of Wilmington, or other blockaded port in the insurrectionary States, and was condemned by that court as lawful prize, and sold under the decree. The vessel belonged to the port of Yarmouth, Nova Scotia, and was owned by British subjects there resident. No appeal appeared to have been taken from the decision of the district court by which the vessel was condemned. The memorial contained a general averment that neither the vessel nor cargo was 'liable to confiscation' under the law of nations or the laws of the United States. A demurrer was interposed on behalf of the United States, specifying, among other grounds of demurrer, the following:

"That the memorial does not show any appeal taken from the judgment of said court to the appellate tribunals of the United States having appellate jurisdiction thereof; and does not show that the remedy of the claimants for their alleged grievance under the laws of the United States had been sought or pursued to or in the judicial tribunal of the United States having ultimate appellate jurisdiction of the said matter."

"On the argument of this case on demurrer, it was contended, on the part of the United States, that until the claimant has exhausted his remedy by appeal, and finds himself still aggrieved by the judicial tribunal of last resort, he has no ground of reclamation against the United States as the workers of injustice against him. That it is only in the event of

final failure of justice, after pursuit of all the regular and ordinary means of redress, that any adjudication is to be considered as working wrong against a foreign litigant so as to entitle him to reclamation through the intervention of his own government. That the litigant who stops short of this and submits to the judgment of the inferior court, without seeking a review and reversal of such judgment by the appellate tribunal, in effect concedes the correctness of the judgment to which he submits. The counsel for the United States cited the report of Mr. Murray (afterward Lord Mansfield), 1753, upon the reprisals made by the King of Prussia upon the Silesian Loan; Wheaton's History of the Law of Nations, pp. 210, 211; Wildman's Institutes, vol. 1, pp. 353, 354; Rutherford's Institutes, vol. 2, pp. 596-7-8-9; the Opinions of Dr. Nicholl and Mr. Pinkney in the case of the *Betsey*, before the commission under the seventh article of the treaty of 13th November 1794, between the United States and Great Britain. (Wheaton's Life of Pinkney, pp. 193 to 276.)

"Her Britannic Majesty's counsel, on behalf of the claimants in this and other cases, maintained that the doctrines of the publicists in regard to the necessity of a party aggrieved following out his complete remedy in the appellate prize courts of the nation of whose acts he complained, applied only to the question as to grounds of war and reprisals, and did not apply to the question of jurisdiction by an international tribunal, established by treaty, with the large powers and jurisdiction conferred by the treaty upon this commission. That under the terms of the treaty the commission had jurisdiction of all wrongful acts committed by the authorities of the United States upon the persons or property of British subjects; that the case of the claimant here was founded, not on an alleged denial of justice, but on an act alleged to be in violation of the law of nations, to wit, the wrongful capture of the claimant's vessel, which act had been adopted by the United States, whose armed force committed the wrong, and of which wrongful act the United States had received the benefit. He cited Dana's Wheaton, § 292; Grotius, book 3, c. 2, §§ 4, 5; Wildman, vol. 1, p. 197; the treaty between the United States and Great Britain of 1794 (8 Stats. at L. 121), and the case of the bark *Jones*, before the commission under the convention of 1853 between the United States and Great Britain. (Report of that commission, p. 83.)"

"The commission disallowed the demurrer in this and in similar cases on the following grounds:

"As there may be circumstances which may make it the duty of the commissioners to consider some of the cases in which there has been no appeal, the demurrers in these cases will be disallowed; but the commissioners wish it to be known that they will not allow any such claim in which the fact of not appealing is not satisfactorily accounted for; and it is desired that Her Britannic Majesty's agent, or counsel, should state in writing as soon as may be, in each case, the reasons relied upon, if any, to excuse the failure to appeal.'

"Subsequently the claimants in the case of the *Napier* filed an affidavit, assigning for their failure to appeal from the decree of the district court the following reasons:

"1st. Because it was universally known in Philadelphia at the time said decree passed that appeals from the prize courts there by claimants were almost uniformly confirmed with costs.

"2d. That public opinion there was in sympathy with such confirmations, under the suspicion that commercial men in this province (Nova Scotia) were in sympathy with the Confederates.

"3d. That the other owners of the *Napier* were not of pecuniary ability to procure the necessary sureties without much inconvenience, nor to sustain further heavy costs, and the burden of loss added to injury, especially as we had already expended nearly \$500 in counsel fees, agency, and traveling expenses connected with this seizure.'

"On the filing of these 'reasons' the commission, without further argument, disallowed the claim."

Am. and British Claims Commission, treaty of May 8, 1871, Hale's Report, 88; Howard's Report, 88, 586, 592.

Opinion of Mr. Fraser. Mr. Frazer, the United States commissioner, filed the following opinion:

"Upon the question whether a claim can now be maintained before this commission for vessels and cargoes, or either, captured and by the proper courts of prize condemned as lawful prize, and no appeal prosecuted from the judgment of such courts, there being nothing in the circumstances to hinder or embarrass the claimant in prosecuting such appeal, I have reached a conclusion in the negative. The reasons which have led me to this opinion I put in writing for the consideration of my learned colleagues, with the remark that, if I am wrong, I shall gladly yield whenever it is shown.

"Justice and equity' constitute the rule of our decision by the terms of the treaty. This is the foundation of international law, and when that law speaks upon a question we must be guided by it, for both countries, as well as the nations of Christendom, recognize its principles as equitable and just; and we shall be wholly at sea, with no guide, and disappoint

both governments if we disregard it. If by the international law there is no valid claim in such a case, then I know not how its validity can be maintained. True, the treaty confers upon us *jurisdiction* of such claims, because it refers them to this commission. The question in hand is not of *jurisdiction*, but it is whether the cases as stated in the several memorials constitute claims which ought to be allowed. I do not doubt the jurisdiction, but that does not determine their *validity*. It only makes it our duty to decide whether they are valid or not; and that decision should be according to the principles of international law.

"So far as I know, the approved writers upon international law are in accord upon this question.

"Thus Rutherford:

"'Natural equity will not allow that the state should be answerable for their (the captors') acts until those acts are examined by all the ways which the state has appointed for the purpose.' (2 Inst., book 2, c. 9, § 16.)

"And again:

"'The subjects of a neutral state have no right to appeal to their own state for a remedy against the erroneous sentence of an inferior court till they have appealed to the superior court, or to the several superior courts if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the state to which the captors belong to examine into their conduct; and till their conduct has been examined by all these means the state's exclusive right of judging continues.' (*Id.*)

"Wheaton (Lawrence's ed.), p. 675, says that 'the neutral has no ground of complaint' until the acts of the captors are confirmed by the sentences of the tribunals appointed by him to adjudicate in matters of prize, what he suffers being 'the inevitable result of the belligerent right of capture,' and cites Rutherford at length in his text.

"On the 7th March 1862 Sir Roundell Palmer, solicitor-general, declared in a debate in Parliament that it was the ordinary law of nations, than which 'nothing is better known,' that the neutral must not interfere except by appeal, if the first decision in prize is deemed wrong. (Law. Wheat. 680 n.)

"An English commission in 1753, in a report concerning reprisals by Prussia for captures by Great Britain, said, concerning adjudications in prize: 'If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.' (Wheat. Hist. Law of Nations, 210; see also Wheat. Int. Law (Lawr.), 678.)

"Wildman seems to adopt this language as expressive of the rule of international law. (Inst., vol. 1, p. 353.)

"Governor Lawrence, the learned editor of Wheaton, in a letter of date May 21, 1871, published in the *World* newspaper, concerning this very treaty, before its ratification by the American Senate, speaking of this commission and the character of claims which it could allow consistently with principles of public law, said:

"'So far as regards maritime prizes, it is a well-recognized principle that no claim can be made on the government of the captor till all the remedies provided through the prize courts have been exhausted.' (Pamphlet, pp. 28, 29; see also Lawrence's note 66 to Wheat. Int. Law, 189.)

"Opposed to this uniform and unbroken current of authority, English and American, Her Britannic Majesty's counsel cites only a single case, which it is urged should outweigh all the text writers. The case cited (bark *Jones*—American and British commission under treaty of 1853, p. 83) was not a prize of war. It was a capture of a supposed slave-trader made under British statutes. The capture was made at St. Helena, where there was a court of record having jurisdiction, but the vessel was taken to Sierra Leone, a distance of 1,000 miles, for adjudication. She was acquitted of the charge, and it was adjudged that there was *no probable cause for seizure*. But the court assessed her with costs for 'resistance of the master to fait inquiry'—a personal matter of which the court had no cognizance under the statute. There was no appeal. These are the circumstances under which Judge Upham was of opinion that the owner was not bound to take an appeal. He seems to have deemed the judgment for costs *coram non jure* and utterly void. It further appears that the master did not know where to follow his vessel, and was deprived of all means of following it (p. 101). He did not appear in court. How could he, if such were the facts? Judge Upham, the American commissioner, might well hold that under *such circumstances* an appeal *was not* necessary to perfect the right of the American Government to demand redress.

"The opinion of Judge Upham seems to imply that in the absence of *special circumstances* an appeal would be necessary.

"The opinion of Mr. Hornby, British commissioner, is silent upon the question of appeal; and indeed it is difficult to see, from his opinion (p. 107), upon what ground he could have consented to award any damages unless it was that claimed by Judge Upham—that the court had no jurisdiction under the statute to adjudge costs against the vessel for the alleged personal misconduct of the master. He was willing to allow for detention of the vessel and damages to her and sacrifice on cargo.

"The umpire expressed no opinion upon the question of appeal.

"The case was peculiar, and I do not deem it an authority applicable to the general question under consideration. General rules can never safely rest upon the precedents of exceptional or hard cases. That there should be some exceptions to the general rule, as I deem it to be, I have no doubt.

For instance, if, as in the case of the *Jones*, an appeal was rendered very difficult or impossible, or was embarrassed, by the act of the captors; or if previous appeals in similar cases had shown that the appellate tribunal of last resort did not govern itself by international law, thus indicating that an appeal would have been useless; or if it had been waived by the government of the captor, I would hesitate long before holding that appeal was necessary to lay the foundation for an international claim.

"But it is suggested that the text writers cited are considering only the grounds of war or reprisals, and not the causes adequate to justify a claim for indemnity by one nation against another. I can only say that I think this is a mistake. Besides, their reasoning, if correct, is absolutely conclusive against both. If, as Rutherford asserts, 'natural equity will not allow that the state should be answerable;' or 'if the subjects of the neutral state have no right to appeal to their own state for a remedy against the erroneous sentence;' or if, according to Wheaton, 'the neutral has no ground of complaint,' and what he suffers is only 'the inevitable result of the belligerent right of capture;' or if, according to Wildman,

a failure to appeal is 'an acknowledgment of the justice of the sentence;' or if, according to Lawrence, 'no claim can be made on the government of the captor,' then I know not upon what ground it can be held that these claims can be sustained upon the facts as alleged.

"But reprisals are justified by the public law for refusal to repair an injury, and when it is admitted that reprisals can not be made it is thereby confessed that there is no just international demand.

"Granted a just claim or injury recognized by the public law, then by that law the state aggrieved is the exclusive judge of the mode of redress.

"The note of Mr. Seward of December 22, 1862, concerning the case of the *Will-o'-the-Wisp* (No. 378, p. 30) has been referred to. Was this either a waiver of appeal in that case or the expression of an opinion that an appeal was not necessary? That note does not stand alone. The reply of Lord Lyons (pp. 30, 31) seems to recognize that as a matter of right the United States might stand on the absence of an appeal; but it makes an appeal to the magnanimity of the American Government in the particular case. Mr. Seward's answer thereto of April 2, 1863, gives distinct notice that the appeal is not waived, and that it is deemed necessary before the executive government can be called upon to consider the subject."

Hale, in his Report (p. 90), says:

Summary of Various Cases.

"Under the order for claimants in cases in which no appeal had been taken to file their reasons for non-appeal, such reasons were filed and passed upon in the following cases:

"John W. Carmalt, No. 89, claimant for part of the cargo of the ship *Amelia*, captured and condemned by the United States, alleged, as his excuse for nonappeal to the Supreme Court of the United States, that the claimant, being then within the State of South Carolina, then at war with the United States, was unable to communicate with counsel in Philadelphia, where the vessel was libeled, or to take any measures for prosecuting such appeal on account of the war then raging.

"The commission (Mr. Commissioner Frazer dissenting) held these reasons sufficient; but subsequently, on the hearing on the merits, unanimously disallowed the claimant's claim, it appearing that he was at the time of the alleged capture domiciled within the Confederate States, and his property, therefore, liable to capture on the high seas as enemy's property.

"In the case of the brig *Ariel*, R. M. Carson, claimant, No. 178, the reason assigned for nonappeal was that the claimant had never been aware, until the filing of the demurrer to his memorial before the commission, 'that there could have been any appeal from the decision of the United States prize court that condemned the vessel and cargo.'

"The commission unanimously disallowed the claim, on the ground of the insufficiency of this reason.

"In the case of the schooner *Argonaut*, Joseph B. Heycock, administrator, No. 263, and Frederic Wm. Ruggles, No. 264, claimants, the reasons for nonappeal assigned were that the counsel consulted by the claimants advised them that there was no necessity for taking such appeal, unless they intended to commence a suit in a civil court for damages, and that such claims, arising during the war, would, without doubt, be ultimately made the subject of arbitration, on which advice the claimants acted, and so omitted to appeal.

"The commission unanimously disallowed the claim on the ground of the insufficiency of the reasons.

"In the cases of the brig *Sarah Starr* and the schooner *Aigburth*, Cowlam Graveley, claimant, No. 292, the reasons assigned for nonappeal were that the claimant had become impoverished by his losses during the war, and the expenses of prosecuting his claims in the prize court of original jurisdiction, and was unable to incur further expense; and also that he was advised that in the excited state of the country, and in view of the tenor of other decisions of the Supreme Court of the United States, he would not be likely to obtain impartial justice by such appeal.

"The commission unanimously disallowed the claim for insufficiency of the reasons.

"In the case of the schooner *Prince Leopold*, Henry A. McLeod, claimant, No. 306, the claimant assigned as reasons for his failure to appeal, his poverty and consequent inability to meet the drafts of his proctor and counsel in New York, and his expectation that his proctor would prosecute the appeal at his own expense, of the failure of which expectation he was not advised in season to secure the services of another lawyer on those terms.

"The commission unanimously held the reasons insufficient, and disallowed the claim.

"In the case of the *M. S. Perry*, otherwise known as the *Salvor*, John McLennan, claimant, No. 370, the claimant alleged as reasons for nonappeal that the case of the vessel was hurried through the prize court so rapidly that he, residing in Havana, had no opportunity to interpose any claim or defense; that he was advised by letter from Lord Lyons, Her Majesty's minister at Washington, that he would have full opportunity to defend, but that subsequently it appeared that the vessel and cargo had been condemned and sold some days before this letter was written, and that, though he attempted by correspondence to secure a defense of his rights, all such efforts proved futile and unavailing.

"The commission accepted these reasons as sufficient, Mr. Commissioner Frazer dissenting, and directed the case to be heard on its merits. On final hearing the claim was disallowed, as will hereafter appear.

"In the case of the ship *Will-o'-the-Wisp*, J. G. A. Creighton and others, claimants, No. 378, the reasons assigned for nonappeal were, in substance, that they did not know the case was appealable, and that they supposed that their proper appeal was to their own government.

"The reasons were held insufficient, and the claim disallowed, Mr. Commissioner Gurney dissenting.

"In the case of the brig *Minnie*, Wm. H. Fisher, claimant, No. 379, the reasons for nonappeal were substantially the same as alleged in the case of the *Ariel*, No. 178, *supra*.

The commission unanimously disallowed the claim for the insufficiency of the reasons.

"In the case of the schooner *Adelso*, Henry Horton, claimant, No. 437, the claimant assigned as his reasons for nonappeal, his poverty and his apprehensions of the danger of investing more money in law expenses.

"The commission unanimously adjudged the reasons insufficient, and disallowed the claim.

"It may be stated generally, that although in two or three cases, as above noted, the commission expressly held the excuse for nonappeal to be sufficient to entertain jurisdiction of the claim upon the merits, and although in other cases the commission did not expressly disallow the claim on the ground of the insufficiency of the reasons for nonappeal, no award was made against the United States in any case in which the claimants had not pursued their remedy in the prize courts of the United States by appeal to the court of last resort. I am advised that Mr. Commissioner Frazer was of opinion that nothing short of the misfeasance or default of the capturing government, by means of which an appeal was prevented, was sufficient to excuse the failure to appeal, and that in accordance with this view he held the reasons assigned in every case before the commission to be insufficient."

In the case of the schooner *Matamoras*, Oliver K. King, administrator, claimant, No. 288, it was alleged that "in consequence of the short space of time to appeal, only thirty days being allowed for that purpose, and the detention of the mails, and the counsel in New Orleans not having taken the appeal, the time to appeal expired." The commission, Mr. Gurney dissenting, held these reasons to be insufficient. (Hale's Report, 114.)

The following claims in prize cases were disallowed:

Claim for costs and damages (the vessel having been restored) in the case of the brig *Isabella Thompson*, Blatchf. Prize Cases, 377, 3 Wall. 155. (Hale's Report, 93.)

Claim in the case of the steamship *Pearl*, 5 Wall. 574. (Hale's Report, 115.)

Case of the steamship *Adela*, 6 Wall. 266. (Hale's Report, 128.)

The bark *Sally Magee*, Blatchf. Prize Cases, 382. (Hale's Report, 98.)

The steamship *Granite City*, Blatchf. Prize Cases, 355. (Hale's Report, 124. In this case the master admitted that he was intending to run the blockade.)

Steamship *M. S. Perry*, alias *Salvor*. (Hale's Report, 123. In this case it was alleged, among other things, that there was a colorable sale of the vessel in September 1861 by her owner, a citizen of Florida.)

Steamships or steamers *Banshee* (Hale, 127), *Dolphin* (id. 92), *Eagle* (id. 127), *Emma Henry* (id. 127), *Greyhound* (id. 127), *Isabel* (?) (id. 114), *Lilian* (id. 127), *Lizzie* (id. 116), *Lucy* (id. 127), *Sunbeam* (id. 127), *Tristram Shandy* (id. 127). In many of these cases the only ground of claim alleged was that the vessels, though captured in 1862, 1863, or 1864, were entitled individually to formal notice and warning by a blockading vessel before they could be subjected to capture. (Hale, 127.)

Schooners *Agnes* (two of this name, Hale, 116), *Albion* (ibid.), *Alert* (ibid.), *Anna* (ibid.), *Anne Sophia* (ibid.), *Arctic* (ibid.), *Brilliant* (ibid.), *Chance* (ibid.), *Defiance* (ibid.), *D. F. Keeling* (ibid.), *Echo* (id. 117), *Fanny* (id. 116), *Florida* (ibid.), *Industry* (ibid.), *J. C. Roker* (ibid.), *John W.* (ibid.), *Julia* (ibid.), *La Criolla* (ibid.), *Mabel* (ibid.), *Mary Stewart* (ibid.), *Nelly* (ibid.), *Pacificque* (id. 95), *Pride* (id. 116), *Swift* (ibid.), *Time* (ibid.), *Wanderer* (ibid.).

Sloops *Julia* (Hale, 116), *Lida* (ibid.).

D., having complained of violations of law, **Driggs's Case.** abuse of authority, and denial of justice, by a judicial tribunal of Venezuela, the commission said: "He obtained, so far as appears, justice, and has no just ground of complaint. It is proper to add that even if, in our opinion, the judgments complained of were not what they should have been, Mr. Driggs should have sought their correction in the proper reviewing court of Venezuela, as he could have done. Not having done so, or sought redress of any kind in that government, he stands bound by these judgments, there being no showing of the want of jurisdiction or of illegality. The commission does not find this claim in any way justified, and therefore disallows it."

Seth Driggs v. Venezuela, No. 31, United States and Venezuelan Commission, convention of December 5, 1885.

4. INTERNATIONAL EFFECT OF JUDICIAL SENTENCES.

"The Board having maturely considered **Prize Sentences:** the memorial and exhibits, together with the **Opinion of Dr.** letter of Mr. Gostling, and it being proposed **Nicholl in the case** and agreed that the board should now come **of the "Betsey."** to a decision on the following question:

"Whether on behalf of the claimant a case has been made out which comes within the provisions of the treaty,"

"Dr. Nicholl stated as his opinion

"That the sentence of condemnation having been affirmed in this case upon an appeal to the supreme tribunal, credit is to be given to it inasmuch as, according to the general law of nations, it is presumed that justice has been administered in matters of prize by the supreme tribunal of the capturing state.

"That the treaty has not altered this general rule of the law of nations, having engaged to afford relief only in cases (either existing at the time of signing or arising before the ratifications) in which from circumstances belonging to them adequate compensation could not then be obtained in the ordinary course of justice, or, in other words (but no words can be more explicit and clear than those of the treaty itself), causes to which circumstances belonged that rendered the powers of the Supreme Court of this country acting according to its ordinary rules, incompetent to afford complete compensation.

"That the appeal was heard after the signing of the treaty and the claimant has not satisfactorily shown any circumstances belonging to his case on account of which adequate compensation could not have been obtained in the ordinary course of judicial proceedings, or on account of which the supreme tribunal could not fully consider and justly decide upon the whole merits of the case.

"Dr. Nicholl therefore thought that the claim ought to be dismissed."

Minority Opinion of Nicholl, commissioner, January 30, 1797. Case of the *Betsy*—Furlong, master—Article VII., treaty between the United States and Great Britain of November 19, 1794.

"Mr. Bayard states in his memorial that the Case of the "*Betsy*:" vessel and cargo were the property of Messrs. Opinion of Mr. William & George Patterson and William Gore.

Furlong; that they are citizens of the United States of America, and were so at the time of the capture; that the trade and voyage which the vessel was prosecuting at the time of the capture were perfectly fair and authorized by the law of nations; that the vessel and cargo were captured on the 20th of March 1794, and on the 21st day of May in the same year were condemned by the vice-admiralty of Bermuda, which sentence of condemnation was affirmed by the lords commissioners of appeal on the 25th day of July 1795. The prayer of the memorial is for compensation to be awarded by this board, to be made to the said Pattersons and Furlong, by the British Government, for the loss they have sustained by this capture and condemnation.

"The King's agent states as an objection to the board's granting the relief prayed for by the memorialists, that a solemn decision of the high court of appeals, which is the supreme court of the law of nations in this kingdom, ought to be respected and confirmed by other authorities, proceeding on the same law.

"It appears to me that in considering this subject much error has arisen from giving to a proposition which is true in a limited degree, viz, as respects individual persons, and things, and principles, so far as they refer to the subjects of one nation—an unlimited and universal sense, in supposing the sentence of the supreme court of the nation not only binding on individual persons and things, within the jurisdiction of the court, but conclusive as to the law, not only on the subjects of their own government, but on foreign nations.

"This proposition I will first consider independent of its relation to this case, and examine to what extent it is true that the decision of a supreme court of a nation, pronouncing sentence according to their understanding of the law of nations, ought to be respected and confirmed by other authorities proceeding on the same law. I will then consider its application to this board in the sense used by the King's agent.

"The proposition is true so far as relates to property in the thing on which the decree is made, and this without any reference to the merits of the case, the grounds or evidence on which the sentence is founded.

"The decisions of judicial courts, having cognizance of prize causes, in every country vest the property of the thing as decreed, and in this sense are respected and confirmed by all. They are complete to bind the persons and things before the court. These courts decide according to their understanding of the law of nations, and to the sense entertained of this law and promulgated to them by the supreme legislative or executive power. The individual affected by their sentence is obliged to submit to the decision, whatever opinion he may entertain of its justice. His former right of property is absolutely divested by the decree if sentence of condemnation is pronounced against the thing claimed, and in such a case the subject of a foreign nation can not lawfully resume possession of it in any country, not even in his own.

"But that the decision of any court, however respectable its members, is conclusive on foreign governments, as to the law of nations, and that the principles on which it is founded may not be rightfully contested, as contrary to that law, is not, in my belief, warranted by just ideas of the equal independence of nations or by their practice.

"In the case of an individual who considers himself aggrieved by the sentence of a court of one nation having jurisdiction in the last resort, and pronouncing on the law of nations, he applies to the government whose subject he is for redress. That government either deems his complaint unfounded and dismisses it, or if, in its opinion, he has suffered loss without just and legal cause, it is a duty from the nation to her citizen to seek relief for him by negotiation or otherwise; if not obtained by pacific arrangements, she is authorized to grant him letters of marque and reprisal against the effects of the subjects of that power from whom he has received the injury.

"To suppose the decisions of the courts of any country conclusive evidence of the law of nations would be to suppose that nation always right who captures and condemns the effects of another, and that always wrong who complains of and on failure of other means seeks redress for such captures and condemnations by letters of marque and reprisal; and yet after a condemnation of effects taken in virtue of such letters, according to Mr. Gostling's position, such condemnation would be conclusive evidence of the law of nations.

"But in such a state of things both can not be conformable to this law. If the original capture and condemnation were just, that of the latter can not be, for it is contrary to the law of nations to issue letters of marque and reprisal, except in cases of violent injuries directed and supported by the state and justice absolutely denied, *in re minime dubia*, by all the tribunals and afterward by the prince. (Answer to the Prussian memorial by Sir George Lee and others.)

"It does not consist with the equality of independent nations to regard the decision of one, merely because it was the decision of that nation, as conclusive evidence of the law of nations; and other nations or other judicial courts, pronouncing on that law, would adopt the decisions of no court, only so far as such appeared to them to correspond with its principles and rules.

"The decision of a judicial court, judging on the law of nations, can not be considered more conclusive or binding on others than the judgment of that nation expressed by a different organ of its government. In the practice of nations there are many instances of difference of opinion as to what acts are, or are not, correspondent with the law of nations, and each asserting and maintaining its right to decide for itself against the express opinion of the other.

"Among a variety that might be cited the following will illustrate the fact and show that the principle advanced by Mr. Gostling can not be binding on this board:

"In the year 1780 the Empress of Russia declared certain principles to be coincident with the primitive rights of nations, and which the belligerent power could not invalidate without violating the laws of neutrality and without disavowing the maxims they had adopted in different treaties and public engagements.

"Among others the following rule was laid down, viz: 'That the effects belonging to a subject of a belligerent power shall

be free in a neutral vessel, except contraband merchandise.' This declaration and the regulations thereto annexed were acceded to by all the commercial powers of importance in Europe, Great Britain excepted. She did not hold herself concluded by the opinions and declarations of these nations, although they confederated together to support and enforce them.

"The United States of America signified their assent and declared them to be useful and wise and founded on principles of justice and equity. The Supreme Court of the United States, as well as courts of subordinate jurisdiction in prize causes, recognized the foregoing rule by their decisions, and in cases manifestly against the interests of their own citizens.

"A Russian ship, loaded with a valuable cargo belonging to the Dutch, after having been captured by the British and in their possession many days, was recaptured by an American privateer. It was determined by these courts that the vessel and cargo should be restored to the claimants, although it was acknowledged that the cargo would have been condemned by the British had she arrived in their ports, the court declaring that they could not find a title to the property in the United States on the ground that another would have decided against principles which their government had declared to be wise and just, and so grounded on the law of nations that they could not be invalidated without violating the laws of neutrality. Great Britain persisted in and supported her own opinion, and her courts decide contrary to this regulation.

"These conflicting decisions, considered merely as sentences pronounced by supreme courts, judging according to the law of nations as understood in each country, would be of equal force on this board, unless the seventeenth article of the late treaty can be considered as sanctioning the principle contended for by Great Britain. But this can have no retrospect. By all rules of sound construction, as well as by the words in which the article is expressed, it only refers to what shall take place in future relative to the enemies' goods on board of neutral vessels, and our decision of this question, which has been unanimous, must have proceeded on our understanding of the law of nations, independent of this treaty, and in direct opposition to those rules on which the sentence of the Supreme Court of the United States in prize causes has been founded; for the support derived to this principle from the treaty could

not influence the judgment of the board, its operation being entirely subsequent to the term in which the capture must have been made to bring the case within our jurisdiction.

"The eighteenth article of the treaty under which the board acts contains evidence of a difference of opinion as to the law of nations in the contracting parties and an acknowledgment by both that neither had an exclusive right to construe and determine this law, and in conformity thereto it adopts an alternative in the case alluded to, which leaves each in full possession of its own construction of the law of nations in what cases provisions and other articles not generally contraband may be regarded as such.

"If any case should arise wherein the high court of appeals of Great Britain should have decided on principles of the kind referred to in this article contrary to the avowed opinion of the United States, such decision would undoubtedly be binding and conclusive on the parties and things within the jurisdiction of the court. The property would be legally vested in the captor and all further demand on him by the claimant illegal and futile in this or any other country. But I think it must be admitted that it could not be a bar to a claim on the British Government for compensation, according to the provisions of this article, when in the same treaty both governments declare that they could not agree as to the law in this respect and expressly accede to the right of each to hold its own opinion.

"I will proceed to consider this objection more particularly, as it applies to the jurisdiction and powers of this board. In my judgment the article which provides for its existence and defines its duties affords complete proof of a difference of opinion between the United States and Great Britain as to the law of nations and a surrender by each of an exclusive right of determining on this law to a court appointed by both.

"According to the law of nations the court of the captor is the proper and regular court for the condemnation of vessels and goods taken on the high seas. The law of nations is the general rule, yet it may by mutual agreements between two parties be varied and departed from, and where there is an alteration or exception introduced by particular treaties, that is the law between the parties to the treaty.' (Answer to the Prussian memorial.)

"To avoid the evils of a discordance of opinion between the two countries, and without deciding which opinion was right, to

terminate their differences in a manner best calculated to produce mutual satisfaction and good understanding, the parties agreed that the decrees of His Majesty's courts should have all the full and legal effect on the things and persons to which they extended in the opinion of either government. The faith and honor of the King to the captors remained firm and untouched and the independence and authority of his courts the same as if this article had not existed. Indeed, the very ground of erecting this board, and of the right of the party to prefer his claim for redress on His Majesty's government, is that the decree of the lords commissioners of appeals is conclusive and binding in the case before them to every intent and purpose, and that such decree can not be reversed, shaken, or in the smallest degree impaired in any other court or country whatsoever. Thus far the rights and dignity of the one were secured. It remained to satisfy the claims of the other consistently with these, and without acceding that the complaints of the citizens of the United States were altogether just, the parties agreed to the appointment of a court other than that of the captor in which complainants of injury should seek redress, and agreed that the government instead of the captor should afford such redress. And because the decree of the court of appeals is so absolute and so totally divests the claimant of his former property in the thing, the British Government undertakes to make him compensation in money for his loss if he is equitably entitled to any. The parties also declared the rules by which the decisions should be made, viz, the merits of the case of the complainant, the law of nations, justice, and equity, as these shall be understood by the board, composed of individuals selected by the governments of the captor and claimant, being the court of both nations, and not of one, and not bound by the orders and instructions of one government, or by the understanding of either as to what is the law of nations, justice, or equity, unless conformable to their own, much less by the particular decision of one in the case of the complainant, especially when examined by other rules and subject to certain rights of the captor.

“If this court, thus deriving its existence and authority from two countries, should consent to take the law of nations from the government of one, whether communicated to it through a court deriving its authority from such government or through any other organ of communication, the avoidance of evils, the adjustment of differences, the cause of its appointment, and the

end to be obtained by it will be entirely frustrated. My opinion on this article is formed from the natural import of the words; from the intentions of the contracting parties, as such intentions are to be collected from the occasion that produced the article, the declaration of the parties as to the manner of terminating their differences, and the complaints it was intended to redress; from the incapacity to attain the objects contemplated by the contracting parties, if the decrees of the court of one nation are conclusive on the judgment of the board; from a consideration of the sixth article of the treaty; from the authorities relative to taking of evidence, and the rules of decision, and lastly, from there being nothing of sufficient importance for the words of the article to operate upon, if Mr. Gostling's objection is valid. The words of the article are universal; they extend to all *cases* where, for *whatever reason*, adequate compensation for the losses and damages sustained by illegal or irregular captures or condemnations during the present war, under color of authority or commissions from His Majesty, can not be actually had and obtained in the ordinary course of judicial proceedings. The only exception is to such losses and damages as have been occasioned by the manifest delay or negligence or willful omission of the claimants; and the provision is expressly made to embrace all cases of capture and condemnation which should exist at the time of exchanging the ratifications of the treaty. A loss resulting, therefore, from a capture made on the day of such exchange is as completely within the provisions of the article as the case of a vessel captured and condemned since the war and before the making of the treaty.

"The British nation is here the party promising, the description of cases absolute, and extended to all happening within the time mentioned. According to every rule of sound construction, positive and indefinite terms shall not be restricted, but they shall be taken in the most comprehensive sense against a promisor, where such construction is not manifestly productive of absurdity or injustice. Where the party makes a restriction or exception to his promise it increases the obligation to give the positive terms all the latitude they are capable of after excluding what is excepted, because the exception proves that the universality of the terms, their operation and the whole subject, with all its relations, were distinctly contemplated by the party. When one has made a promise and then excepted from its extent what the words might naturally have

conveyed it is evident that he was aware of the effect of his language, and took from its comprehension all that was within his intention to except. It would not have escaped the notice of the contracting parties that the generality of the expressions might be construed to embrace cases which had been determined on by the lords commissioners of appeal, and in making the restriction it is hardly possible to conceive that they should not have added after the words 'wilful omission of the claimant,' 'nor to cases where the high court of appeals of his Britannic Majesty should have decreed the capture to have been legal and regular,' if such had been their intention.

"Hence it appears, from the fair import of the general and positive words of the article, that this case is within the description of cases submitted to the judgment of the board, and this construction is especially confirmed inasmuch as a restrictive clause is imposed on the generality of the description, and no exception made to cases decided by the lords commissioners of appeal. It can not be forgotten that this indiscriminate capture of all vessels belonging to citizens of the United States, bound to or from certain foreign ports, was an important ground of complaint by the American Government against that of Great Britain. Neither can it be forgotten that the United States did not accede that the orders which authorized these captures were conformable to the law of nations. It appears to be the design of the parties to waive all contention on this subject and, professing in the preamble to the treaty to terminate their differences in such a manner as, without reference to the merits of their respective complaints and pretensions, may be the best calculated to produce mutual satisfaction and good understanding, they agreed to this among other articles.

"If the merits of the complaints of the citizens of the United States are not to be examined by the board, and this is certainly the effect of the decree of the high court of appeals being conclusive and binding on the board, this article does not embrace, in the manner agreed on by the parties, those differences which formed a principal ground of complaint on the part of the United States.

"There is no valuable distinction between the high court of appeals being the only and last resort for compensation by the complainant and the decree of the same court being necessarily conclusive on that board to which by the treaty such

complainants have a right to prefer their claims. Under the construction contended for by Mr. Gostling the citizens of the United States gain nothing by the article; they are in the same state they were before, and enjoy no other right than what all neutrals or than what His Majesty's enemies enjoy, viz, a trial in the first instance by the admiralty courts and in the last resort by the high court of appeal.

"Instead of terminating this difference without reference to its merits, and so as to produce mutual satisfaction, if the decision of the court of one, on the merits of the complaints of the other, is to be conclusive, the party against whom this complaint is made does determine for both on the weight and merits of the complaint and pretensions of the party complaining. The conclusive and final decision by one on the complaints and pretensions of the other is certainly not terminating the difference in the manner stated by the parties themselves to be their intention.

"The complaints of the subjects of his Britannic Majesty, which occasioned the sixth article, were undoubtedly founded on the existence of judicial decisions, authorized and sanctioned by legislative acts of certain States of the United States; and compensation is to be made to the complainants by a board totally independent of the decision of any other court, otherwise than as such decision may be produced to prove the very case the article provides for, viz, an existing reason why the party can not obtain compensation in the ordinary course of judicial proceedings. Whatever ground there may be for considering the decrees of the supreme court of one nation, pronouncing on the law of nations, conclusive on all as to the law, there is in the nature of things, and in the practice of nations, as strong reason for considering the final judgment of supreme courts of a nation conclusive as to the justice and equity of the demand of a foreigner on a nation for a debt growing due in that country. A debt is contracted under the sanction of the municipal laws of a state. The parties enter voluntarily into the contract, knowing, at the time of making it, that the same will be construed by the courts of one state, and that the supreme legislative and judicial powers of that state will always bind and control all property therein and all contracts to be performed within its dominions. In the case of a capture at sea, the property and persons captured are carried by force into the country and jurisdiction of the captor. The law by

which the case is to be examined and decided is not exclusively the law of one but of both nations, and it results from the equality of independent states that the nation whose citizen is constrained within the jurisdiction of another is not under any moral obligation to consider the sentence pronounced against its citizens conclusive as to the law of nations if contradictory to their own judgment and understanding of the law.

"It would be contrary to all our knowledge of the grounds of complaint of the British Government against the United States to say that the decisions of the courts of the States should be binding on the board appointed to examine them.

"There was, to say the least, as strong reason for submitting these claims to the Supreme Court of the United States as for considering the objection of Mr. Gostling valid, and the decision of a case between the captor and claimant conclusive on a case between the claimant and the British Government, who are the parties raised by this article, and between whom the board is to decide; for that court is not bound by the legislative acts of the several States, and, so far as it has expressed an opinion on the claims of the British subjects, it has not been adverse to them. But the parties, having agreed to waive all contest about the fitness and right of the impediments that intervened between the British creditor and a compensation for his loss, agreed also to submit a question of municipal law, arising within the jurisdiction of one nation, to the examination and judgment of either. Considering these two parties in the relation they bear to each other, from the nature of their differences, from their declaration of the manner in which they should be terminated, and the express and respective surrender by each of all right to determine on the merits of the complaints and pretensions of the other, it is manifest to my mind that it was their intention that the decision of the high court of appeal, between the captor and claimant, should not bar the claimant's demand against the crown, and that those of the courts of America should not be binding or conclusive on the board constituted under the sixth article. A construction that makes such decision conclusive is an assumption, on the part of that nation who makes it, of a right to judge exclusively on the merits of the complaints and pretensions of the other, which is in direct contradiction of their solemn declaration. It is likewise evident, from this consideration of the subject, that the article would be incompetent to attain the declared object of

the parties, viz, mutual satisfaction and good understanding, if such a construction could prevail as should submit the merits of the most important complaints and pretensions of one to the exclusive arbitrament of the other. The authorities relative to the taking of evidence, and the rules of decision, show that the commissioners must determine, without reference to the decree of the high court of appeal, other than as it is evidence that the party had sustained a loss, and that such circumstances are attached to his case as prevent the obtaining compensation in the ordinary course of judicial proceedings. These rules, and a consideration of the parties before the court of appeals, and of the parties before this board, will show that the case in the two tribunals is in many material features very different.

“The commissioners are bound ‘to examine all such persons as shall come before them, and to receive in evidence, according as they may think most consistent with equity and justice, all written depositions or books, papers, copies, or extracts, being duly authenticated, either according to the legal forms existing in both countries, or in such other manner as they shall require.’ If the decree of the lords commissioners is binding on this board as to the claim of the party on His Majesty’s government, no room exists for this latitude in receiving evidence and examining witnesses. A simple document showing the decree of this court is all that is necessary; the examination of witnesses and the reception of books and papers, taking evidence according to the legal forms existing in the two countries, or making rules for taking such evidence, and the exercise of a discretion in prescribing the rules, so as to adapt them to the principles of justice and equity, is totally useless.

“No evidence of the decisions of the high court of appeals can be derived from the United States or from the testimony of witnesses. Their decrees appear by copies from their record, not by depositions nor by the parole testimony of witnesses.

“How can the board examine and decide on the merits of the case if estopped by the decrees of the lords commissioners? The merits of the case do not appear in the decree. But supposing the case and the grounds of the sentence to be displayed at large on the record. If we are obliged to conform ourselves to their decision, it would be their, not our, decision on the merits of the case, and not on the merits of the case before us, but of a case between different parties, viz, between the captor, who has right under the instructions of the King, and the

claimant, who, before that court, could only ask for justice under the strict rules of the law of nations, and for a compensation measured by regulations which are designed to guard the captor from suffering injury by having made a capture through mistake, or having persisted in a detention through ignorance or misconstruction of the orders under which he acted, or by the illegal condemnation by a vice-admiralty court.

"Whereas the case before the board is essentially different. Under the article the merits of the complainant's case are to be examined distinct and independent of any claims or right of the captors. His case may contain merit which entitles him to compensation from the crown in the judgment of the same persons who might very justly think that, considered in relation to captor and claimant, it had no merits to relief from the captor. A rule made for the measure of compensation to the claimant by the captor may be perfectly just and equitable when examined in relation to the rights of these two and yet be very far from a complete compensation for the loss sustained by the claimant, which is here promised by the crown.

"To what purpose are the law of nations, equity, and justice prescribed to the commissioners as rules for their decision if the objection is valid? It leaves nothing for these words to operate on.

"The sentence of a court condemning or restoring property may be conformable to the law of nations, but such sentence, merely pronouncing condemnation or restoration of a thing, can in no sense be called the law of nations, which is a rule of action. There is no usage, either in technical language or common parlance, that will warrant calling the sentence of a court the law of nations. If, then, the commissioners are bound to conform to the sentence of the court of appeals in the case of the captor and claimant, they can not examine the complainant's case by comparing it with the law. They are precluded from inquiring whether, according to this rule, the capture was illegal and irregular, which is the original ground of complaint, and the cause of that loss which the British Government undertakes to compensate on our decision that it was so.

"Thus it appears that, if Mr. Gostling's objection is valid, the board is estopped from taking the first step necessary to the performance of their duty.

"The same remarks apply to the other parts of the duty imposed by this article, viz, an examination whether the claim be conformable to justice and equity.

"To assume the sentence of the lords as conclusive evidence against the claimant, is to substitute the judgment of others as to what is equitable and just for our own, and that in a case between parties materially different and not having the like pretensions.

"In considering the case between captor and claimant the court inquires what justice demands on the part of the former as well as the latter, and complete justice to the claimant may not be consistent with the rights of the captor, though, as between the crown and the claimant, and distinct from any consideration of the captor, justice may require that compensation be made him. When the case is examined in the court of appeals equity is due to both parties, and, while the same court considers what equity requires for the claimant, it is likewise bound to examine what equity demands for the captor. Compensation may be equitably due to the complainant, and yet it may be very inequitable that the captor should render it—a capture may have been made under such circumstances as perfectly to justify the captor in the court of his nation. The property captured may have been condemned in a vice-admiralty court and restored by a decree of the court of appeals. Now, although equity requires that the claimant should be compensated for the loss sustained by the capture and detention, yet it would be very inequitable to compel the captor to make this compensation, when the detention was perfectly innocent on his part. Therefore to take the judgment of the court of appeals as conclusive on this board, would be to apply what was a true measure of justice and equity in one case to a case differing from that in its merit, in the parties, and in the rules of decision. It must be evident that although such a measure may be justly applicable to some cases of both descriptions, yet its application to others would produce great injustice and be highly inequitable. In the admiralty courts the captors ground themselves on the instructions and authority of His Majesty, and have a right to demand the protection of these, and to claim a decision on their capture according to such instructions, as well as the laws of nations. Now, although it may be said that the law of nations is bottomed on equity, yet, from the parties superadding that term to the

others, it is evident they meant to give a greater latitude to this quality than could be applied to it as entering into the composition and ground of this law.

"A vessel captured and brought in for adjudication under the orders of His Majesty may be restored to the claimant as not being liable to condemnation. The neutral, if he has done no act to forfeit his right to a compensation for the loss sustained by the capture, is undoubtedly entitled to his costs, expenses, etc., but it would hardly consist with the respect due to His Majesty's sense of justice, or to his high court of appeals, composed of the same persons who advised to the orders, that the captor should suffer any injury for obedience to them. Yet, if the objection is sound, notwithstanding the absolute promise of compensation for all loss and damage, this board could not award it to the claimant and the promise is rendered null.

"The order of the 6th November, A. D. 1793, to the commanders of ships of war, etc., is, 'that they shall stop and detain all ships laden with goods, the produce of any colony belonging to France, or carrying provisions or other supplies for the use of such colony, and shall bring the same with the cargoes to legal adjudication in our courts of admiralty.'

"Without considering at present the question whether a belligerent can justly interfere against a trade, because it was not practiced in time of peace, let us suppose a vessel bound from a French colony laden totally with such articles as are the fair object of a trade authorized by treaty years before the present war. It would be the duty of the commander of a British ship of war that met her during the existence of this order to capture and send her into the port of his sovereign, and whatever injury naturally resulted from this act, being the consequence of this order, would not be permitted to fall on the captor in His Majesty's courts. It is not less evident that the claimant would be entitled to compensation for the loss he sustained by the capture, according to justice, equity, and the law of nations. Yet, if the objection prevails, the same decree that protects the captor would be a complete bar to our awarding the claimant the promised compensation. Cases of almost every description have been preferred; the answer, though varying in some points, has always stated the decrees of the lords, etc., to be final and conclusive; and, indeed, if conclusive, merely as their decree in one case, I can

perceive no good reason why it should not be so in all. Under such a construction the article affords no benefit not enjoyed before, or that could not be enjoyed as well without it, except in a class of cases which has been mentioned as sufficient for the article to operate upon, viz, cases of insolvency or absconding.

“If it were possible, consistent with any just construction of the terms of the article, though in my opinion it is not, to confine the remedy to such narrow limits, let us consider whether it would comport with the importance of its provisions, the solemnity of the occasion that produced the arrangement, or to the nature and extent of the complaint it was intended to redress.

“From the provisions of the laws of England relative to the security of property captured, the obligation on the courts of original jurisdiction to hold the same until satisfactory stipulations are made for abiding the final orders of the court of appeal, and the obligation imposed on that court as to the measure of estimating the value of the articles to be restored, together with the security every privateer is obliged to provide before a commission is granted, it could hardly be considered an object of sufficient importance in the minds of the contracting parties to provide a remedy of any sort for the very few cases of loss that might happen from insolvency or absconding. The length of time necessarily elapsing before this fact could be ascertained, in the ordinary course of judicial proceedings, is a strong argument that these evils were scarcely within the contemplation of the parties, more especially that they were not the sole objects of the article. No such case has yet been brought before the board, and it is doubtful whether, from the course of the process, evidence of such fact is now in existence.

“According to admiralty proceedings it is hardly in the nature of things that a claim founded on such a state of the captor, taking into consideration the great scene of captures, viz, the West Indies, could be produced under several years from the present time, with the necessary evidence to verify it, and more than seventeen months have elapsed since the ratification; and if unforeseen delays had not happened in the conveyance of the treaty to the United States, in all probability the first term of time for receiving complaints, viz, eighteen months, would on this day have been completed. The

making provision for an event, the knowledge of which could not probably exist till after the expiration of the term for which the provision is made, is charging the article and the contracting parties with too great an absurdity to be admitted.

“If the intention was merely to provide a substitute in the person to pay, this board, the rules of evidence and of decision are unnecessary.

“The official returns, on the process issued by the court to compel payment, show the fact of insolvency or absconding; and interest on the amount awarded by the court, until day of payment, would be all the calculation to be made, and, being the mere result of figures, would not require any examination of the merits of the case, any aid from the law of nations, justice, or equity, nor the testimony of any witnesses, or depositions, books, or papers from the United States, to ascertain the sum to be paid by the British Government. It would be affronting the two nations to suppose that they gravely appointed, by their supreme authority, four men, took uncommon precaution for the equitable appointment of a fifth, gave them a latitude of discretion, and imposed on them a solemn oath, to do that, according to the law of nations, justice, and equity, which might be as well done by a person possessing no knowledge of either, and which the simplest arithmetician might do as correctly as the profoundest lawyer or statesman in Europe. If the natural import of the words describing the cases submitted warrants the construction I have given to the article; if this construction is confirmed by the declared intention of the parties, and by an avowed equality in the surrender made by both of an exclusive right to determine on the merits of their respective pretensions and complaints; if it is fairly deducible from the rules, by which the board is to regulate its decisions and receive evidence, or from a conviction that the words of the article could have nothing of sufficient importance to operate upon, without such construction; or if it is necessary to the attainment of the object both parties profess to have in view, the consequence follows that such construction is sound and just, and that the objection to the board's proceeding in this case is of no validity.

“It is likewise stated, as an objection to the board's entertaining the case, ‘that it has no circumstances belonging to it by which the claimants were disabled from receiving complete justice in the ordinary course of judicial proceedings,’ and it

seems to be the opinion of one gentleman of the board that the claimants have not shown any circumstances belonging to this case, on account of which adequate compensation could not have been obtained in the ordinary course of judicial proceedings.

“The article says that whereas complaints have been made by divers merchants and others, citizens of the United States, that they have sustained considerable losses and damages, by reason of irregular and illegal captures, etc., and that from various circumstances belonging to them adequate compensation can not now be actually obtained, had, and received, in the ordinary course of judicial proceedings, it is agreed that in all such cases, where adequate compensation can not, for *whatever reason*, be now actually had and received in the ordinary course of justice, full and complete compensation for the same will be made by the British Government to said complainant.

“It will be readily granted that there can be no stronger or more conclusive reason against a complainant’s obtaining adequate compensation for the loss sustained by a capture, in the ordinary course of justice, than a decree by the high court of appeal against his receiving any compensation; and if the board is satisfied that he has sustained loss by the capture, and that the capture was illegal and irregular, it would be unjust to resist the strongest evidence the nature of the case admits, of his incapacity to obtain compensation therefor in the ordinary course of justice.

“It is not easy to conceive terms of greater latitude than those here used—for *whatever reason*; and they appear to be adopted, among other purposes, to exclude any inquiry by the board as to what was the particular reason why the party could not obtain compensation in His Majesty’s courts.

“Delicacy and propriety forbid our examining or even inquiring into the reasons that occasioned the judgment of another tribunal.

“The grounds on which judgment was rendered can not be known to this board; no part of the doings of the lords commissioners of appeal appears but the result of their consideration, viz, the sentence. It is true the King’s agent undertakes to say what were the grounds of the decision of the lords commissioners, but how far his knowledge or memory can serve him in this particular is not for me to judge. It is

sufficient that the recital of what he supposes to be the ground of a decision can not have more influence on the board than the declarations of the claimants, which are to be relied on no further than they are verified by evidence.

“It is needless for us to inquire what were the particular circumstances belonging to the claimant's case, and what was the particular reason which induced the court to reject his claim. Because, from the nature of the process, it is impossible for us to arrive at the knowledge of such circumstance, or reason with any degree of certainty, and because the article does not specify any description of circumstances or reasons, the existence of which is necessary to bring a case within its provisions; and there can be no evidence more complete of the existence of some circumstances in the complainant's case, and of some reasons which prevented his obtaining adequate compensation in the ordinary course of judicial proceedings, than proof of his having attempted to obtain it through every course, and met a decision against his claim in the last resort of judicial process. The fact of his being unable to obtain compensation after having sought it through all His Majesty's courts necessarily involves the existence of some circumstance, or some reason, that prevented his obtaining adequate compensation, and unless the circumstances or reasons were manifest delay or negligence or willful omission of the claimant, he is, in my opinion, entitled to the decision of the board.

“He has suffered loss and damage from a capture under color of authority from His Majesty. That capture, he says, was illegal and irregular. Our first inquiries on the presentation of a claim are the time of capture, the quality of the person capturing, and of the complainant, the legality or illegality of the capture. If these conform to the description of cases in the article, it is a case in which the British Government promised to make compensation, if it can not be otherwise obtained, unless the loss was occasioned by his own willful omission and neglect. My opinion is that the claimants have made out a case thus far within the treaty, and of their not being able to obtain compensation in the ordinary course of judicial proceedings. If, then, we insist on their proving the particular reason why they could not obtain compensation, we demand of them to prove that which they have no means of procuring the knowledge of, viz, the reason that influenced the high court of appeals in their decision. The claimants state what they

consider to be the reasons of the condemnations of both courts, of the first because it is alleged to be the particular reason by the court itself, and of the court of appeals, because such reasons were urged against them in argument, and are considered as just causes of condemnation.

"The King's agent says these were not the reasons that influenced the judgment of the lords commissioners, but that the facts alleged in the memorial, and those supported by the affidavits now produced on the part of the complainants, were fully admitted before the lords, and that the judgment of their lordships was founded on the legal result of all the circumstances, including and admitting those very circumstances which are undertaken to be proved in the memorial.

"The case, then, according to the King's counsel, as made out before the high court of appeals, was one where the claimants and owners of the vessel and cargo were citizens of the United States, and not inhabitants of any country at enmity with Great Britain, and the voyage perfectly fair and legal, for he says the blockade was not even a point in issue, and a trade from the French colonies in the West Indies to the United States by the Americans has been determined by the same court to be legal.

"It is evident from this that the claimants' and the King's agent will not agree on the reason, and if the statement of the latter is true, it would not be an easy, if possible, task for the former to prove in any court what was the particular reason that prevented their obtaining compensation in the ordinary course of judicial process. This view of the subject satisfies my mind that there is no necessity to produce evidence of the precise circumstances belonging to a case which prevent the complainants from obtaining compensation, for the existence of some circumstance is proved by the final sentence against the claimants, and this is all that is required. In this particular case we may fairly quote the decree itself, for its verbal conformity to the article.

"In the sentence their lordships say that under all the *special circumstances of the case* they pronounce against the appeal of the claimants. By the most severe rules of criticism this case, then, is literally within the article, for no man can doubt that the terms, '*various circumstances belonging to the cases of the complainants*' include all the *special circumstances* of any one particular case, and that the terms *for whatever reason*

completely embrace the terms *special circumstances*, or special reason as applied to any one case. It would seem as if these words were adopted purposely to mark this case as, in the opinion of the lords, within the provisions of the treaty. They do not say that vessel and cargo shall be decreed to the captors, because the property of the subjects of France, or because in a trade inconsistent with a neutral character, and they do not, as is frequently the manner, merely affirm or reverse the decree below, but declare that their sentence is founded *on all the special circumstances of the case*, which words are tantamount to those in the article, and as truly within its letter, as well as meaning, as if it had been said on account of various circumstances belonging to the case."

Gore, commissioner, case of the *Betsy*, Furlong, master, Article VII., treaty between the United States and Great Britain of November 19, 1794.

"A leading feature of this case is that the Case of the "*Betsy*," sentence of condemnation in the vice-admiralty Furlong: *Opinion* of Bermudas has, upon the appeal of the of Mr. Fighney. claimants, been affirmed by the lords commissioners of appeal, the supreme judicature in the kingdom in matters of prize.

"In consequence a question has occurred upon the showing of the agent of the crown, 'Whether the board is bound and concluded by that affirmance so as to be prevented (as between the claimants and His Majesty's government) from examining into and relieving against the capture and condemnation, sanctioned by it as between the claimants and the captor, upon the same evidence in substance submitted to the consideration of their lordships.'

"The agent's objection is in the following words:

"That the captor has no right against the claimants to found a condemnation, but as a grantee of the crown and such as the crown would have had in the same circumstances; and that therefore this is a case between the *same parties*, and upon the same facts in which a judgment has been given in a solemn decision by the supreme court of the law of nations in this kingdom which other authorities, proceeding by the same law, are bound to respect and confirm; that the case has no circumstances belonging to it by which the claimants were disabled from receiving complete justice in the ordinary course of judicial proceedings, and therefore that it is not a case in

which the parties are entitled to relief under and by virtue of the provisions of the treaty.'

"Upon the fullest consideration of this objection I have stated it to be my opinion 'that the affirmance of the condemnation by the lords does in no respect bind us as commissioners under the seventh article of the treaty, and that it is no further material to our inquiries, in the execution of the trust confided to us, than as it goes to prove that compensation was unattainable by the claimants in the ordinary course of justice.'

"It has been explicitly understood that the opinion I have thus delivered is in precise conformity with that of His Majesty's government, but as the objection to which it is opposed has been repeated by the agent on every occasion that has since occurred, notwithstanding the avowed disapprobation of its principles by those from whom his authority is derived, and as one of the board has not only sustained the objection by his ultimate opinion, but recorded the reasons which have induced him to do so in the nature of a protest against the decision of the majority, I feel it to be my duty to reduce to writing and to file the reflections which have led me to the foregoing conclusion.

"There are some of the agent's premises which I shall not employ myself in contesting.

"He who alleges, for example, that the crown is the same party with the *master or owner of a privateer*, to whom it has granted a commission of reprisals, can expect no more than that his allegation should be merely denied. But, even if the allegation were true, there is certainly more novelty than correctness in the argument that a judgment of His Majesty's own court, composed of the members of his own council, is the more especially entitled to a conclusive quality against neutral nations and their citizens who have been injured by it because His Majesty was himself a party to the suit. I am very far from being disposed to insist that the judgment of the lords of appeal is *less* to be respected on that account; but it is neither indecorous toward that high court nor unreasonable in itself to say that the extensive binding force, now for the first time attributed to their sentences, could not be rested on a foundation so little calculated to support it.

In order to ascertain whether the sentence of the lords in this case (however unjust it may be) is conclusive upon this board *under the treaty*, it is previously to be inquired whether

the Government of the United States, independent of the treaty, would upon the application of the claimants for redress against the capture and condemnation confirmed by it, by way of reprisals or otherwise, be bound by the law of nations to esteem it just, although upon the face of it it was manifestly the reverse.

"The necessity of this preliminary inquiry would seem to be obvious at first sight, but it will perhaps be more apparent when I proceed to show the influence which its true result is entitled to have upon the construction of the treaty.

"By the law of nations universally and immemorially received, the legality of a seizure as prize is to be determined in the courts of the nation to which the captor belongs, judging according to that law and to the treaties (if any) subsisting between the states of the captor and claimant. (Answer to Prussian memorial.)

"The nature and grounds of this exclusive prize jurisdiction in the nation of the captor, and the legal effects flowing from its exercise, are so clearly detailed by Rutherford, in his Institutes of Natural Law, that I will here quote that detail at large in place of giving my own.

"This right of the nation of the captor (says Rutherford, 2 vol., p. 586) is founded upon another, i. e. the right of the nation to inspect into the conduct of the captors, both because they are members of the state, and because it is answerable to all other states *for what they do in war, and what they do in war is done either under its general or under its special commission.* The captors, therefore (p. 597), are obliged, upon account of the jurisdiction which the state has over their persons, to bring such goods or ships as they seize on the main ocean into their ports, and they can not acquire property in them till the state has determined whether they were lawfully taken or not. This right which their own state has to determine this matter is so far an *exclusive* one that no other state can claim to judge of their behavior till it has been thoroughly examined into by their own, both because no other state has jurisdiction over their person and likewise because no other state is answerable for what they do. But the state to which the captors belong, whilst it is thus examining into the behavior of its own members and deciding whether the ships or goods which they have seized upon are lawfully taken or not, is determining a controversy between its own members

and the foreigners who claim the ships or the goods; and this controversy did not arise within its own territory, but in the main ocean. The right, therefore, which it exercises is not civil jurisdiction; and the civil law, which is peculiar to its own territory, is not the law by which it ought to proceed. Neither the place where the controversy arose nor the parties who are concerned in it are subject to that law. The only law by which it can be determined is the law of nature applied to the collective bodies of civil societies—that is, the law of nations—unless, indeed, there have been particular treaties made between the two states to which the captors and claimants belong,' etc.

“‘This right of the state to which the captors belong (p. 598) exclusively *is not a complete jurisdiction*. The captors, who are its members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons; but *the other parties in the controversy*, as they are members of another state, are only bound to submit to its sentence *as far as this sentence is agreeable to the law of nations or to particular treaties*, because it has no jurisdiction over them in respect either of their persons or of the things that are the subjects of the controversy. *If justice, therefore, is not done them, they may apply to their own state for a remedy, which may consistently with the law of nations give them a remedy either by solemn war or by reprisals*. In order to determine when their right to apply to their own state begins, we must inquire when the exclusive right of the other state to judge in the controversy ends. As this exclusive right is nothing else but the right of the state to which the captors belong to examine into the conduct of its own members *before it becomes answerable for what they have done*, such exclusive right can not end till their conduct has been thoroughly examined. Natural equity will not allow that the state should be answerable for their acts till those acts are examined by all the ways which the state has appointed for this purpose. Since, therefore, it is usual in maritime countries to establish not only inferior courts of marine to judge what is and what is not lawful prize, but likewise superior courts of review to which the parties may appeal if they think themselves aggrieved by the inferior courts, the subjects of a neutral state can have no right to an appeal to their own state for a remedy against an erroneous sentence of an inferior

till they have appealed to the superior court, or to the several superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them.' 'After the sentence of the inferior courts has been thus confirmed' (the very case of the *Betsey*, Furlong) 'the foreign claimants may apply to their own state for a remedy if they think themselves aggrieved; but the laws of nations will not entitle them to a remedy unless they have been *actually* aggrieved; and even if upon their own report they appear in the judgment of their own state to have been actually aggrieved, yet this will not justify it in declaring war or in making reprisals immediately. When the matter is carried thus far the two states become the parties in the controversy. And since the law of nature, whether applied to individuals or civil societies, abhors the use of force till force becomes necessary, the supreme governors of the neutral state, before they proceed to solemn war or to reprisals, ought to apply to the supreme governors of the other state both to satisfy themselves that they have been rightly informed and also to try whether the controversy can not be adjusted by more gentle methods.'

"From the foregoing quotations it may be collected that the jurisdiction of the court of the capturing nation is complete upon the *point of property*; that its sentence forecloses all controversy *between claimant and captor and those claiming under them*, and that, if it do not appear unjust on the face of it, it suffices to *terminate forever all ordinary judicial inquiry* upon the matter of it. These are unquestionable effects of a final admiralty sentence, and in these respects it is unimpeachable. But the doctrine involved in Mr. Gosling's objection reaches infinitely further. It swells an incidental jurisdiction over *things* into a direct, complete, and unqualified control over nations and their citizens. The author I have just quoted proves incontestably, by arguments drawn from the nature and foundation of prize cognizance, that this doctrine is absurd and inadmissible; that neither the United States nor the claimants its citizens are bound to take for just the sentence of the lords, if in fact it is not so; and that the affirmance of an illegal condemnation, so far from legitimating the wrong done by the original seizure and precluding the neutral from seeking reparation for it against the British nation, is peculiarly that very act which consummates the

wrong and indisputably perfects the neutral's right of demanding that reparation through the medium of his own government.

"If I had no opinion to combat but that of the agent on a point so extremely plain, I would content myself on this part of the subject with what has been said. But the agent's opinion has derived countenance from a source too respectable to be slighted, and I will therefore bestow some further consideration on it.

"It results from the equality and independence of nations that the jurisdiction entrusted to one, for wise and equitable purposes, by the law which is common to all, shall not be allowed to encroach upon the rights of other states, or (which is the same thing) those of their citizens or subjects. The municipal law of every well-regulated community in which the ends of social union and the moral duties arising out of it are understood will furnish us with this maxim, '*sic utere tuo ut alienum non lædas.*'

"This axiom, although incorporated into the local code of many countries, belongs to and forms a part of the law of nature; and if such is the rule which natural as well as civil law prescribes to individuals in their social relations, it is not to be conceived that the law of nations, which considers states as so many individuals upon a footing of relative equality, communicates jurisdiction to any without annexing a condition to the grant that in its exercise it shall not trench upon the rights of any other member of the great society of nations.

"If the largest possible scope be given to the jurisdiction in question, still it is a jurisdiction which must be *rightfully* used by the state that claims it. The law of nations can not be supposed to give to one state the right of invading under judicial forms the property of another. The power it gives is that of examining and justly deciding (directly) upon the conduct of its own members, and (incidentally) upon the rights of neutrals in matters of prize; but it would be a libel upon the law of nations to say that a decision *contrary to justice* against those who are equal to and independent of the court pronouncing it, is warranted by any jurisdiction known to that law. Such a decision, it may be confidently urged, has and can have nothing but physical power to sustain it. However it may be pronounced *under color* of an existing authority, it can never be by *virtue* of it.

"The law of nations, which is a system of moral equity applied to civil societies, respects and is calculated to shield from infringement the rights of all without preference to any. If it recognizes and protects the right of a belligerent to determine the question of prize or no prize, according to the rules it has ordained, it also acknowledges and protects the right of a neutral to his merchandise and vessels not confiscable by those rules. And if the former right is abused or exceeded (from error or design) to the manifest violation of the latter, that law which has both *equally* under its protection will vindicate the right so violated by entitling the party injured to redress.

"The most strenuous advocate for the omnipotence of prize jurisdiction would hardly venture to advance so bold an absurdity as that the law of nations confers an *unlimited discretion* upon those who act under it. On the contrary, it is universally agreed (*vid. Lee on Captures*, 238; answer to Prussian memorial; *Ruth. ut supra*, etc.,) that the use of the jurisdiction is regulated and bounded by the law which grants it. Who does not see, then, that if it is used contrary to those regulations or stretched beyond those limits such use is *wrongful* in respect of the neutral nation, and its citizens affected by its operation? And if it be *wrongful*, how can it be maintained that the neutral nation and its injured citizens are remedyless? But if admiralty decrees are to carry along with them incontrovertible evidence of their own legality—if they are to be sheltered by a veil of imaginary sanctity from all scrutiny or examination into their merits, and if they are to pass upon the world for just, although palpably oppressive, it is in vain that the law of nations has circumscribed prize cognizance and laid down rules of conduct to those to whom it is committed. No sophistry can establish this position that although a flagrant wrong has been done by one nation to another, under the pretext of the law of nations, that very law prohibits retribution, or that an injurious act becomes to all effectual purposes a lawful one for no other reason but because it has been done.

"The only ground upon which admiralty jurisdiction ever has been or ever can be rested shows that a sentence under it is not to be conclusively taken to be legal. A belligerent has this jurisdiction for its own safety—*because it is answerable to other nations for the conduct of its captors*. It is allowed exclusive cognizance of the capture for the purpose of ascertaining whether it will confirm it and thus complete its own

responsibility, or give to the claimants adequate redress against the captor and thus exonerate itself. Until it has made this ascertainment (provided it is not delayed) the neutral has not in general¹ any cause of complaint against the *belligerent nation*. The national liability is suspended while the subject is regularly *sub judice* between captor and claimant, because it is yet undecided whether the state will adopt the injury and convert it from a private to a public one. The judgment of its prize court in the last resort, in general, perfects or destroys that liability. If it grants adequate redress there is nothing to be answerable for, but if instead of doing so it completes the original injury by rendering it irreparable by any ordinary means, the national responsibility is obviously perfect. The injury becomes its own, and the neutral, from being compelled to ask redress against the *captor* is now authorized to ask it against *his nation*, which has sheltered him from his just demands.²

"Grotius, B. 3, ch. 2, sect. 5 (treating of reprisals), states expressly that a judicial sentence *plainly against right* to the prejudice of a foreigner entitles his nation to obtain reparation by reprisals, '*for the authority of the judge is not of the same force against strangers as subjects.*' 'Here is the difference; subjects are bound up by the sentence of the judge though it be unjust, so that they can not oppose the execution of it lawfully, nor by force recover their own right, for the efficacy of that power under which they live. But strangers have a coercive power (i. e., reprisals of which the author is treating), though it be not lawful to use it *whilst they may recover their right in a judicial way.*'

"So that Grotius agrees with Rutherford that the nation of the captor is so far from being discharged of its responsibility for a wrong committed by him by means of a definitive decree of its prize tribunal denying justice to the neutral claimant, that this very circumstance consummates that responsibility; and he opposes himself unequivocally to the novel doctrine that the courts of marine of this or any other country can bind strangers to receive their sentences as indisputably legal when they are in truth otherwise.

¹ "I say in general, because there may be cases where the nation may be answerable immediately, or at least before the cause has gone through every possible stage, as where the capture is under the special orders of the state, etc."

² Vid. Grotius, lib. 2, ch. 21, sect. 1, 2, 3, and Ruth. Inst. Natl. Law, p. 515.

“The same principles will be found in Lee on Captures (treating of reprisals) and in Vattel on the same subject.

“It is doubtless true that the law of nations prescribes to states reciprocal *respect* for the maritime jurisdictions of each other, and for the sentences flowing from them. It is necessary to their repose that they should not encourage or act upon captious complaints against such sentences. But there is no law, nor can a shadow of authority be produced to prove that there is, which prescribes to states *implicit submission* to them when well-grounded complaints are made against them; on the contrary, it is, under such circumstances, the duty of the state whose citizens are oppressed to seek reparation for the damages produced by them. It is self-evident that a belligerent has not by the law of nations the power of adjudging away the property of neutrals not liable to condemnation. But a belligerent has this colossal power in its utmost size if the decrees of its prize courts are in every view to be irrefragable testimony of their justice. How is the want of right to pass a decree by which a neutral has been injured to be established if that very decree is admitted to prove undeniably that the right existed? How is oppression to be shown or redressed if that which constitutes its essence and gives to it its character and quality is precisely that which legitimates and shields it from investigation? A *final unjust judgment* against a neutral, says the law of nations, is a good ground for reprisals because no other mode of compensation is left. But Mr. Gosling informs us that this ground of reprisals is annihilated in the moment of its birth, for that as soon as the unjust judgment is passed the law of nations presumes that it is a lawful judgment and forbids all the world to doubt or question it.

“It is obvious that between independent states, none of which can have authority over the others, one can not assume to itself an exclusive power of interpreting the law of nations to the prejudice of the rest. So long as the interpretation put upon that law is a proper one, and works no injury to any other state or its citizens, all are under a moral obligation to acquiesce in it, because all are bound by the rule itself; but surely, if the rule is misconceived, or if rules unknown to the law of nations are attempted to be introduced by one nation to the detriment of another, the independence of nations is a term without a meaning if this is to be submitted to.

“To administer the law of nations is the acknowledged province of a prize court, and while acting within this province

(which can only appear from its decrees) none are authorized to complain of it; but when it occupies itself in administering some other law, by which the society of nations is not bound, it is out of its province and has no claim to the acquiescence of those whom its sentence may prejudice. If it be true that the definitive decree of a prize court, though contrary to the law of nations, binds the nation of the claimant to admit the propriety of its principles as well as forecloses judicial controversy, the court so decreeing has *legislated pro hoc vice*, not adjudged; for the decree introduces a new law for the case and does not execute that which already exists. What more can be said of a law than that it has a title to implicit submission and creates the rules which it enforces? That a prize court, whether inferior or superior, of any one nation has this extravagant authority of legislating in the shape of admiralty sentences, as opportunities occur, so as to bind the independent nations of the universe, is a proposition so monstrous that to be rejected it needs only to be stated.

“One of Grotius’s commentators, speaking of his idea of a positive law of nations, remarks ‘that the want of a voluntary union amongst the several nations of the world is the reason why there is in this great society *no legislative power*.’ (2 Ruth. 463.)

“He was not aware of the boundless effect of admiralty sentences, or, instead of being able to find no legislative authority among nations, he would have discovered it to reside in every superior prize court in Europe under the semblance of judiciary power. In short, Mr. Gosling’s position turns upon a total misconception of the true principle applicable to this question. The definitive sentence of an admiralty court is conclusive upon the subject of it so as to justify the captor, establish his property, and divest that of the claimant. In reference to *ordinary judicatures* the matter of such a sentence can never be drawn *ad aliud examen*. But while in this view it operates conclusively by the common consent of mankind and from the nature of the thing, it leaves open, or rather begets, the question of injury and claim to compensation as between the nations of captor and claimant. The final quality of the sentence *in one respect* is the best reason why it should not be so *in the other*. It is by that final quality that the claimant’s hopes of ordinary retribution are destroyed; it is that final quality which protects the captor from the just

demands of the claimant, and it is that which completely transfers the original wrong from the captor to his government, who, by sheltering him through the instrumentality of an unquestionable judgment from all individual responsibility, takes his act upon itself and shows its intention of standing the consequences. Can it be imagined that the belligerent is relieved from its liability for the irregular behavior of its commissioned cruisers because it has done that which renders this liability the only instrument of reparation? Can it be believed that it exonerates itself from the obligation to repair eventually the wrong sustained by a neutral from its fleets and privateers merely by refusing to compel compensation from the wrongdoers? Among all the principles ever attempted to be established in former times to the ruin of neutral commerce and the introduction of lawless plunder upon the ocean none can be selected that equals this. If once it shall be admitted that an admiralty sentence must be received as just, however it may be in fact, there is no species of depredation to which neutrals may not be subjected.

"The memoirs of France and the placards of Holland may be revived and executed in their utmost rigor without danger of reprisals, since, if confirmed by admiralty sentences, their effects are not to be murmured against! Constructive blockades may be set up without limit, for admiralty sentences can legalize them! I do not mean to intimate that such would be the conduct of this or any other government in particular. It is enough that such may be (although we know that such has been) the conduct of maritime states, and I am at liberty to argue against a principle from its possible pernicious consequences.

"Heretofore it has been supposed that this sort of conduct found its only warrant in *physical* power, but the new principle that admiralty sentences can justify everything by an *ex post facto* purification will, if it shall be adopted, place it upon the basis of *moral right*, or, in other words, it is a contrivance to make the law of nations uphold and justify the *violation of its own rules*.

"The law of nations is differently understood in different countries. In most countries the instructions of the sovereign are held to be the law of its admiralalties without reference to their coincidence with the law of nations. War has, in general, produced such instructions, and they have not always been

conformable to the only law by which prize courts ought to determine. A neutral nation, however, has a perfect right to have the claims of its citizens in matters of prize decided according to the law of nations, let the instructions of the belligerent government be what they may. (Answer to Prussian memorial, etc.) But this right never has been and never will be regarded by maritime jurisdictions, whatever we may be told to the contrary. It follows that the rights of neutrals are often sacrificed; but, being sacrificed by admiralty sentences, acting upon the instructions of the government, there can be no remedy for the neutrals if these sentences, though notoriously founded on instructions at variance with the law of nations, are to be conclusively presumed to be in exact conformity with that law. Thus, although the instructions were unlawful and the seizure under them equally so, although the condemnation was evidently unjust and the affirmance in the last resort (of course) no better, although by this illegal series the neutral was oppressed and the rights of his nation violated in his own, the affirmance in the last resort, by a retrospection peculiarly operative, sanctioned the whole transaction, thus beginning, progressing, and ending in wrong; and by accumulating one injury upon several others, left no injury remaining.

“Without going into further detail on this part of the subject (upon which I have already said more than I believe to be necessary), it may, I think, be safely concluded that the sentence of the lords did not and can not bind the neutral claimants, or their nation, to deem it just; but that, on the contrary, if in truth it was otherwise, that sentence was the unequivocal perfection of the original injury produced by the irregular or illegal capture, and gave to the claimants and their nation a complete right by the law of nations to seek reparation for the loss and damage resulting from such capture against the Government of Great Britain.

“Independent of the treaty such unquestionably would have been the law. It is now to be seen how far the establishment of this conclusion is entitled to influence the construction of the treaty with a view to the case before us.

“The preamble of the seventh article sets forth a complaint on the part of divers American citizens ‘that during the course of the war in which His Majesty was then engaged they had sustained considerable losses and damages by reason of irregular or illegal captures or condemnations of their vessels and

other property, *under color of authority or commissions from His Majesty*, and that from various circumstances belonging to the said cases *adequate compensation for the said losses and damages could not then be actually obtained, had, and received by the ordinary course of judicial proceedings.*'

"Such were the grievances existing or supposed to exist at the time of making the treaty for the reparation of which the British Government was ultimately answerable by the *law of nations*, as has been already shown. Upon the principles above stated, however, it is apparent that, generally speaking, the responsibility of the British Government to the American claimant was at the time of making the treaty (even supposing his complaint to be well founded in regard to the capture or condemnation) incomplete.

"It did not *then* appear that justice was unattainable by the claimant against the *captor* through the lords of appeal, since at that time the lords had decided nothing. The law of nations declares that before the neutral shall have any demand against the *captor's government* he shall endeavor to obtain redress against the *captor himself* by all the judicial means in his power. At the time of making the treaty such endeavors had not been used by the American claimants to the extent required; for the most forward of their cases were still *sub judice*. There had been no *denial of right* (in the language of Grotius) by the lords of appeal. The sentences of the inferior courts had not (in the language of Rutherford) been in any instance confirmed or in any shape acted upon by the superior. There had not even been an unreasonable *delay of justice* against the captor. It follows that the American Government was not authorized to demand from the British Government immediate and unconditional compensation for the captures or condemnations of which its citizens complained, since (even supposing them to be irregular or illegal, as alleged) it was yet to be shown *whether the claimants could or could not procure indemnification against the captors in the ordinary course of justice*, and this could only be known in cases where there were responsible captors by the direct or analogous determination of the lords of appeal. The framers of the treaty were to adapt their stipulation to a state of things which had not yet arrived, but which it supposes and upon which it was to operate. They were to adapt it, in a word, to the rights of the one party and the eventual obligations of the other. They do not provide, therefore, 'that

for the losses and damages arising from the irregular or illegal captures or condemnations complained of the British Government will at all events make compensation,' but they provide as follows: '*That in all such cases where adequate compensation can not, for whatever reason, be now actually obtained, had, and received by the said merchants and others in the ordinary course of justice full and complete compensation for the same will be made by the British Government to the said complainants.*' The treaty was made before events had paved the way for its immediate effect. It takes up the subject of national redress by anticipation. It states the ingredients necessary to constitute a valid demand under it, although all the requisite ingredients did not and could not then exist. It imposes it upon the claimants as a duty to seek redress against the individual wrongdoer by all competent ordinary means, the result of which could not then be foreseen; and it is upon the eventual failure of such means without any laches on his part that it authorizes him to seek reparation from the Government of Great Britain. Such a provision, if I comprehend it rightly, is precisely what the law of nations would dictate, and is framed in the very spirit of that law. The eminent negotiators who adjusted it seem to have had in their view not only the substance, but the *words* of what is said by Grotius in a passage before cited, that the neutral has no claim to compensation from the state to which the wrongdoer belongs '*whilst he may recover his rights in a judicial way.*'

"Those who place a different interpretation upon the article say 'that it refers to cases to which circumstances belonged that rendered the powers of the Supreme Court of this country, acting according to its ordinary rules incompetent to afford complete compensation.'¹

¹ "The cases admitted to come within this interpretation are, as far as I have been able to collect, as follows:

"In cases of seizure under the revoked orders of council, the lords have held that they are bound upon a reversal of the condemnation to consider the captor as so far justified by them as to be excused from costs and damages. In such cases, therefore, it is supposed that the commissioners have, with a view to those costs and damages, power to award them against the British Government.

"Where restitution is decreed after a sale, the lords are bound by the prize act to give no more than the net proceeds; and if these proceeds be short of *adequate compensation*, it is supposed that we have the power to award the deficiency against the British Government, since the lords were

"So far as this construction professes to stand upon the spirit of the treaty, or to execute the probable views of the contracting parties, I oppose to it the consideration that it stops short of such an engagement on the part of Great Britain as the law of nations would prescribe. That law does not measure the responsibility of a belligerent for illegal captures as prize merely by the *powers* which it chooses to vest in its tribunals or the checks it thinks proper to impose upon those powers. It measures it also by the legality or illegality of their decisions compared with the law of nations where their powers are confessedly commensurate with the purposes of justice. According to that law, as I have shown above, an illegal sentence by the lords, confirmatory of an illegal capture to the prejudice of a neutral, is a *national wrong* for which the British Government is to make amends. In every correct idea of the subject the act of the court is the act of the nation. The seizure upon which it operates was an act for which the state was accountable in default of judicial retribution. The judgment of the lords shuts up every avenue to such retribution, and of course makes the nation answerable definitively instead of removing or lessening its precedent liability.

"The revoked orders of council, under which many American vessels were captured contrary to the law of nations, and which are held to bind the lords to excuse the captor from costs and damages, or the act of Parliament compelling the lords to grant only the net proceeds upon a decree for restitution, were no more *national acts*, for the injurious effects of which the government was to be charged, than the misuses of its prize jurisdiction, by those to whom it has intrusted it, in confirming a capture which the law of nations condemns. The state is as much chargeable for the infringement of neutral rights by the council in its *judiciary character*, as by the same council in its executive or any other character. It can only result from a misconception of the subject that we should

rendered *incompetent* by an act of Parliament to award it against the captor.

"Where the captors become insolvent, so as that the claimant can not procure payment of a decree of restitution, and without any fault on his part, we are supposed to have jurisdiction.

"Where any fact other than the claimant's negligence has disabled the lords from entertaining an appeal, we are supposed to have jurisdiction. I have not heard of any specific cases under this head."

attach national responsibility to the latter, and yet exempt the former from all obligations to recompense. If there is a national authority (and it is admitted that there is) for the exercise of which a state is answerable to foreign powers and their members, it is peculiarly that which the law of nations, and not civil institutions, has communicated. Territorial jurisdiction more immediately belongs to the government that claims it. It is more absolute and exclusive, because it is founded upon the domain of the society within which it is exerted and springs from their common will and theirs only. But prize cognizance has its basis in the law which all states have an equal interest in and to which all are parties. Its objects are the rights of all. Its essential principle the equality of all. It is admitted that the British Government is responsible not only by the law of nations, but even under the seventh article of the treaty, for the losses sustained by the citizens of the United States by reason of an act of the British Parliament, which makes the net proceeds in prize causes the measure of restitution, even after the rule established by that act has been judicially sanctioned.

“If there is any difference between the power of legislation vested in the Parliament of Great Britain and the judiciary power vested in its courts of prize, with a view to plenitude or exclusiveness, we can be at no loss to discover on which side the difference lies. Can it be thought that, if the former power, sovereign, preeminent and completely exclusive as it unquestionably is, can not justify the violation of neutral rights, the latter deriving its existence from the general law which belongs to civil societies, and founded upon their relative independence, is thus omnipotent? It is inconceivable that while the British nation is answerable for wrongs produced by the acts of its constitutional legislature, even after they have received the sanction of admiralty decrees, the acts of its prize courts, having no warrant in any law whatsoever, can be lifted above the reach of inquiry or exception. And here it is proper to notice a suggestion which we have heard more than once deliberately repeated, that it is highly improbable that Great Britain would consent that the decrees of its highest court of prize should be brought into question. Without stating the particular manner in which this improbability has been inferred, it may be sufficient to observe that if the suggestion is grounded upon any supposed right on the part of

Great Britain to insist on the conclusive nature of such decrees, we have already seen that, however such a right may be *supposed*, it does not in truth exist. If it be rested on any other ground, it may be answered that Great Britain has consented to submit the justice of one of its highest acts of sovereignty (an act of Parliament) to our determination, and has also consented to subject to our opinion the propriety of a rule of prize cognizance necessarily flowing from, or rather included in, an order of His Majesty in council and adopted in practice by the lords. Can there be any sense of national pride or respect for national jurisdiction or prerogative, fairly attributable to a great nation, which will allow it to go *thus far* in a scheme of equitable retribution for injuries to a friendly power, produced in the heat of an unprecedented war, and yet induce it to hold up the sentences of its maritime tribunals as defying impeachment and to exact from all the world a blind and superstitious faith in their legality?

“From the foregoing considerations it will be pretty manifest that (unless the words of the treaty necessarily import as much) there is no reason to believe that the framers of that instrument intended to bottom the liability of the British Government in regard to the captures and condemnations complained of in the preamble to the seventh article, *upon any specific want of power in its supreme court of prize to grant complete compensation*, but on the contrary that it ought to be presumed (if the words of the article will bear us out in it) that they intended to provide for and effectuate that more extended and rational responsibility which the law of nations indicates.

“When we are acquainted with the measure of redress which the neutral had a right to demand and the belligerent was under every obligation to assent to, it does not seem reasonable to *infer* that the treaty was meant to fail of giving full effect to them. An interpretation of an instrument of redress between nations, which can not be referred to any conceivable estimate of the rights of the party seeking or the moral duties of the party conceding the redress, can not lay claim to attention upon any other footing than that it arises *unavoidably* from the positive and restrictive language of the stipulations. An interpretation of such an instrument, which precisely quadrates with the reciprocal rights and obligations of the parties to it, is such an one as must be received and will be received

by the common sense of mankind, if it can be sustained *without violence to the letter of the contract*.

"It is said by Rutherford and other respectable jurists 'that even where words are capable of *two senses*, either of which will produce some effect, you shall take that sense which is reasonable and consistent with that law which applies to the subject;' and again, 'that where nothing appears to the contrary, the presumption is that the parties meant what they ought to mean.' (2 Ruth. Inst. Natl. Law, pp. 326, 327.)

"It is in this view that I have supposed it to be important to ascertain by a preliminary inquiry that neither the United States, nor the claimants, her citizens, were bound to receive as just the sentences of the lords unless they were so in fact; that such sentences, if unjust, instead of shaking off the responsibility of the British nation for the losses and damages resulting from illegal captures and condemnations, produced the perfection of that responsibility and gave the United States an indisputable right by the law of nations to require of the British Government in behalf of its citizens adequate compensation for these losses and damages. It will now follow that even if the words of the seventh article will admit of two constructions, one of which shall be agreeable to the foregoing result, and the other to the opinion of the agent, it is our duty to adopt the former, and it will now be in our power to estimate more accurately the import of every efficient term in the article.

"The truth is that, without forcing upon the language of the clause a meaning not to be found in it, the agent's position can not be countenanced by it, while, on the other hand, that construction which suits, as I have shown, the nature of the subject regulated by the article is such as the language of it would lead us to adopt.

"Let us now proceed to an examination of the *letter* of the article.

"I have already quoted the preamble, from which it appears that the allegation recited in it has a twofold aspect: 1st, that American citizens had sustained considerable losses and damages by reason of irregular or illegal captures or condemnations under color, etc.; 2d, that from *various circumstances* belonging to their cases adequate compensation *could not* then be actually obtained, had, and received by the ordinary course of judicial proceedings.

"The provision itself stipulates 'that in all such cases, where adequate compensation for the said losses and damages *can not for whatever reason* be now actually obtained, had, and received *by the said merchants and others*, in the ordinary course of justice, full and complete compensation for the same will be made by the British Government to the said complainants,' with a proviso that the stipulation shall not extend to such losses and damages as have been occasioned by the manifest delay or negligence or willful omission of the claimants.

"Upon language so clear and definite, it is not easy to make comments with any view to further perspicuity. I will make the attempt, however. We are to have jurisdiction, if it shall appear that the claimant *could not*, at the time of making the treaty, for any reason *whatsoever* (other than their own laches) actually obtain, have, and receive adequate compensation in the ordinary course of justice. The claimants, in the case before the board, have alleged and proved that they made a *complete experiment* on this subject; they have alleged and proved that they have had recourse to the only tribunal competent to give them any redress in the ordinary course of justice, and that this tribunal, after a full examination of their case, has, upon the special circumstances of it, absolutely and conclusively denied them any compensation whatsoever, without any delay, negligence, etc., on the part of the claimants. Of the practicability or impracticability of obtaining judicial redress in any given case, one would think that no evidence could be so eminently satisfactory and appropriate as the result of a fair and complete attempt to obtain it, in the only possible way in which it was to be obtained, if attainable at all. It is not pretended on this occasion that the attempt was *defectively made*, or that its result is in any sort ascribable to the laches of the parties making it. It must be allowed on all hands, then, to have flowed *from the circumstances belonging to the case*, upon which the lords of appeal have pronounced a final decision. Indeed the decree of the lords expressly says so; we have not heard it suggested that any expedient was open to the claimants by which they could have produced a different result, or, in other words, by which they could have obtained judicially the redress to which they say they are entitled; and it is certain that the sentence of the lords has closed the subject in a judicial view forever. If the claimants *could* have obtained adequate compensation in the usual course

of justice, it is natural to ask, How does it happen that they *have not* obtained it? Have they not made every practicable effort toward that end? Nobody denies it. Has not all compensation been definitively refused them, upon the facts attending their complaint? We will agree to this. It is, of course, sufficiently proved that the claimants *could not* obtain judicial retribution. But it is said that this is not enough to gratify the treaty. I will at present take for granted, however, that it gratifies the term can not, and, if it does, it will be difficult to point out any other words in the article which it does not gratify. It is contended that it must appear further *that the claimants could not obtain adequate compensation on account of the want of power in the lords of appeal, acting according to their ordinary rules, to afford it.* Although this idea is obviously short of what the contracting parties *ought to have meant*, and can not be reconciled with *the law applicable to the subject of the article*, yet if the language of it inevitably pointed to so inadequate a conception of its views, I should hold it to be my duty to adopt it. I have therefore searched in the article for the restrictive specification which confines the impracticability of obtaining judicial redress to that sort only which could be referred to nothing but the incompetency of the powers of the lords of appeal. Upon examining the stipulations, however, which is supposed to contain this specification, or something equivalent to it, I am so far from finding it that I discovered the terms actually used for the purpose of the definition it aims at, to be of peculiarly extensive import, so wide and comprehensive as to be universal and unclogged by any exception whatsoever other than the exception of the *manifest delay, etc., of the claimants.*

"The language of the preamble is '*from various circumstances belonging to the said cases;*' that of the provision itself is '*for whatever reason.*'

"If the term '*various circumstances*' can be supposed to mean no more than *circumstances of a particular description affecting the powers of the lords*, or if the term '*for whatever reason*' can be lessened down so as to mean no more than *for a reason of a precise and peculiar nature*, or if a designation of the largest possible range evidently inserted to reach universality can be converted arbitrarily into a designation of the most circumscribed and limited nature—then, indeed, it may be true that the article extends only to cases *to which circumstances*

belonged that rendered the powers of the Supreme Court of this country, acting according to its ordinary rules, incompetent to afford complete compensation.

"The slightest view of the article will serve to produce conviction that this selection of a particular class of *circumstances* or *reasons* to the exclusion of all others is a fanciful selection not authorized by the article itself.

"The article does not prescribe to the claimants the precise indication of *any circumstances* or reasons producing the failure of the judicial remedy. It is enough, unless we put into the clause what is not there at present, that it is palpably seen that some *circumstance or reason*, other than the claimant's neglect, produced that failure; and of this the sentence dismissing the appeal upon the merits must be undeniable testimony, altho neither the sentence nor the prior proceedings may enable us to identify the special fact or reason which stood between the claimants and the compensation they demanded. In the case before the board, the lords have stated in their decree that they dismissed the appeal *upon all the special circumstances of the case*. If it were necessary to resort to every mode of illustration upon this question, it might here be observed that when the lords have, by a formal sentence, assured us that, on account of *all the special circumstances* of the claimant's case, judicial redress was refused them, we might venture to conclude in the language of the preamble to the seventh article, that there were '*various circumstances* belonging to the said case' by reason of which the claimants *could not* obtain, have, and receive adequate compensation by the ordinary course of judicial proceedings. It will hardly be imagined that the term '*various circumstances*,' in the preamble of the seventh article of the treaty, is not at least equally large with '*all the special circumstances*' in the lords' decree, and it need not be insisted on that if their lordships had shaped their sentence with studied reference to that article they could not have framed it more aptly for the purpose of bringing the claim of the memorialists within its pale. Even if the treaty required it of the memorialists to specify the circumstances which made them incapable of procuring compensation before the lords, they are here enabled to comply with this nicety, inasmuch as they have the best warrant for saying that *all the circumstances* of their case concurred to constitute this incapacity. But surely there is no necessity to be thus minute; nor is it on many occasions possible to be so.

We know that the miscarriage of the judicial remedy must arise from *some circumstance* belonging to the case, from a reason of some description or other. And if we are satisfied that such *circumstance* or *reason* was not the *neglect of the claimants*, why are we to scrutinize further, since the treaty declares that it shall be totally immaterial what the *circumstance* or reason is, provided it be not such neglect? We can put no other construction upon the words '*for whatever reason*,' without resorting to equitable interpretation, more loose than any example will justify. And if we have recourse to equitable interpretation, such as it ought to be, it has before been demonstrated that it will only serve more decidedly to indispose us toward the desired restriction.

"But stress has been laid upon the word 'cannot,' as if it related to want of power in the lords. And it has been asked why the contracting parties did not (if my construction of the article is correct) use the words 'shall not,' so as to make the clause read thus: 'It is agreed that in all such cases where adequate compensation *shall not* for whatever reason be actually obtained, had, and received in the ordinary course of justice, etc.' It might be sufficient to say, in answer to this argument, that the word 'cannot' has not in itself any exclusive relation to an impracticability of any particular description, and that, when it is conjectured to refer to a defect of authority in the lords, the conjecture has no foundation in the ordinary meaning of the word. But the argument will admit of another answer, more pointedly applicable to the latter branch of it. The words 'can not now' appear to have been used in preference to the words suggested, because they would exclude the claimants from compensation where the failure of ordinary redress should be *in consequence of their own neglect happening after the making of the treaty*, while at the same time they would completely open the door to compensation where such failure was not produced by the fault of the claimants. The treaty contemplated national reparation where no other was *within the power of the claimants*, and consequently it has said 'where adequate compensation *can not* be obtained by the said merchants and others.' If it had been said where adequate compensation *shall not* be obtained, etc., it would have gone beyond the object I ascribe to it, as well as beyond the responsibility of the British Government, upon which it meant to act.

"If I am told here that a proviso might have limited and explained this looseness of expression, and that in fact there is now such an explanation subjoined to the provision as it stands, I answer that those who are framing a treaty must be supposed to aim at as accurate a designation of their meaning as possible in the body of the provision they are modeling, and that they are not to be suspected of adopting a phraseology unnecessarily wide of their views in the hope of being able to correct it by a proviso; that, as to the explanation which now makes a part of the article, it appears to have no effect upon it with a view to any delay or negligence happening *after the making of the treaty*, for that such after negligence is guarded against solely by the words '*can not now*,' and if not solely, it is at least sufficiently guarded against by those words.

"In short, the terms '*can not now*' suited views such as I attribute to the makers of the treaty. The words '*shall not*' would have exceeded those views.

"It is said to be a rule, in literal interpretation, to follow that sense which is agreeable to common use, without attending to grammatical fancies or refinements; but surely there is much fancy and refinement, and very little attention to common usage, in construing words which state an impracticability for *any cause* to mean an impracticability for some special cause. He who says 'that, if redress can not *for whatever reason* be obtained in the ordinary course of justice, he will himself grant it,' can hardly, without departing from the settled import of the terms, be made to mean merely 'that he will grant compensation, if it can not be obtained *on account of some possible deficiency of power in a certain tribunal*.' If the treaty had run thus, 'where adequate compensation *can not be adjudged or afforded by the lords of appeal in their ordinary course of proceedings*,' instead of 'where adequate compensation can not *be obtained by the said merchants and others*,' there might have been room to argue that the incapacity of the lords, by reason of the scantiness of their authority, was intended to be relied upon, and not the incapacity of the claimants. The words, as they now stand, have no reference to the incompetency of the lords. They point to the claimants' want of power to procure retribution; and they declare, moreover, that it shall be of no importance what this want of power arises from, if it be not the precedent negligence of the claimants themselves.

"The practicability of obtaining judicial redress for a legal claim is one thing. The practicability of *rendering* it is another. They may depend on causes wholly distinct. If a proper case for relief is brought before a court of competent jurisdiction, it is practicable to that court to relieve; but it may, notwithstanding, be true in regard to the claimant that relief can not be obtained; for the court may mistake the law, and, though empowered to do justice, refuse it. The treaty speaks of what can or can not be procured by the claimants, under all the circumstances of their claims, by resorting to their ordinary remedy, and not of what can or can not be done by the lords in acting upon that ordinary remedy. The first might indeed depend in a great degree upon the last, but it did not *wholly* depend upon it, since the lords might reject the claimants' demand from *error*, as well as *want of power*. It is plain, therefore, that before the agent's position can be maintained the terms of the treaty must be radically altered. From a stipulation providing for cases in which the *parties injured* can not, *for whatever reason*, obtain redress before the lords, it must be changed into a stipulation providing for cases in which the *lords* can not *for a particular reason*, grant redress. That such a provision can not, by any admissible mode of construction, be inferred from language which relates exclusively to the power of the *suitor*, and not to that of the tribunal, is too evident for argument. We can give countenance to this forced inference in no other way than by *fancying* that *both* the contracting parties had such dependence upon the *court of one of them* as to take it for granted that, in all cases where that court had the *power* to do justice, it *necessarily* followed that it would be procured from it, on a proper application. But there is no part of the treaty which makes profession of such unbounded respect for that court, and there is no rule of the law of nations which prescribes such respect to the United States. On the contrary, the American Government, by acting upon such an improvident dependence on the possible legality of decrees which were yet to be pronounced, would have surrendered by anticipation its indisputable right of questioning those decrees, if in reality they should be unjust. Why are we to *imagine* that this was contemplated? The treaty does not invite us to this conclusion, and Great Britain had no color to ask from the United States such a sacrifice. Are we, then, to uphold an interpretation of this instrument which is not only unauthorized by its language, but is unsuitable to the subject of it, and

at variance with the undoubted rights of one party and the duties of the other. What Great Britain could not properly demand we are to *suppose* she did demand, what the United States ought to have insisted upon we are to *suppose* they abandoned, and this is to be done not only without evidence, but in direct contradiction to the declarations of the parties. This is so far from being conformable to the rule cited from Rutherford that it seems to proceed upon a rule to this effect—‘that even where words will fairly admit of *but one sense*, and that, too, consistent with *the law applicable to the subject*, we are to force upon them a sense incongruous with that law, and compel the contracting parties to mean *what they ought not to have meant*.’¹

“It is said by Vattel (B. 2, ch. 17, S. 266) ‘that on every occasion, where a person has, and ought to have, shown his intention, we take for true against him what he has sufficiently declared. This is an incontestable principle applied to treaties, etc.’ (Id. ib. sect. 264.) ‘If he who can and ought to have explained himself clearly and plainly has not done it, it is worse for him; *he can not be allowed to introduce subsequent restrictions which he has not expressed*.’ There can be no secure convention, no firm and solid concession, if these may be rendered vain by subsequent limitations, that ought to have been mentioned in the text, if they were included in the intentions of the contracting powers. Nothing can be plainer than that the limitation now attempted to be imposed on the seventh article of the treaty (which, in relation to the subject now before us, is the stipulation of Great Britain), is a *subsequent* restriction not expressed in the article itself. The application of the above extracts from Vattel is peculiarly strong upon this occasion, not only because the language of the seventh article, so far from being mysterious and equivocal, clearly opposes itself to the restriction suggested, not only because the restriction is inconsistent with every just idea of the mutual rights and obligations of the contracting parties, and such an one as the matter

¹ “But even if it were admitted that the parties to the treaty presumed that where the lords had *power* to redress, they would always grant redress, and that they acted upon that presumption in framing the seventh article, there is a correspondent presumption, which it would appear to be our duty to be guided by. I mean the presumption that where the lords have not rendered justice, *they had not the power to render it*, and consequently that *we* have the power upon every interpretation of the article. I reject this mode of establishing our jurisdiction, however, because I do not believe the framers of the treaty acted upon the first presumption.”

of the contract does not naturally admit, but also because the framers of the article have, in the adjustment of its form, evidenced their anxiety to guard it from a too enlarged construction by an explanation subjoined to the body of the clause, and yet have not added any explanation which gives a color to this limitation. The concluding part of the first paragraph of the article is satisfactory proof that those who framed it were attentive to the precise effect of their act, and had considered the means of preventing it from being stretched beyond their views. When we thus find the negotiators of the treaty employed in weighing the import of the terms in which they had conceived this provision, when we find them occupied in bounding them by a proviso so as to fit them, with exactness, to their object, it is not to be credited that they would have omitted the important limitation which has since occurred to the agent, if in truth they intended so to narrow the scope of the clause. Surely if it was meant to assert the infallibility of any particular judicature, in opposition to the words of the provision, an object, which is supposed to have been preserved so steadily in the view of one of the parties, would not have been neglected, at the time when explicitness upon a subject of infinitely inferior consequence was so cautiously attended to. I forbear to enlarge further on this point, because I wish to avoid unreasonable prolixity. But I think I have already said enough to prove that the objection to our jurisdiction is unfounded." * * *

"It is supposed that even admitting the property of George Patterson not to have been liable to condemnation, there was at least *probable cause* of seizure and detention for the purpose of judicial inquiry.

"If this *probable cause* be referred to any ambiguity as to *facts* at the time of the capture, I answer that no such ambiguity existed. But it is not in *this view* that there is believed to have been probable cause of seizure. The *law* arising from the facts appearing in the letters of George Patterson is imagined not to have been so clearly in his favor as to render detention for the purpose of obtaining judicial opinions upon it illegal. But in my judgment it was so clearly in his favor that I confess myself astonished that any doubt could be entertained about it. It is not satisfactory to insist upon the opinions of the vice-admiralty of Bermudas and the lords of appeal condemning the property as sufficient evidence of probable cause. The sentence of the vice-admiralty of Bermudas, founded upon a

ridiculous falsehood abandoned by everybody, is no evidence of anything but the folly of the judge who passed it. The sentence of the lords is that of a tribunal respectable in the highest degree for talents, integrity, and station; but even the commissioner who recommends it to us, as conclusive proof of *probable cause*, confesses that it was an *erroneous sentence*, inasmuch as it condemned the property of William Patterson as well as that of George Patterson. For this sentence, *as it stands*, it is impossible to find or conjecture a reason; and yet we are told that we ought to receive it as irrefragable proof of *probable cause*. The sentence of the lords is either erroneous or it is not. If it is not erroneous, we ought to decide in *exact conformity* with it. If it is erroneous, it can not in any shape be an authority for us. We are unanimous that, as to William Patterson's property, it is *palpably* erroneous, and that no pretext can be imagined even to *countenance* it in respect of his property; and a majority of the board are of the opinion that it is *clearly* erroneous *in toto*. After this it is at least novel to rest the proof of *probable cause* upon the authority of that sentence. The question of *probable cause* is as much a question upon which it is our duty to decide according to our own judgments as the question whether the condemnation was rightful; and if the sentence of the lords is not allowed to be sufficient to control our judgments on the latter question, I see no reason why it should be allowed to control it on the former, especially when the sentence thus set up as a proper guide to decision on the former is nothing more than a confessedly erroneous sentence upon the latter. As to the opinions of the commissioners who differ from the majority on this subject, [if] they were sufficient evidence of *probable cause* it would follow that every decision against *probable cause* ought to be *unanimous*.

"In short, I hold it to be plain that there was not the smallest foundation for the seizure in question, and that if the captor thought proper to make the seizure upon any mistaken idea of the laws of nations, he did it at his peril, and that his nation, in default of redress against him, is to indemnify the parties injured. And thinking thus, I can not persuade myself that I am to sacrifice the conviction of my own mind, not to the *reasons* of others, but to the acts of others admitted on all hands to be founded in misconception."

Opinion of Pinkney, commissioner, July 1, 1797. case of the *Betsy*, Furlong, master, Article VII. treaty between the United States and Great Britain of November 19, 1794.

In the preceding case the commissioners made the following award:

Award in the Case of the "*Betsey*," Furlong.

"At a meeting of the Commissioners on Thursday the 13 day of April.

"Present, John Trumbull, Esqr., John Nicholl, LL.D., John Anstey, Esqr., Christopher Gore, Esqr., Willm. Pinkney, Esqr.,

"The Board proceeded to award in the Case of the *Betsey*, Furlong, as follows

"London, the thirteenth Day of April, one Thousand seven hundred and ninety seven.

"At a Board of Commissioners, appointed, Qualified and Constituted pursuant to the Provisions of the Seventh Article of the Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America.—

"Present, John Trumbull, Esquire, Fifth Commissioner. John Nicholl, LL.D., John Anstey, Esquire, Commissioners named on the Part of His Britannic Majesty. Christopher Gore, Esquire, William Pinkney, Esquire, Commissioners named on the part of the said United States.

"*Betsey*—William Furlong, Master.

"In the Case of the Claim Preferred by Samuel Bayard, Esquire, agent for the United States of America on behalf of George and William Patterson described in the Memorial of the said Samuel Bayard as citizens of the United States—stating—

"That on the Twentieth day of March in the year of our Lord One Thousand seven hundred and ninety four and during the Course of the War in which His Britannic Majesty was Engaged at the time of exchanging the ratifications of the said treaty the said Brigantine *Betsey* and her Cargo were irregularly and illegally captured by Willis Morgan, Commander of the Private Ship of War the *Agenorias*, under Colour of Authority or Commission from his said Majesty and afterwards, viz, on the twenty-first day of May in the Year aforesaid were condemned as a Prize by the Vice Admiralty of Bermuda from which Sentence the claimants appeal to the Lords Commissioners of Appeals, who on the twenty-fifth day of July in the Year of our Lord one Thousand seven hundred and ninety-five affirmed the sentence aforesaid. From all which the owners of the said Vessel and Cargo have sustained a loss of Eight Thousand one hundred and Thirty-eight Pounds, two shillings Sterling money.

"That the said Vessel & Cargo were at the time of the capture as aforesaid the Property and Belonging to the said William & George Patterson Citizens of the United States and not Inhabitants of any Country at Enmity with Great Britain, and that the said Vessel was not then and had not been at any time previous thereto in any Trade contrary to the law of Nations.

"And therefore praying That inasmuch as from the Circumstances as aforesaid belonging to the Case of the said Brigantine *Betsey* and her Cargo the Owners of the Same could not at the Time of exchanging the Ratifications of the said Treaty nor at any time since and cannot now obtain adequate Compensation for the loss and Damage so sustained as aforesaid in the ordinary Course of Justice, And inasmuch as the said loss & Damage have not been occasioned by the manifest Delay or Negligence or willful omission of the Claimants aforesaid, the Board would examine the Merits & Justice

of the said Case and pursuant to the Provisions in this behalf made in the Seventh Article of the Treaty aforesaid award full and complete Compensation to the said Claimants to be paid them by the British Government, under such Releases and assignments as by the Board shall be directed.

"LONDON 13th day of April 1797.

"The Board having duly considered the said Memorial as also the written Objections of Nathaniel Gostling, Esquire, the agent appointed by the British Government on behalf of the Crown together with all the Depositions Proofs and Vouchers laid before the Board on the Course of the Investigation by them made of all the Circumstances in evidence upon the Merits of this Claim, do decide and award as follows, viz,

"That the Complainants in the said Memorial named viz, George Patterson and William Patterson are entitled under the provisions of the seventh Article of the said Treaty to have and receive of the British Government full and complete Compensation for the losses and Damages so by them alleged to have been sustained as aforesaid and the same having been duly ascertained to amount to the sum of Six Thousand Three Hundred and Seventeen Pounds one Shilling and four pence, one Farthing, Sterling Money of Great Britain.

"The Board do also adjudge and award, and it is hereby awarded accordingly, that the said sum of six thousand, three hundred and seventeen pounds one shilling and four pence one farthing sterling money of Great Britain, be paid by the British Government according to the provisions of the said article at His Majesty's office of Treasury on Saturday the first day of July next to Samuel Bayard, Esq., the memorialist and claimant on behalf of the said complainants George Patterson and William Patterson or his certain assigns to the sole use and benefit of the said George Patterson and William Patterson their executors administrators or assigns.

"And the Board do further award that the said Samuel Bayard or his assigns, shall at the time of receiving the said sum of Six Thousand three hundred and Seventeen Pounds one Shilling and four pence, one farthing, at His said Majesty's said office of Treasury, actually sign and deliver to the person so making the said payment, on the behalf of the British Government an acquittance and release in the form following vizble

"I ———, agent of the United States ——— do hereby acknowledge to have received of and from the British Government for the use of George and William Patterson, Merchants, of Baltimore, in the said United States, their Executors and administrators, the sum of Six thousand three hundred and seventeen pounds one shilling and four pence one farthing, Sterling money of Great Britain in full satisfaction of the like sum mentioned in an award made at London on the Thirteenth day of April one thousand seven hundred and ninety in the Case of the Brigantine *Betsy*—William Furlong, Master, by the Board of Commissioners appointed in Pursuance of the Treaty of Amity Commerce and Navigation between His Britannic Majesty and the United States of America according to the Tenor of the said award and in full satisfaction of all losses and damages sustained by reason of the capture or condemnation in the said award mentioned.

"London 13th day of April 1797.

"We do hereby certify that the foregoing was the final decision and award made at London on this Thirteenth day of April one Thousand

seven hundred and ninety seven by a majority of us the Commissioners aforesaid in the said Case of the *Betsy*—William Furlong, Master.

"In Testimony whereof we have hereunto set our Hands and Seals at London this Thirteenth day of April in the year of our Lord one Thousand seven hundred and ninety seven.

"(Signed)

JNO TRUMBULL (LS)

"JNO NICHOLL (LS)

"JNO ANSTEY (LS)

"C. GORE (LS)

"WM PINKNEY (LS)

"At the same time the board prepared and executed a certificate of the foregoing award for the purpose of being used by the Memorialist in demanding at His Majesty's Treasury the Payment of the Sum awarded."

Cases before the American and British Claims Commission. Mr. Charles Hale, agent of the United States, before the claims commission, under Article XII. of the treaty between the United States and Great Britain of May 8, 1871, referring to claims before the commission, growing out of belligerent captures on the high seas, says (Report, 87):

"These claims related to vessels and their cargoes captured as prize by the United States during the war, and libeled in the prize courts of the United States. In a portion of them final sentence of condemnation of the vessel or cargo, or both, was given by the courts of the United States, and the claim was now brought for the alleged value of such vessels and cargoes, alleging the condemnation to have been wrongful. In the other cases judgment of restitution was given by the courts, and the claim was now brought for damages by reason of the alleged wrongful capture and detention, and for costs and expenses incurred in respect of the same.

"The whole number of memorials filed by different claimants for such captures was seventy-six, some of the memorials covering claims for several different vessels, as in the case of Sanders & Sons, No. 281, in which damages were claimed for the capture and condemnation of twenty seven vessels.

"The whole number of vessels captured, in respect of which and their cargoes claims were interposed, was seventy, in some instances many claims of different alleged owners being interposed in respect of the same vessel and her cargo, as in the case of the *Peterhoff*, in regard to which, and different portions of her cargo, twenty-two memorials were filed.

"In respect of the capture of six of these vessels and their cargoes, or portions of the same, awards of greater or less amount were made against the United States.

"In respect of the remaining sixty-four, the claims were wholly disallowed.

"The whole amount claimed as damages against the United

States in all these cases was \$5,560,924, besides interest, amounting, with the addition of interest for the average time claimed, to \$9,064,306.

"The whole amount of the allowances, in respect of the six vessels as to which awards were made, was \$582,177.

"The question was early raised, on the part of the United States, as to the jurisdiction of these prize cases by the commission, both in respect to cases where the decision of the ultimate appellate tribunal of the United States had been had, and to those in which no appeal had been prosecuted on the part of the claimants to such ultimate tribunal. As to the former class of cases, the undersigned may properly state that he personally entertained no doubt of the jurisdiction of the commission, as an international tribunal, to review the decisions of the prize courts of the United States, where the parties alleging themselves aggrieved had prosecuted their claims by appeal to the court of last resort. As this jurisdiction, however, had been sometimes questioned, he deemed it desirable that a formal adjudication by the commission should be had upon this question. The commission unanimously sustained their jurisdiction in this class of cases, and, as will be seen, all the members of the commission at some time joined in awards against the United States in such cases."

Venezuela Commission: Case of the "Mechanic."

"The *Mechanic*, an American schooner, flying the flag of the United States, Taber, master, sailed from Havana, April 17, 1824, with a general cargo, bound for Tampico, Mexico, via Key West. A part of the cargo consisted of goods valued at near \$20,000, shipped from the Cuban port by Joaquin Hernandez Soto, 'by order and on account and risk of Robert Barry, of Baltimore, an American citizen,' and consigned to 'Ant. M. Miranda, Pueblo Viejo, Mexico, or his assigns, he or they paying freight on the said goods.'

"The vessel, with Soto aboard, arrived at Key West in due course and departed therefrom May 4, with her sea papers in proper form. Two days out she was captured by a privateer, the *General Santander*, Chase, master, under commission of the Republic of Colombia against Spain, and detained under a charge of carrying enemy goods, Colombia being then at war with Spain for independence. Soto, with some eight others, being taken from the vessel she was sent in charge of a prize crew to a Colombian port for adjudication of the goods seized before the proper tribunal. In due season libel proceedings were instituted against the cargo before the Colombian prize court at Puerto Cabello, and on the 9th of July, after hearing, the Soto invoice was found to be enemy property and condemned as good prize.

"May 14, Barry procured insurance on the goods against all loss, including loss by capture, past and prospective, occurring during that trip, in two New York companies, to wit: \$12,000 in the Atlantic Insurance Company, and \$7,000 in the Hope Insurance Company, of that city. In January 1825 the Atlantic paid its policy in full and in June following the Hope paid its, with \$175 interest, making in all \$19,175, covering the full value of the goods. Soto made a formal assignment about this time of all and singular his rights pertaining to said goods, and growing out of the capture thereof, to the insurance companies.

"It does not appear that he made any exertion to save them from capture by the assertion of ownership as a neutral, either then or afterward, in the prize court. It seems he abandoned them at capture. A year later, when the insurance companies were preparing their case for presentation before the Colombian Government, he made affidavit that he was a native of Spain, but a citizen of Mexico engaged in mercantile business there, and had been since 1819; that he invoiced the goods in the name of Barry for safety, and that no Spanish subject had any interest whatever in them at the time of shipment or afterward, they being his sole and exclusive property.

"In 1826 the Government of the United States presented the claim of the insurance companies for indemnity in the premises against the Government of Colombia, it being alleged that the goods were neutral, and not, as found by the court, enemy property. But nothing was allowed by that government.

"After—upward of twenty-five years after—the dissolution of Colombia (1830) and the adjustment of her liabilities between the constituent States, fifty per centum thereof falling to New Granada, the insurance companies assigned that portion of the claim which was against that State, namely, one-half of it, to the present claimant, Amos B. Corwin.

He prosecuted the portion so assigned against that government before the mixed commission under the treaty between New Granada and the United States of 1857, and secured an award for the amount thereof, to wit, the half of \$19,175, with interest to the date of the allowance, 1862, amounting in all to \$——.

"In 1863, the American minister at Caracas asked the Venezuelan Government in behalf of Corwin to pay its proportion of the insurance claim, to wit, 28½ per centum.

"The claim for that proportion was presented to the Caracas

commission of 1867-68, which awarded him \$15,629.87. It is now made before us and amounts with interest to near \$30,000.

"It is well settled that where there is abandonment of property under circumstances like these and the entire loss is paid, the insurer succeeds to all the rights of the insured, of whatever kind, respecting the property, as of the time of abandonment. (Phillips on Ins., § 1712 *et seq.* Hollbrook, adm'r, v. United States, 21st Ct. Claims 438.) The conveyance by Soto to the insurance companies, in 1825, was therefore quite superfluous. The companies were subrogated to his rights and to them only. A question suggests itself, whether, in respect to this treaty, supposing Soto to have been a Mexican, the companies do not succeed simply to the rights which he would have, if living, but for the payment of the insurance. If so, they can not claim here, for he, not being a citizen of the United States, would have no standing under the treaty. We think, however, that it is not their *status*. To hold so, would be to say there may be invasion of neutral rights without remedy. Mexico refuses to interfere in Soto's behalf, for he is indemnified; it refuses the companies, for they are Americans. The United States refuses them, because they have only the rights of Soto, and he has no claim on its services, for he is a Mexican.

"The true view, as it seems to us, is that the companies are to be regarded as having succeeded to Soto's rights at the seizure of the goods, May 6, and of course *cum onere*. If the capture was wrongful, the wrong was consummated and then first made apparent by the judgment of the prize court, and consummated *as against them*. They therefore stand in respect of the wrong, not in Soto's shoes but in their own.

"They consequently have a standing here in their own original right.

"Are they bound by the judgment of the prize court?

"It has been suggested in argument whether, as indeed it seems to have been claimed by the American minister at Bogota in 1824-1827 that Colombia, having been Spanish territory at the time, was bound as to the United States by the treaty between the latter and Spain of 1795, which embodied the doctrine that 'free ships make free goods,' making its violation an act of piracy; and that such obligation continued during her struggle for independence. Mr. Chief Justice Marshall, 9 Cranch, 191, said: 'The United States having formed a part of the British Empire, their prize law was ours; and when we

separated it continued to be ours, so far as adapted to our circumstances, and was not varied by the power which was capable of changing it.'

"It is likewise probably true that the Spanish prize law, impressed, it may be, with such conventional modifications as to particular states as were from time to time made, became the prize law of the Spanish-American colonies, subject to the qualifications named. Conceding its operation as to Colombia at independence, it continued under the principle stated, only so long as adapted to her condition, and she, of course, was the judge of that. The very act of sending out privateers to prey upon Spanish commerce was at once a determination that the Spanish prize law, with its conventional modifications as to the United States (if before in force), was not adapted to her circumstances, and at the same time a decree 'varying it by her power,' in conformity with international law.

"The question arose in the case of the *Senora*, a Spanish vessel captured by a Carthaginian privateer, and taken again by an American cruiser, supposing it British, during the war of 1812. The Supreme Court of the United States said: 'The treaty with Spain can have no bearing on the case, as this court can not recognize such captors [the Carthaginians] as pirates; and the capture was not made within our jurisdictional limits. In those two cases only does the treaty enjoin restitution.' (4 Wheaton, 497.)

"Said the same court in case of the *Pastora*, a Spanish vessel captured by a privateer under the flag of La Plata, 4 Wheaton, 63, *per* Marshall, C. J.: 'The case of the United States *v.* Palmer, 3 Wheaton, 610, establishes the principle that the government of the United States having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which the new governments of South America may employ against their enemy.'

"It seems to us, therefore, clear that Spain's engagements to the United States, under the treaty of 1795, did not extend to and bind Colombia in respect of the doctrine stated, at least at the time of this capture, and that the law of nations in this regard was then her only guide, she not as yet having bound herself contrarywise by treaty.

"The seizure by the *Santander* of the *Mechanic*, and the sending of her to Puerto Cabello for authoritative decision as

to her cargo, under a claim of its being enemy (Spanish) property, and the adjudication there by the Colombian prize court of the question, were, as is conceded, authorized by the law of nations. But it is contended the court found that Soto was a Spaniard, when he was in fact a Mexican, and that its judgment being predicated on that error of fact, is not binding on these companies as respects their demands against the government of the captor.

"Undoubtedly a wrong done by a government through its prize courts is redressible in a proper case the same as if done through its other courts or agencies. But the wrong must be shown. Although a prize court is summary in proceeding, acting in time of war when impartiality in procedure and decision is not in *practice* generally thought to be attained, yet its judgments are in the eyes of the public law respected much as judgments of municipal courts are. Mr. Wheaton says: 'The *theory* of public law treats prize tribunals established by and sitting in the belligerent country exactly as if they were established by and sitting in the neutral country, and as if they always adjudicated conformably to the international law common to both.'

"The Supreme Court of the United States declared a prize tribunal 'a court of the law of nations, and takes neither its character nor its rules from the municipal law.' (Schooner *Adeline*, 9 Cranch, 244.)

"When the United States complained to Denmark because of the sentences of her prize courts affecting citizens of the United States during the war between that power and Great Britain, it was not that those sentences were against the weight of the evidence and probably wrong; but that they, being affirmed by the court of last resort, amounted to 'a denial of justice.'

"Mr. Wheaton, quoting with approval from the notable report of Sirs George Lee, Dudley Ryder, Dr. Paul, and Mr. Murray to the British Government, 1753, on the reprisals by Prussia on account of captures by British cruisers and condemnations by British admiralty courts, says it plainly shows: 'That in the opinion of the eminent persons by whom that paper was drawn up, *if justice be denied in a clear case by all the tribunals*, and afterward by the prince, it forms a lawful ground of reprisals against the nation by whose commissioned cruisers and tribunals the injury is committed.' It is only,

says Vattel, 'in cases where *justice is refused or palpable and evident injustice is done*, or rules and forms openly violated' that definitive sentences should not be respected. 'The British court,' he says, 'established this maxim with great strength of evidence on the occasion of the Prussian vessels seized and declared lawful prizes during the last war.' (See Crousden et al. v. Leonard, 4 Cranch, 404; Vattel, Bk. 2, § 84; *The Mary*, 9 Cranch, 142; 1 Wheaton, 238; *Santisima Trinidad*, 1 Brock. affirmed in 7 Wheat. 283.)

"Says Bluntschli: 'The belligerent which constituted the prize courts is always responsible to neutral states for every *manifest* violation of international law committed to the prejudice of the neutrals by that court.'

"We do not understand the doctrine announced by the commissioners under the treaty of 1794, between the United States and Great Britain, to be at variance with the foregoing. While they refused acquiescence to the contention that a prize sentence affirmed by the lords commissioners was conclusive on the parties (except as to the *rem*), they seemed to place it (otherwise) along with other judgments. They said: 'A sovereign is as much liable for wrongful action of prize courts as he is for the wrongful action of any other court.' Their insistence may be condensed in almost their exact words—prize jurisdiction must be *rightfully* used by the state that claims it. From this no one will dissent.

"Counsel for Venezuela, then, is quite right in saying, 'the question for us is not whether upon the facts before the prize court we would have come to a different conclusion.' It is whether the proceedings and judgment of that court were *manifestly and certainly* wrong, to the prejudice of the claimant.

"We are not convinced of their wrongfulness.

"The Colombian prize court was duly established in pursuance of a law of the Colombian Congress passed October 14, 1821. That law authorized the executive power to establish prize courts in the republic, and promulgated rules and regulations for their procedure and government. This was done by executive decree, March 30, 1822, in which the rights and duties of parties and officers in prize matters are set forth fully and with precision, and, so far as we are advised, in conformity with the requirements of the public law and the usages of nations in this regard.

"The prize court consisted of the senior commandant of the

department, with an *asesor* learned in the law. An appeal lay from its decision to the supreme court of justice. We see in these laws no basis for the complaint, therefore, of one of the insurance companies, to Mr. Clay, in 1825, against the Colombian 'ordinance' establishing the court.

"The proceedings before the tribunal seem to have been regular and in accordance with usage. On the hearing, July 9, 1824, before the 'senior commandant-general of the second marine department, finding himself associated with his *asesor* in the hall of the tribunal,' to quote the language of the record, the following proofs as appears from the record, giving its terms, were offered:

"Documents are recapitulated Nos. 1 to 8.

"No. 8. Ten signed letters, which state that all the cargo is Spanish property, which it was endeavored to protect beneath the American flag.

"No. 9. Four declarations relating to the act of detention by the consignee captain [master (?)], passengers, supercargo, and pilot.

"Captain [master] declares that the only articles which he knows to be American property are those belonging to Mr. Gonsche, supercargo.

"Joaquin Hernandez Soto, underconsignee and passenger, declared himself to be a native of the kingdom of Castile, in Spain; that he did not know who are the owners of the cargo, although in part owner and consignee himself, which portion he shipped on board an American vessel for greater security thereof.

"The captain of the schooner *Mechanic* makes the following representation: That the act of having detained this schooner, evinced that the cargo she had on board was not considered to be American property, except that part belonging to Gonsche, for all the rest was shipped by merchants of Havana, and he believes it is their exclusive property; that he knows that almost all the merchants of Havana endeavor to guard their interests under the American flag, in order to escape capture by the Colombian privateers; that he has nothing to state in favor of said cargo, and judges that it is good prize.'

"What the supercargo or the passengers said is not intimated, and there is nothing in the case to show. The letters are not here, nor all the eight (ship) documents, and all we know of their contents is stated in the record. From this

fragmentary showing, all that has come to us, so far from fluiding the prize judgment manifestly wrong, it seems to us justified.

"The letters were said to show *all* the cargo was Spanish. The captain said it was shipped by merchants of Havana. He supposed it Spanish property and good prize. He knew those merchants were accustomed to send their merchandise under the American flag. Soto claimed to be a native of Spain, but did not pretend to anyone on board to be a Mexican; and disclaimed knowledge of the ownership of the goods. There was no showing of neutral property before the court, aside from the small amount acquitted, and under the law the burden was upon him who asserted neutrality of property to prove it. The conduct of Soto was singular, to say the least. If he were a Spaniard one can readily see why he shipped the property in Barry's name and disowned it on the ship. But why should he do either, if he were a Mexican? There would be a reason for this if the property had been subject to capture in an American vessel by a Spanish cruiser, for Mexico was also at war with Spain. But under the treaty of 1795 it was not so subject to capture. To attempt it would have been an act of piracy, subjecting the captors to execution, and their government to full indemnification.

"His explanation, therefore, of shipment in Barry's name for greater safety does not explain, *if* he was a Mexican citizen. The circumstances all point to his being a Spanish subject.

"Apropos to the question of the regularity and sufficiency of this proof, attention is directed to this passage in the opinion of Judge Story in the case of the *Isabella* (6 Wheaton, 1), decided not many years before 1824: 'It is to be recollected,' he said, 'that by the settled rule in prize courts the *onus probandi* of a neutral interest rests on the claimant. This rule is tempered by another, whose liberality will not be denied, that the evidence to acquit or condemn shall in the first instance come from the ship papers and the passengers on board.'

"This judgment was, in our opinion, in accordance with the public law. Soto, other owners of the cargo, and the insurance companies through the master of the ship, were parties to the proceedings and bound by them unless involving manifest injustice. (Case of *Mary*, *supra*, Crousden et al. v. Leonard, 4 Cranch, 34.) The naked affidavit of Soto, a year afterward, can not avail against it.

"And that affidavit taken at its face was at least of questionable sufficiency, under the doctrine laid down in the case of *Thirty Hogsheads of Sugar* (9 Cranch, 328), by Chief Justice Marshall, quoting a like enunciation by Sir William Scott. In that case Bentzon was a subject and resident of Denmark, owning and operating a plantation in Santa Cruz island, then in possession of the British. Thirty hogsheads of sugar manufactured from the products of said plantation by Bentzon's agents and for him were shipped from the island on a British vessel, consigned to a house in London for account of Bentzon. On their way (during the war of 1812) the vessel was captured by an American privateer and brought to Baltimore, where it and the cargo were libeled as enemy property. Both were considered as good prize, although the United States was at peace with Denmark. The ground of the decision as to the sugar was that it took its character *not* from that of the owner, but from that of the soil on which the cane was produced. How far or whether the goods of Soto may have been of his own manufacture in Cuba, arising from products grown there on his own land, there is nothing to indicate.

"There is still another objection to this claim, even if the prize sentence was erroneous. This is not a case, it may be premised, where its principles have been settled by the court of last resort, and where an affirmance would follow as a matter of course because of such former judicial settlement. There was involved a simple question of fact, to wit: Whether the Soto invoice was enemy property.

"It is thoroughly well settled that in such a case—as indeed is true of judicial sentences generally where appeals are reasonably attainable—a state's liability begins only when the court of *last resort*, accessible by reasonable means, has acted on it.

"The doctrine is well stated by Rutherforth (Inst. vol. 2, ch. 9, § 19), quoted approvingly as a part of his own text by Mr. Wheaton, p. 465. He says:

"In order to determine when their right to apply [those injured by wrongful sentence of prize court] to their own state begins, we must inquire when the exclusive right of the other state to judge in this controversy ends. As this exclusive right is nothing else but the right of the state to which the captors belong to examine the conduct of its own members before it becomes answerable for what they have done, such exclusive right can not, and, until their conduct has been

thoroughly examined, natural equity will not allow that the state should be answerable for their acts, until those acts are examined by all the ways which the state has appointed for this purpose. Since, therefore, it is usual in maritime countries to establish not only inferior courts of marine, to judge what is and what is not lawful prize, but likewise superior courts of review, to which the parties may appeal if they think themselves aggrieved by the inferior courts; the subjects of a neutral state can have no right to apply to their own state for a remedy against an erroneous sentence of an inferior court till they have appealed to the superior court, or to the several superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the state, to which the captors belong, to examine into their conduct: and till their conduct has been examined by all these means the state's exclusive right of judging continues.'

"The law of Colombia provided for appeals from its prize courts to the supreme court of the republic, as seen, yet there was no attempt at appeal. In fact, the captain of the vessel seemed to acquiesce in the sentence—at least, he thought, as he stated to the court, the goods condemned good prize. There is no reason to suppose he acted dishonestly or collusively. The conduct of Soto was sufficient, with the other facts stated, to justify his remark. If Soto abandoned the goods to their fate, why should the captain further litigate? He of course knew nothing of this particular insurance, for it was effected eight days after the capture.

"Still he would reasonably assume insurance, and the law made him, being the master of the ship, the agent of the companies, in their absence, to protect their interests in this regard. His failure to appeal, if such under the circumstances became his duty, was not the fault of Colombia.

"There is still, apparently, another objection to this claim as it is presented on the papers transmitted to us. It is prosecuted by Corwin. The papers here fail to show that he ever had other interest in the insurance demands than the portion prosecuted against New Granada.

"The transfer to him by the Atlantic Company was, to wit:

"'For the proportion of loss said government [New Granada] is liable to pay by reason of the seizure of the cargo of the schooner *Mechanic* in 1824 by the Colombian privateer *General Santander*, the said State of New Granada being liable to pay the one-half part of the loss sustained by

said company by reason of such seizure, of the sum of about \$6,000, with interest. To have and to hold the said hereby sold and assigned premises unto said Amos B. Corwin, his heirs, and assigns, forever.'

"The transfer by the Hope Company, made at the same time, is in substantially the same terms, save as to the amount of the interest transferred. But this half so assigned to him was allowed entire by the Bogota commission in 1862, and, so far as appears, settled by New Granada. Corwin's presentation through Minister Culver of a claim in his behalf upon the Venezuelan Government, in 1863, for her 28½ per cent of the insurance, was not based upon any interest held by him, so far as disclosed here. He was not a claimant of that portion of the alleged indebtedness within the meaning of the treaty, so far as appears. It is proper to say, however, that we should not be disposed to rest the decision upon the present showing in this regard without further inquiry, if the claim were good otherwise.' It may be the diplomatic correspondence would supply the deficiency.

"Again, even if the Corwin demand in 1863 could be shown to have been authorized, it seems to us it came too late, under our announcement in case No. 36, if that was its first presentation. Venezuela had then been a state thirty-three years. The demand was thirty-nine years old. It had been presented to the old republic and not allowed. Venezuela now could not be supposed to have anticipated its resurrection. The witnesses to the transaction in 1824 had, presumably, passed away, and other means of defense become dissipated. But owing to the possible incompleteness of the record in this regard, we prefer to base our conclusion upon the other grounds stated, assuming proper and timely presentation of the claim against Venezuela.

"The claim is disallowed."

Little, commissioner, for the commission, *Amos B. Corwin v. Venezuela*, No. 39, United States and Venezuela Claims Commission, convention of December 5, 1885.

The foregoing decision was made on the assumption that the treaty of 1795 between the United States and Spain was not binding on the Colombian courts. A different view of this question was taken by Mr. Hassaurek and his Ecuadorian associate on the mixed commission under the convention between the United States and Ecuador of November 25, 1862. Mr. Hassaurek's opinion, which has not heretofore been published, and of which the Venezuelan commission does not appear to have been cognizant, is given below.

“This case has been before the mixed commission for the settlement of claims between the United States of America and the Republic of New Granada, and an award was made, both commissioners concurring, in favor of the claimants.

“The claimants now apply to this commission for an award of 21½ per cent of the original amount as the proportion of the old Colombian debt, for which Ecuador made herself liable on the disintegration of the Republic of Colombia.

“The following are the facts of the case:

“In April 1824 the American schooner *Mechanic*, Humphrey Taber, master, sailed from Havana with a general cargo bound for Tampico, Mexico (via Key West). After having made the latter port, and being on her way to her ultimate destination, she was on the 6th of May boarded by the Colombian privateer *General Santander*, Captain Chase, and detained for carrying enemy's goods. It must be borne in mind that the Republic of Colombia was then at war with Spain, a war in which the United States were neutral. Captain Chase took out of the *Mechanic* the supercargo, two passengers, one of whom was Mr. Joaquin Hernandez Soto, and four of the crew, and sent the schooner to Laguayra in charge of a prize crew for adjudication. Proceedings were instituted against the cargo of the *Mechanic*, and, with the exception of a few packages belonging to the supercargo, who was an American citizen, the entire cargo was condemned as enemy's (Spanish) property by the court sitting at Puerto Cabello, on the 9th of June 1824. The schooner was restored to the captain, to whom freight was allowed on the cargo.

“It also appears that a large portion of the goods on board the *Mechanic* belonged to Joaquin Hernandez Soto, who claimed to be a citizen of the United Provinces of Mexico, with which the Republic of Colombia was then at peace. Soto was a native of Spain, but had lived in Mexico since 1819, at San Luis de Potosi, where his family resided, and where he was established in business as a merchant. Under these circumstances it is claimed that his property was neutral property, and, having been found on board of a neutral vessel, should not have been condemned.

“The cargo shipped by Soto at Havana was insured against all risks for the sum of \$19,000, as follows: \$12,000 in the

Atlantic Insurance Company and \$7,000 in the Hope Insurance Company of New York; and in consequence of its condemnation by the Colombian prize courts, the said insurance companies had to pay to Soto, through his agents, Goodhue & Co., in New York, the following sums: The Atlantic Insurance Company, \$12,000, and the Hope Insurance Company, inclusive of interest from 3d January 1825 to the 2d of June 1825, \$7,175.

"The former payment was made on the 3d January 1825, the latter on the 2d June 1825.

"In the same year a claim was presented on behalf of said insurance companies by the American minister at Bogotá to the Colombian Government, and lengthy discussions followed which had led to no result when they were terminated by the dissolution of the Republic of Colombia. The point of discussion between the Colombian Government and the Hon. R. C. Anderson, the American minister, was the insufficiency of the evidence and the erroneous grounds on which the court of admiralty at Puerto Cabello had declared the property of Soto to be Spanish property. Soto, it was claimed by the American representative, even if he had not renounced his Spanish allegiance, which he swears he did, by becoming a Mexican citizen, was by the law of nations a Mexican merchant, and his property, if captured by the armed vessels of Spain, would have been liable to confiscation as Mexican property.

"The same view is presented to this commission by Mr. Amos B. Corwine, the attorney for the claimants. But it does not seem necessary to us to enter upon a discussion of a mere question of fact, which after all is not the question on which this case should be decided. Even if Soto had been a Spaniard, and his property Spanish, and consequently enemy's property, it should not have been condemned. Having been found on board of an American vessel, it was protected by the neutral flag by the express terms of a treaty, which, in our opinion, Colombia was bound to respect.

"The principle of 'free ships free goods' had been established by the treaty of 1795 between Spain and the United States. Article XV of said treaty contains the following provision:

"'It shall be likewise lawful for the subjects and inhabitants aforesaid, to sail with the ships and merchandises aforementioned, and to trade with the same liberty and security from the

places, ports, and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same prince or under several; and it is hereby stipulated that free ships shall also give freedom to goods, and that everything shall be deemed free and exempt which shall be found on board the ships belonging to the subjects of either of the contracting parties, although the whole lading, or any part thereof, should appertain to the enemies of either, contraband goods being always excepted. It is also agreed that the same liberty be extended to persons who are on board a free ship, so that although they be enemies to either party, they shall not be made prisoners or taken out of that free ship, unless they are soldiers in actual service of the enemies.'

"When this treaty was made, the subsequent Republic of Colombia was part of the Spanish Empire, and the public laws and treaties of Spain were binding on all her subjects, whether in Europe or America. From the obligations that treaty imposed on the whole Spanish nation the Republic of Colombia could not and did not free herself by her subsequent declaration of independence. Third parties had acquired rights and interests under the treaty which Colombia was not at liberty to disregard, and the United States had a right to expect that the Colombian cruisers and prize courts would respect the property covered by the American flag.

"That a state never loses any of its rights, nor is discharged from any of its obligations, by a change in the form of its civil government, is one of the fundamental principles of international law. It applies, by analogy, to cases such as the one before us, where one part of a nation separates itself from the other. It is evident that on the creation of a new state, by a division of territory, that new state has a sovereign right to enter into new treaties and engagements with other nations; but until it actually does, the treaties by which it was bound as a part of the whole state will remain binding on the new state and its subjects.

"The authorities in support of this proposition are numerous, but I will only cite the following:

"And so (says Chancellor Kent) if a state should be divided in respect to territory, its rights and obligations are not impaired, and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations

fulfilled by all the parts in common.' (Kent's Commentaries, vol. 1, p. 25).

"Bello says:

"'Even if a state should be divided into two or more, neither its rights nor its obligations are thereby impaired, but must be enjoyed or fulfilled in common or apportioned among the new states by mutual agreement. Bynkershoek censures the conduct of England for denying to Holland the rights of fishery established by treaty between Henry III. of England and Philip, Archduke of Austria, on the ground that said treaty had been concluded with an Archduke and not with the states general. He also censures the bad faith of Denmark in refusing to keep with those states the compact of Espira, concluded with the Emperor Charles V., in favor of the Belgians.' (Principios de Derecho Internacional, 2 edition, p. 20.)

"Phillimore says:

"'If a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, ratably binding upon the different parts.' (Commentaries on International Law, Vol. 1, Part II. chap. 7, secs. 137, 158.)

"'Contra evenit, (says Grotius) ut quæ una civitas fuerat dividatur, aut consensu mutuo, aut vi bellica, sicut corpus imperii Persici divisum est in Alexandri successores; quod cum fit, plura pro uno existunt summa imperia, cum suo jure in partes singulas. Si quid autem commune fuerit, id aut communiter est administrandum, aut pro ratis portionibus dividendum.' (Grotius, II. c. IX. s. 10, p. 327.)

"The United States availed themselves of the very first opportunity to notify the Republic of Colombia that they must consider her bound by the obligations imposed on her by the treaty of 1795, said treaty having been concluded prior to her separation from the mother country. On the 27th of May 1823 Mr. Adams, then Secretary of State, in his instructions to Mr. Anderson, the first American minister appointed to Colombia, said:

"'It is asserted that by her declaration of independence Colombia has been entirely released from all her obligations by which, as part of the Spanish nation, she was bound to other nations. This principle is not tenable. To all engagements of Spain with other nations affecting their rights and interests, Colombia, so far as she was affected by them, remains bound in honor and justice.'

"He refers by way of illustration to the treaties of 1795 and 1819, between the United States and Spain. To the stipulations of the former, Colombia is bound as by an express compact

made when she was a Spanish colony. As to the latter, this treaty having been made after the territories now composing the Republic of Colombia had ceased to acknowledge the authority of Spain, they are not parties to it, but their rights and duties in relation to the subject-matter remain as they had existed before it was made. (British and Foreign State Papers, 1825, C., p.; 480.)

"The same principle has been continually invoked by the republics of Ecuador, New Granada, and Venezuela, which formerly constituted the Republic of Colombia. Until, for the treaties between Colombia and foreign nations, they had substituted treaties of their own, they claimed to be entitled to all the rights granted and bound to the fulfillment of all the obligations imposed by the treaties of Colombia.

"In 1861 complications arose between Ecuador and Peru, threatening to lead to a serious rupture between the two countries. One of the principal points in controversy was an old boundary question affecting the title to the so-called Oriental or Napo province on the eastern side of the Ecuadorian Andes, a question which had already on former occasions produced a great deal of ill feeling between the two sister states. The Peruvian Government found fault with a new Ecuadorian election law, dividing the country into districts, one or more of which comprised the territory claimed by Peru; and on account of this and other unpleasant questions then pending, war was considered imminent. The Ecuadorian Government in arguing the boundary question chiefly relied on a treaty concluded on the 22d September 1829, between the old Republic of Colombia and Peru, which provided for the appointment of a joint commission to fix the boundary line, and for a reference of the dispute, in case the commissioners should be unable to agree, to the arbitration of a friendly power. Ecuador, as a former part of Colombia, took it for granted that said treaty still continued to be in force, notwithstanding the dissolution of one of the contracting parties; and Dr. Carvajal, then minister of exterior relations, must have considered such an assumption to rest on self-evident principles of public law, for he did not even consider it necessary to support it by argument. On the 6th of October 1861 he wrote to J. F. Melgar, then Peruvian minister of foreign relations, as follows:

"Such a law would not prejudice the rights of Peru and could not prejudice or decide the territorial question at issue

between the two countries, because a law is obligatory only in the country where it is made, as your excellency has well said, and moreover because there is a superior law existing which equally binds both countries. I mean the treaty of 22nd of September 1829, a treaty which settles this question by prescribing the manner and form in which the boundaries of the two republics should be determined.

“In conformity with that treaty, therefore, the undersigned does not hesitate to repeat what he has said in one of his other notes to your excellency, transmitted with this, that his government is ready to appoint the commission, which jointly with that to be appointed by the government of your excellency is to ascertain the boundary lines between the two countries, and that he proposes to leave to the arbitration of Chile any question or questions on which the said commissioners should be unable to agree.”

“And in another paragraph of the same note Dr. Carvajal says: ‘The said treaty of 1829 being in full force, whereas on the other hand its provisions for ascertaining the boundary lines have not yet been complied with, the undersigned can not discover the reason why your excellency should have claimed as Peruvian territory the territories of Jaen, Napo, Canelos, and Quijos, which have already been and are now in possession of Ecuador.’

“That the Ecuadorian Government considered said old Colombian treaty still valid and binding, although made by Colombia and not, strictly speaking, by Ecuador, is evidenced by the additional fact that in a publication of the treaties in force between the Republic of Ecuador and foreign powers, which publication was made in 1862, by order of the Ecuadorian Government, the above treaty is not only reproduced, but even occupies the first place.

“Ecuador, therefore, having fully recognized and claimed the principle on which the case now before us turns, whenever from such a recognition rights or advantages were to be derived, could not in honor and good faith deny the principle when it imposed an obligation.

“It seems to be clear, therefore, that Colombia was bound by the treaty of 1795 to respect enemy's property covered by the American flag as neutral property, only excepting contraband of war. The treaty concluded on the 3d October 1824 between the United States and the Republic of Colombia reiterated the same principle, and although that treaty was made subsequent to the transaction now under examination, it gives an additional sanction to a principle established and recognized long before.

"Hence, after a careful examination of the question, we are constrained to hold that the condemnation of Soto's goods was a wrongful act for which Colombia is responsible.

"The condemnation of the rest of the cargo of the *Mechanic* as enemy's property was equally wrongful, but as no claim is preferred by the other parties in interest, that part of the case need not be considered.

"We have come to the conclusion, therefore, that an award should be entered in favor of the claimants for 21½ per cent of the original sum of \$19,000, being \$4,085, on which sum interest must be calculated for 40 years and 7 months at the established rate of 5 per cent, making \$8,289.15, which, added to the principal, will give a new principal of \$12,374.15.

"Having already adopted 25 per cent premium as the normal rate of exchange between this country and the United States, we will make an addition of \$3,093.54, and enter an award for \$15,467.69 of Ecuadorian currency."

Opinion of Mr. Hassaurek, commissioner, delivering the opinion of the commission, case of the *Atlantic and Hope Insurance Companies v. Ecuador*, United States and Ecuadorian Claims Commission, convention of November 25, 1862.

Judicial Decision in a Customs Case. The claimants, merchants of New York, in the autumn of 1825 purchased at that place 93 bales of Russian beeswax, which had lately been imported from St. Petersburg. On October 29, 1825, they shipped the wax on the schooner *Fourth of July*, which arrived at Alvarado, Mexico, her port of destination, November 30, 1825. In an accompanying invoice the value of the wax when shipped at New York was said to be \$10,108.81, and both in the invoice and the bill of lading the wax was declared to be Russian. The invoice was certified under seal by the Mexican consul at New York, and accompanying it there was a copy of the export entry from the New York custom-house, showing the official record of the arrival of the wax from Russia, its deposit in the public warehouse, and its shipment on the *Fourth of July*. This export entry was certified by the collector of customs of the port of New York, and in turn by the Mexican consul, in each case under seal.

December 18, 1825, the whole 93 bales were seized by the customs authorities at Alvarado "on suspicion" of its being Havana wax, the importation of which into Mexico was, owing to the war with Spain, then prohibited. Disregarding the evidence furnished by the ship's papers, the authorities called in

three alleged experts, one of whom thought the wax was Havana, while another pronounced it Russian, and the third expressed no opinion whatever. Samples were then sent to the City of Mexico, where two customs officers, without hearing anyone on behalf of the owners, reported that the wax was from Havana. On this report the judge of first instance at Alvarado pronounced a sentence of condemnation. From this sentence the owners appealed, and about the time of the entry of the appeal sent the most conclusive evidence from New York (including the original invoices) of the Russian origin of the wax. After much delay the court of second instance, to which the appeal was taken, rendered a judgment of restoration in favor of the owners. The authorities, however, instead of restoring the wax, took an appeal to the supreme court of Mexico, which in 1828 ordered the restoration of the wax to the owners, but refused indemnity for the loss by its detention, deterioration, and diminished price when sold.

The American commissioners allowed \$10,733.15, which was the amount of loss ascertained by deducting the price finally obtained at Alvarado from the invoice price at New York, after adding to the latter the duties, charges, and a moderate profit, together with the expenses incurred in the recovery of the wax. On this sum they allowed interest at 5 per cent from April 29, 1828, the day on which the owners received the wax from the custom-house under the decree of the supreme court of Mexico. The Mexican commissioners did not argue that the seizure was rightful, but maintained that as "the suit instituted in the matter of the wax" was "terminated by the final decision of the supreme court of justice of Mexico, which court, having before them the merits of the case, ordered the restitution of the wax, but disallowed the right to the claimants of suing for damages and costs," the claimants had "no such right to the indemnification which they now ask."

The umpire on February 23, 1842, awarded, in accordance with the opinion of the American commissioners, the sum of \$18,058.61.

G. G. & S. Howland v. Mexico: Commission under the convention between the United States and Mexico of April 11, 1839.¹

¹ A case similar to the above, before the same commission, was that of Nancy Andrews, who claimed indemnity for the confiscation of Russian wax by the Mexican authorities on suspicion of its being Spanish. In this case, however, there was no carrying of the case to a higher court than that of first instance, which pronounced the condemnation. The whole proceeding was apparently fraudulent, and the umpire awarded the value of the merchandise with interest.

A claim was presented to the mixed commission under the convention between the United States and Mexico of April 11, 1839, for the confiscation of the American schooner *Orient* and her cargo by Mexican authorities. Stephen Morgan, jr., and various other persons claimed as owners of the vessel, and John Baldwin as owner of the cargo. The United States commissioners, Messrs. Marcy and Brackenridge, maintained that the proceedings against the vessel and cargo were irregular and fraudulent, and that damages should be awarded. The Mexican commissioners maintaining a contrary view, the case was sent to the umpire, who for lack of time returned it undecided. It was afterward laid before Messrs. Evans, Smith, and Paine, commissioners under the act of Congress of March 3, 1849, who said:

"The *Orient* was cleared at New Orleans on the 14th day of March 1837 for Tobasco, but by the terms of the charter party between the master of the vessel and the shippers of the cargo, her destination was to be controlled by Baldwin, the claimant, who was on board. On arriving at the port of Minatitlan, they found there Victor Crossons, the agent of Baldwin, to whom the cargo was consigned, and it was agreed, with the permission of the collector, to land the cargo there. Permission was given and the cargo was landed and deposited in the custom-house. After the vessel had been discharged, Baldwin wished to transfer the goods into the interior, where they were destined for purposes of trade. The collector refused to allow their removal and ordered the arrest both of Baldwin and the master, who were taken into custody. He then ordered a complaint to the commissary-general of the department of Vera Cruz, charging fraud, the delivery of false manifests, and an attempt to bribe him. Proceedings were immediately instituted by the commissary-general before the judge of the district, with a view to procure the condemnation of the vessel and cargo. By order of the judge, a schooner of war was dispatched to Minatitlan to conduct the *Orient* and her cargo to Vera Cruz. This order being executed, the proceedings were continued till the 8th May, at which date the judge pronounced a decree of confiscation of the vessel and cargo. This sentence was confirmed on the 8th of June by the superior tribunal to which appeal was taken from the decision of the inferior court. The vessel and cargo were sold and were wholly lost to the owners.

"The claimant's right to an indemnity in this case depends on the degree of authority which should be attached to the sentence of the court by which the confiscation was ordered. It is well settled that the decisions of a court, condemning the

property of citizens of another country, are not conclusive evidence of the justice or legality of such condemnation. The government of a country whose citizens have been despoiled by such decisions has a right to look into the proceedings, and if the sentence is in violation of the well-established principles of national law, or based upon testimony clearly insufficient, such decisions may be wholly disregarded, and an indemnity demanded for the wrongs inflicted under their sanction. * * *

"An examination of the proceedings in this case, and of the evidence upon which the sentence of confiscation was rendered, which is embraced in the *expediente*, has satisfied the board that the sentence was unwarranted by the evidence, and therefore unjust, and consequently presents no bar to the present claim for indemnity. The ground upon which the sentence of confiscation was founded was a charge of fraud and an intention to violate the revenue laws of Mexico. The specific facts alleged upon which this charge was based and from which the intention of fraud was inferred were that the cargo was discharged at Minatitlan after the vessel had cleared for Tobasco, and that a false manifest of the cargo was delivered to the collector of the former port. Although the landing of the cargo at Minatitlan after the vessel had cleared for Tobasco might create some suspicions of a fraudulent intention, and perhaps justify an increased vigilance on the part of the revenue officers, it was not in itself such evidence of fraud as would justify a confiscation. In this case the facts presented furnish a reasonable explanation and sufficiently rebut the presumption of fraud. The cargo was designed for trade in the interior, and Crossons, the agent, to whom it was consigned, was to make the necessary arrangements to transport it from the coast. The fact that the charter party placed the destination of the vessel under the control of Baldwin, who was on board, is evidence that it was not absolutely determined that the cargo should be taken to Tobasco, although the vessel was cleared for that port. The point of landing the goods might reasonably be supposed to depend upon the facilities for transportation to the interior which might be found. Crossons was found at Minatitlan when the vessel arrived there, and it is a reasonable presumption that his presence there, and the arrangements which he had made for the transportation of the goods, induced Baldwin to land them at that point. Besides, it is conceded that no attempt was made to land them until the permission of the collector was given. No intention of fraud can therefore be fairly inferred from this fact.

"It seems more probable, from the declarations of the collector to the commissary-general, that the permission to land the goods was given by him for the purpose of getting them into his possession in order to proceed more surely to effect their confiscation. He says, 'this strengthened my suspicions, and then, with prudence and dissimulation, I commenced the operation of unloading.' The charge that a false manifest

was presented is sustained by the testimony of the collector alone. He presented a paper purporting to be a manifest certified by the collector at Key West, showing that the *Orient* sailed from that port for Tobasco, and which he alleged was presented to him by the master. This manifest did not contain a true description of the cargo. The evidence of the collector on this point was directly contradicted by that of Morgan, the master, Baldwin, Crossous, and Librado Vargas, one of his own assistants, who all certified that when he went on board the schooner triplicate manifests of the cargo were presented to him by the master, certified by the Mexican consul at New Orleans, which he refused to receive because they were not written in either French or Spanish, and that he went ashore leaving the manifests on the table in the cabin.

"The decision of the court confiscating the vessel and cargo was thus founded on a single fact, ascertained to exist only on the testimony of a single witness, while it was expressly denied by four others, having an equal opportunity of knowing the truth and equally entitled to credit. A decision thus given in direct opposition to so strong a preponderance of the testimony cannot be entitled to respect. It indicates strongly a pre-determination on the part of the judge to confiscate the property without reference to the testimony. This opinion is strengthened by the fact that fourteen days before the decision was made the judge had agreed to pay certain expenses out of the proceeds of the confiscation. On the 24th of April José de Aldana, a commissioner of the government, addressed a note to the judge in reference to an express which had been sent to —, in which he said: 'And as it would not be just that the public treasury should undergo the expense of said express, on account of the vessel that causes it having been employed in a particular service, his excellency has determined, according to what we have agreed on this morning between you and myself, that it will be paid from the proceeds of the confiscation as fees relating to it.' A judge who would thus, two weeks in advance of a trial and before the testimony was examined, pledge himself to make a particular decision, would not be likely to be very scrupulous in the examination of the evidence, and certainly could claim no very great degree of respect for his decision.

"The board is satisfied from the whole proceedings that the charge of fraud was not sustained by the evidence before the court, and that the sentence of confiscation was improperly rendered. It is therefore decided by the board that the claim * * * is a valid claim against the Republic of Mexico."

Certain property having been seized by military authorities, the matter finally came before the supreme court of Mexico, which, while holding that the seizure was not legal refused to render a judgment for loss and damage. Mr. Wadsworth thought

Case of Mather &
Glover.

that an award should be made. Referring to the decision of the supreme court of Mexico, he said: "Such a decision by the supreme court may be binding upon all inferior tribunals in Mexico, but while it is entitled to much respect here, is not conclusive upon this commission." Mr. Palacio thought that no award should be made. The umpire made an award in favor of the claimant.

Lieber, umpire, July 19, 1871, *Mather & Glover v. Mexico*, No. 178, Am. docket, convention of July 4, 1868, MS. Op. I. 454.

The claims convention between the United French and American Claims Commission. States and France of January 15, 1880, contained an exceptional provision excluding from the jurisdiction of the commission organized thereunder claims which had been "diplomatically, judicially, or otherwise by competent authorities heretofore disposed of by either government." We have also seen that in the case of *Isaac Taylor v. The Republic of France*, No. 1, the United States, on the strength of that provision, withdrew a claim for the seizure and condemnation of a vessel and cargo as prize by the competent authorities of France; that Mr. Blaine, as Secretary of State, in directing the claim to be withdrawn, expressed the expectation that the French Government would pursue the same course in respect of similar claims of French citizens against the United States; but that the French Government, while directing the withdrawal of certain claims against the United States (R. M. A. de Perdreauxville, No. 18; Thomas C. Payan, assignee, No. 28; Jules Perrodin, No. 90, as to 13 bales of cotton; Bazile Laplace, No. 365; Marie Amelie Laplante, widow, and heirs, No. 674), declined so to treat the case of G. A. Le More & Co., No. 211, the withdrawal of which the United States had demanded.¹

G. A. Le More & Co., citizens of France, Case of Le More. demanded compensation for 830 bales of cotton, alleged to have been of the value of \$350,726.46. This cotton had been the subject of controversy in the district court of the United States for the southern district of Illinois, sitting as a prize court. The cotton was condemned as lawful prize, and upon an appeal the decree of condemnation was affirmed by the Supreme Court of the United States. The agent and counsel for France, however, refused to withdraw it on the ground that the district court

¹For a statement of Taylor's case, see *supra*, vol. 2, p. 1141.

for the southern district of Illinois had no jurisdiction of cases in prize, and that its decision was not that of competent judicial authority. Counsel for the United States, maintaining that the commission had no jurisdiction of the claim, refused, in the presence of the diplomatic arrangement made in the Taylor case, either to recognize the commission's authority in the case, or to submit an argument upon the questions involved. The case, however, was heard by the commission, and arguments were submitted by the counsel for the French Republic.

A decision was rendered by a majority of the commission, consisting of Baron de Arinos and Mr. Commissioner Aldis, as follows:

WASHINGTON, *March 26th, 1884.*

"By the second article of the convention all those cases are excepted from our jurisdiction which 'have been already diplomatically, judicially, or otherwise by competent authorities heretofore disposed of by either government.'

"The cotton claimed by the claimants was libeled in the United States district court of Illinois, was taken possession of by the marshal, and sold under the order of the court, and the proceeds deposited and held to await the final judgment of the court.

"At this point in the proceedings the claimants and Withenbury & Doyle, citizens of Ohio, and the New Orleans Bank, intervened, each claiming to own the cotton.

"The first question, of course, was, whether either of these three parties owned the cotton. If they were not the owners then they had no right to intervene, and whether the cotton was taken on the high seas or on the land, and was or was not lawful prize, was nothing to them. This preliminary question was tried by the court, much evidence was taken, and upon a hearing, the district court decided that neither of the three intervening parties owned the cotton. Thereupon the claimants and the two other parties appealed to the United States Supreme Court. The case was heard in the Supreme Court, and the court held that neither of the three intervening parties owned the cotton, and thereupon the decree of the district court was affirmed.

"The claimants moved for a rehearing of the case upon the ground that a part of the evidence given by Queyrouze was withheld from the Supreme Court, but the motion was denied. We refer to the case, *The Onachita Cotton*, 6 Wallace Rep. 521.

"That the United States district court and the Supreme Court of the United States were competent authorities to decide the question whether the claimants were the owners of the cotton does not seem to us doubtful. They are prize courts, having full jurisdiction of all questions as to prizes—indeed, under the laws of the United States (by which alone these

questions were to be determined) they were and are the only courts having jurisdiction of prize cases.

"Under the decision which the two governments have adopted in the Isaac Taylor case, this pending case has been disposed of by competent authorities.

"The distinction insisted upon by the claimants' counsel—that the cotton was taken upon land, and therefore that the court has no jurisdiction, and its judgments must be void—does not seem to us a tenable ground for holding that the decision that the claimants were not the owners of the cotton was void also.

"The case was sent back to the district court.

"It is sufficient as to these claimants that competent authority has decided that they are not the owners of the cotton, and have no right to intervene.

"The claim is dismissed upon the ground that it 'has been judicially or otherwise disposed of,' under the second article of the convention, and is therefore one of those cases which are excepted from our jurisdiction."

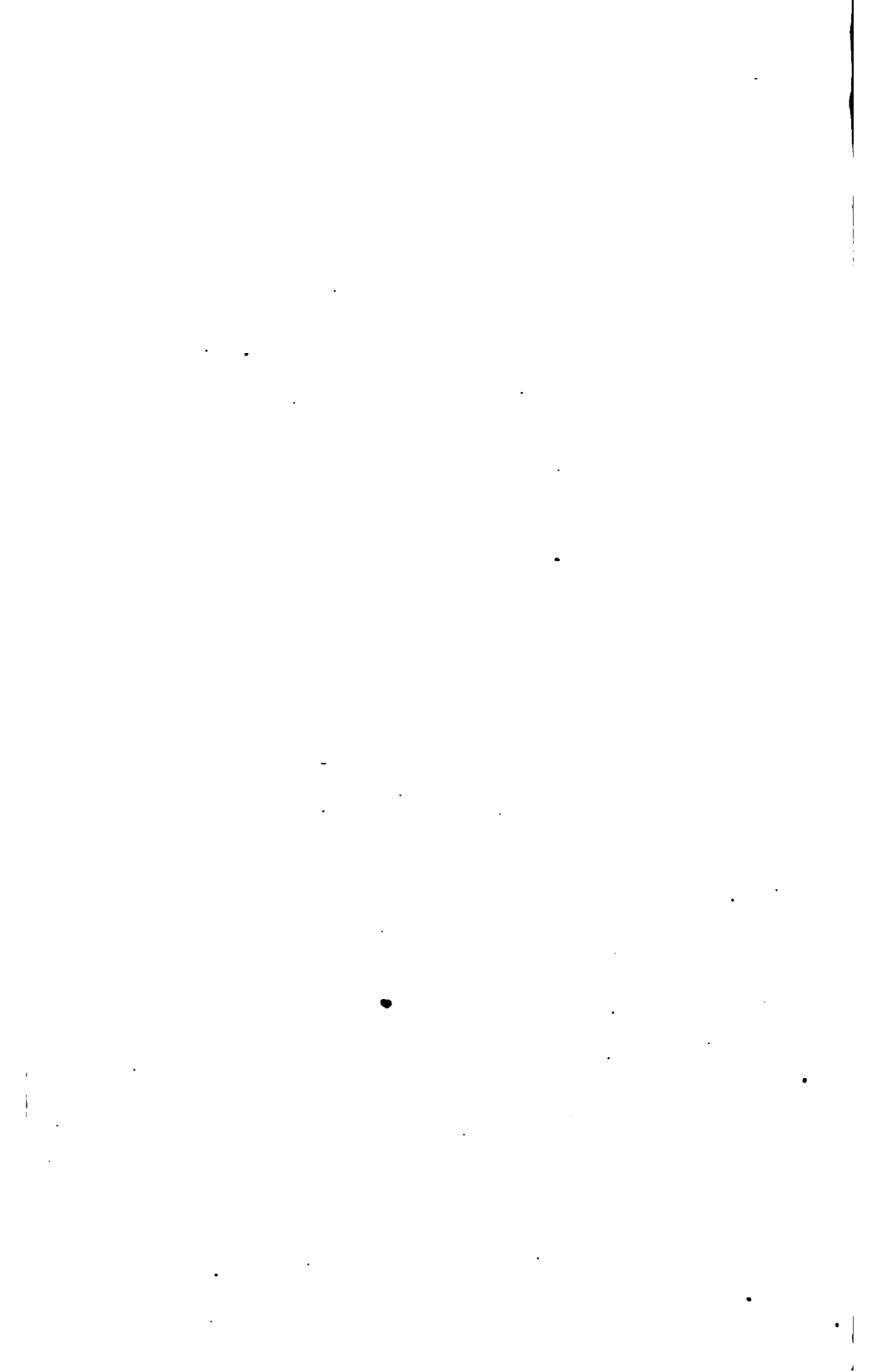
A dissenting opinion was filed by Mr. Lefavre in these words:

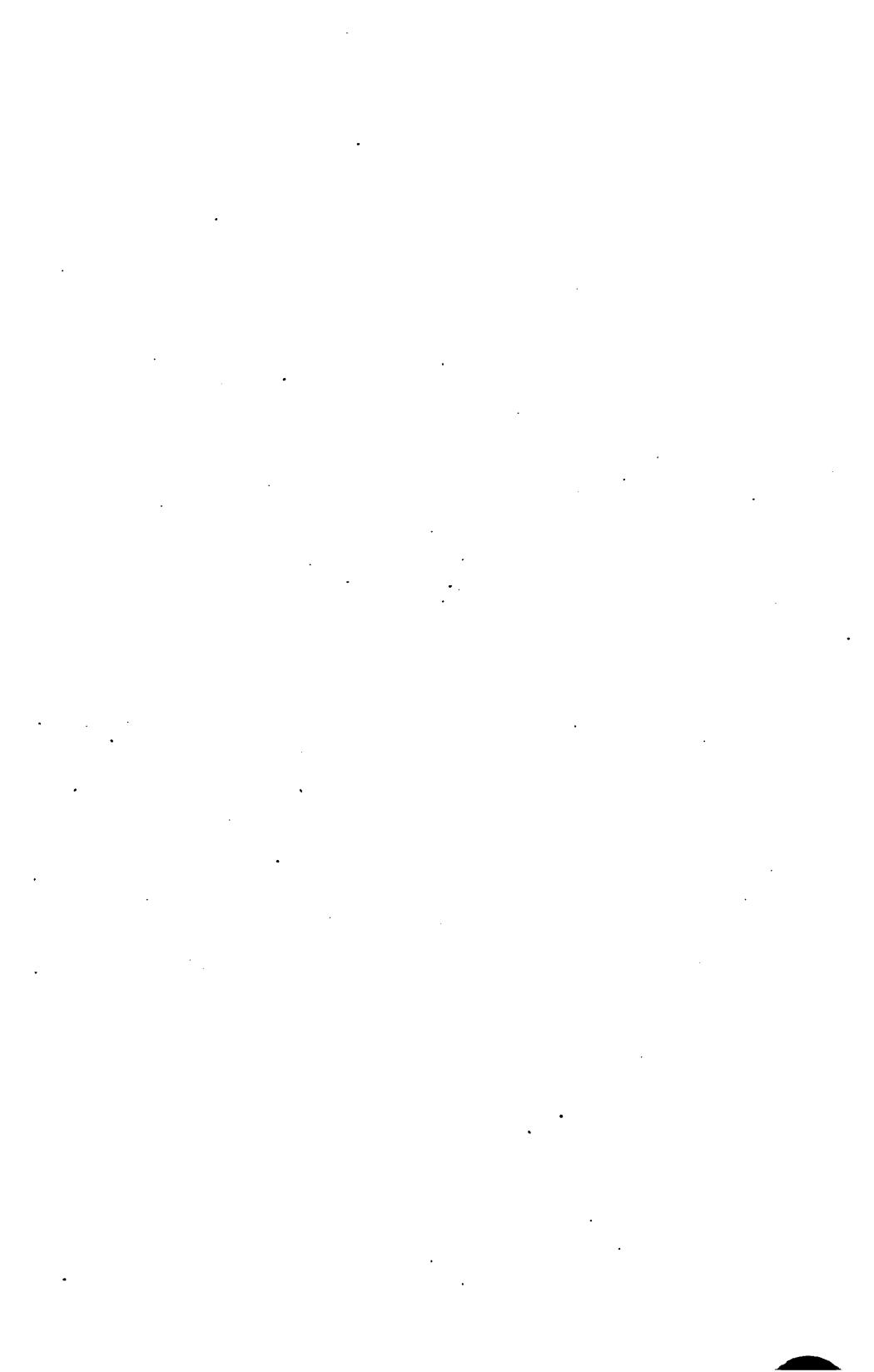
"The 830 bales of cotton to which this claim relates and which were seized on April 8th, 1864, at the Simmons plantation, on the Ouachita River, in Louisiana, by the Federal authorities, were undoubtedly the property of G. A. Le More & Co., of Havre, France. It is immaterial whether the cotton was acquired by them from the Confederate government or from Léon Queyrrouze, or whether the consideration given by them for the cotton was cloth or money. The claimants were neutral French citizens and merchants. As such they had a perfect right to buy cotton from the Confederate government with cloth or money. Léon Queyrrouze was a Frenchman who had been naturalized as an American citizen, but was residing at Matamoras, Mexico, and engaged in business there at the time when the cotton in question was sold to him as principal, or as agent of G. A. Le More & Co. The nonintercourse act of the United States could not and did not apply to him, because that act could have no extraterritorial effect.

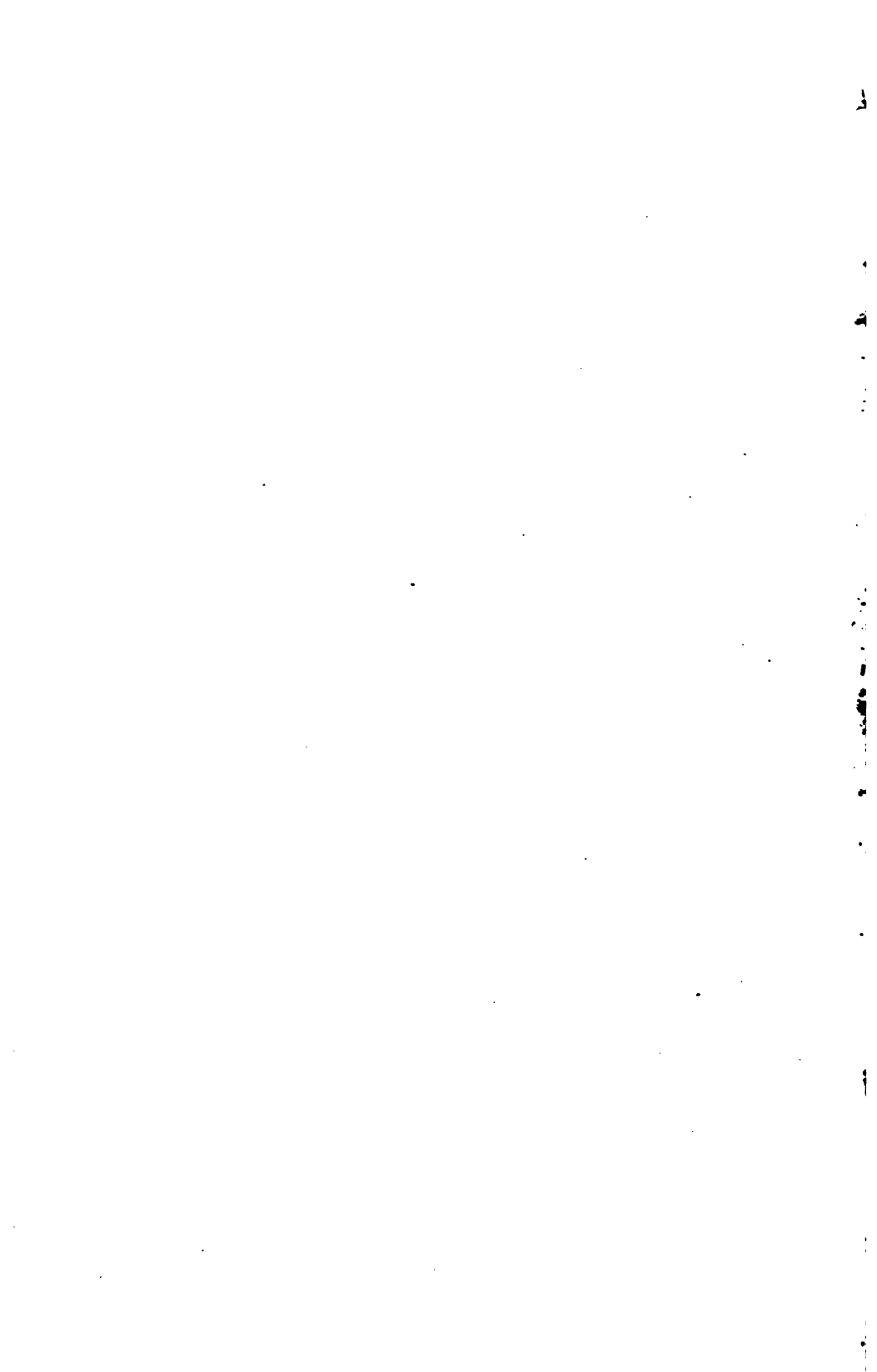
"The 830 bales of cotton belonging to the claimants were sold on June 22, 1864, by the United States authorities for the sum of \$350,726.46. (Record pp. 113 and 288.) From this gross amount there was deducted the sum of \$41,566 for 'costs and expenses' (Record, p. 288), leaving as the net proceeds of the cotton, deposited in the United States Treasury, the sum of \$309,160.46. This sum, with interest from June 22, 1864, the claimants are entitled to recover of the United States. The honor and good faith of the United States Government, in view of promises heretofore made by the State Department, imperatively demand the settlement of this claim."

G. A. Le More & Co. v. United States, No. 211, Boutwell's Report, 176: Commission under the convention between the United States and France of January 15, 1880,.









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